

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health and Aged Care

*Private Health Insurance Act 2007*

*Private Health Insurance Legislation Amendment Rules (No. 1) 2023*

### Authority

Section 333-20(1) of the *Private Health Insurance Act 2007* (the Act) authorises the Minister to, by legislative instrument, make specified Private Health Insurance Rules providing for matters required or permitted by the corresponding Chapter, Part or section to be provided; or necessary or convenient to be provided in order to carry out or give effect to that Chapter, Part or section.

The *Private Health Insurance Legislation Amendment Rules (No.1) 2023* (the Amendment Rules) amends the:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules); and,
- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules).

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### Purpose

The Amendment Rules make consequential amendments to the Benefit Requirements Rules and the Complying Product Rules to implement changes to the private health insurance (PHI) clinical categorisation and procedure type classification of items of the Medicare Benefits Schedule (MBS) to reflect changes to MBS items commencing 1 March 2023.

Changes to the clinical categorisation and procedure type classification of MBS items are achieved by amending:

- Schedules 5, 6 and 7 of the Complying Product Rules for the purpose of describing hospital treatment(s) that must be covered under insurance policies, to categorise new and reviewed MBS items by clinical category and remove deleted items, as appropriate. Note that new MBS Pathology Services Table (PST) items, Diagnostic Imaging Services Table (DIST) items and 3C Determination items are automatically categorised as Support Treatments under Schedule 7 of the Complying Product Rules, so do not need to be specifically listed under Schedule 7.
- Schedules 1 and 3 of the Benefit Requirements Rules for the purpose of specifying minimum hospital accommodation benefit requirements, to classify new and reviewed

MBS items against procedure type classifications, and remove deleted items, as appropriate.

The MBS item changes relevant to these Amendment Rules, and also reflected in the associated PHI technical document, are given effect by, and detailed in, the following legislative instruments commencing 1 March 2023 and in 2023 could be viewed on the Australian Government Federal Register of Legislation (FRL) website (<http://www.legislation.gov.au>) by title or Unique ID:

- *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022 F2022L01518*
- *Health Insurance (Section 3C Diagnostic Imaging Services – Whole Body Magnetic Resonance Imaging Scan) Determination 2022 F2022L01472*
- *Health Insurance Legislation Amendment (2023 Measures No.1) Determination 2022 F2022L01497*
- *Health Insurance (General Medical Services Table) Amendment (2023 Measures No. 1) Regulations 2023 F2023L00089*

The above instruments will make changes to reflect Government policy to MBS items of the General Medical Services Table (GMST), Pathology Services Table (PST), Diagnostic Imaging Services Table (DIST), the *Health Insurance Regulations 2018* and *Allied Health Services Determination 2014*. Changes to various instruments made under subsection 3C(1) of the *Health Insurance Act 1973* are found in Ministerial Determinations.

The MBS items changes implement the Government's response to recommendations from the clinician-led independent MBS Review Taskforce (the Taskforce) and the Medical Services Advisory Committee (MSAC) Executive.

PHI minimum benefits for these MBS item changes are reflected in benefit classifications assigned in these Amendment Rules including for:

- *Otolaryngology, Head and Neck Surgery changes*
- *Thoracic surgery item changes*
- *Attendance services for complex neurodevelopmental disorders and disabilities amendments*
- *Whole body (W/B) Magnetic Resonance Imaging to enable the detection of cancer in individuals with germline pathogenic TP53 variants (new item 63564)*
- *other minor technical and administrative amendments.*

Detailed information on MBS items, including fact sheets and quick reference guides, and could in 2023 be viewed on the Department of Health and Aged Care's ('the Department's) website 'MBS Online' (<http://www.mbsonline.gov.au>) and in the Explanatory Statement that accompanies each set of regulatory changes. These statements also outline consultation that took place on the MBS changes.

The private health insurance classification and categorisation changes commencing 1 March 2023 are detailed in the Attachment to this Explanatory Statement. Further PHI clinical category and procedure type information, including announcement of changes through PHI 'Circulars' and the 'Private Health Insurance Classification of MBS items' technical document (PHI technical document) could in 2023 be viewed on the Department's website (<http://www.health.gov.au>).

Extensions and cessations of MBS services not intended to be provided as hospital treatment, or MBS changes not resulting in changes to PHI benefit classifications are also reflected in administrative classification assignments by MBS item in the PHI technical document. These MBS items are given effect by, and detailed in, the following legislative instruments and in 2023 could be viewed on the FRL website (<http://www.legislation.gov.au>) by title or Unique ID:

- *Health Insurance Amendment (Better Access Services for Family and Carer Participation) Determination 2023 F2023L00046*
- *Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (No. 1) Determination 2023 F2023L00030*
- *Health Insurance Legislation Amendment (2022 Measures No. 5) Determination 2022 F2022L01632*
- *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (High Risk Groups) Determination 2022 F2022L01760*
- *Health Insurance (Section 3C Diagnostic Imaging Services – Conjunctive Gallium-67 Nuclear Medicine Imaging Service) Determination 2022 F2022L01432*

## Consultation

### ***Private Health Insurance Rules classifications for MBS items***

Medical officers within the Australian Government Department of Health provide expert clinical advice to assist in determining the appropriate private health insurance clinical category and level of accommodation benefits for MBS items in private health insurance rules.

The Department's weekly email with *Regulatory Amendments and Consultations Calendar* to private health sector stakeholders including peak insurer and hospital representative associations, private health insurers and private hospitals, includes information on anticipated changes to MBS items and consultation processes.

Consultation for proposed 1 March 2023 private health insurance classifications of these MBS items included notifications of consultations in the *Regulatory Amendments and Consultations Calendar* and seeking direct feedback throughout the period July 2022 to February 2023 on draft proposed changes from representatives of those most likely to be directly impacted, including:

- *Private Healthcare Australia (PHA);*
- *Australian Private Hospitals Association (APHA);*
- *Day Hospitals Australia;*
- *Members Health Fund Alliance;*
- *Catholic Health Australia;*
- *HAMBS (Hospital and Medical Benefits System);*
- *Australian Health Service Alliance;*
- *National Procedures Banding Committee (industry committee); and,*
- *Clinical college and professional medical association representatives.*

Feedback received from stakeholders was considered when determining the final amendments.

Advance notification of the draft final classifications of the bulk of the MBS changes through provision of an interim PHI technical document, could from 9 December 2022 through to February 2023 be viewed on the Department's website (<http://www.health.gov.au>).

### ***MBS item related consultation***

The Amendment Rules relating to clinical categorisations and procedure type classifications are consequential to MBS items changes. Detail on the MBS items and consultations undertaken, including by the Taskforce, MSAC and with medical professional organisations can be found in the Explanatory Statements to the MBS Regulations that in 2023 could be viewed on the Australian Government FRL website (<http://www.legislation.gov.au>), and the Department's 'MBS Online' website (<http://www.mbsonline.gov.au>).

Implementation liaison groups involving professional bodies and clinical experts also inform development of MBS items. Consultation encompasses private hospital and private health insurance sector representation, including from the APHA and PHA.

### **Background**

MBS items with the potential to be provided to privately insured patients as hospital treatment are allocated to clinical categories under the Complying Product Rules and to hospital accommodation procedure type classifications under the Benefit Requirements Rules, to provide clarity in the administration of treatments across policy tiers by insurers and facilitate claims and minimum benefit payments.

### ***Complying Product Rules***

The Complying Product Rules sets out the 'Basic, Bronze, Silver and Gold' product tiers for complying health insurance policies, and which clinical categories of treatment are included in each 'Hospital Treatment Product Tier.'

#### *Schedule 5—Clinical categories*

The 38 'Clinical categories' named in column one of Schedule 5 are treatments that must be covered by private health insurance products in the product tiers set out in Schedule 4, Basic, Bronze, Silver and Gold, and the treatment is delivered as hospital treatment. The 'Scope of cover' is described for each clinical category in column two of the table with a non-exhaustive list of MBS items in column 3. The mention of an MBS item against a particular category does not mean it is only covered under that clinical category.

MBS items that are likely to be relevant to the scope of cover for only one clinical category have been placed against that category in the table at Schedule 5 of the Complying Product Rules. MBS items that may be relevant to the scope of cover for two clinical categories are placed against the clinical category that is in the lowest product tier for which the MBS item is likely to apply.

If an MBS item is relevant to the scope of cover for three or more clinical categories it has generally be placed into the list of 'Common treatments' (Schedule 6).

Where an MBS item is not likely to be a reason for admission for hospital treatment it has generally been placed into the list of 'Support treatments' (Schedule 7) even if specific to a single body system.

### *Schedule 6—Common treatments*

The Common treatments list (Schedule 6) consists of MBS items that are used across, and therefore common to, multiple clinical categories (more than 2). For example, professional attendances by a medical practitioner are on the Common treatments list except where the MBS descriptor expressly prevents claims for hospital treatment.

MBS items on the list of Common treatments will generally be for treatments that may be the primary reason for admissions for hospital treatment. In some cases they may also be associated with, or support, another treatment that is the reason for admission.

Insurers are required to cover MBS items in the list of Common treatments where the treatment falls within the scope of cover for the clinical categories included in an insurance policy, and the treatment is delivered as hospital treatment.

### *Schedule 7—Support treatments*

The Support treatments list (Schedule 7) consists of MBS items, such as pathology tests and diagnostic tests, generally used to support the provision of a primary treatment in one of the clinical categories, or in the Common treatments list. Items in the Support treatments list are unlikely to be the primary reason for treatment in hospital.

MBS items of the Diagnostic Imaging Services Table (DIST), Pathology Services Table (PST) and 3C Determination items are automatically categorised as Support Treatments under Schedule 7 of the Complying Product Rules, so are not individually listed in the Rules. Support list PST and DIST items are listed in PHI technical document.

Insurers are required to provide cover for MBS items in the Common and Support treatments lists where the MBS item is for hospital treatment within the scope of cover for a clinical category included in a patient's private health insurance policy.

'Type C' procedures under the *Private Health Insurance (Benefit Requirements) Rules 2011* are also listed in the clinical categories or the Common or Support treatments list. Type C services do not normally require, but may be provided as, hospital treatment with the appropriate certification.

Inclusion of an MBS item against a clinical category or in the Common or Support treatments lists has no bearing on whether that service requires a hospital admission and does not imply these services necessarily require admission.

MBS items which cannot be claimed for services provided as hospital treatment are not intended to be listed in the clinical categories, Common treatment or Support treatment lists; but are identified in the PHI technical document.

### ***Benefit Requirements Rules***

The Benefit Requirements Rules provide for minimum benefit requirements for psychiatric care, rehabilitation, palliative care, and other hospital treatments. Schedules 1 to 5 of the Benefit Requirements Rules set out the minimum levels of accommodation benefits payable by private health insurers associated with private patients' hospital treatment: benefits for overnight accommodation (Schedules 1 and 2); same-day accommodation (Schedule 3);

Nursing-Home Type Patients (NHTP) (Schedule 4) and second-tier default benefits (Schedule 5).

*Schedule 1 and 2— Type A procedures*

Schedule 1 of the Benefit Requirements Rules provides for benefits for different patient categories by categorising MBS item numbers into patient classifications for accommodation benefits. Procedures requiring hospital treatment that includes part of an overnight stay ('Type A procedures') comprise 'Advanced surgical patient', 'Obstetric patient', 'Surgical patient', 'Psychiatric patient', 'Rehabilitation patient' and 'Other patients.'

Against these patient classifications, Schedule 1 sets out the minimum accommodation benefit payable by insurers per night for overnight accommodation for private patients at private hospitals in all states and territories, and for private patients in overnight shared ward accommodation at public hospitals in Victoria and Tasmania.

Schedule 2 of the Benefit Requirements Rules states the minimum accommodation benefit payable by insurers per night, for private patients in overnight shared ward accommodation at all other State and Territory public hospitals. For each jurisdiction listed in Schedule 2, the minimum benefit payable by insurers per night is averaged across all patients, rather than being specific to patient classification as for Schedule 1.

*Schedule 3— Type B procedures*

Schedule 3 of the Benefit Requirements Rules sets out minimum same-day hospital accommodation benefits payable by insurers for procedures that normally require hospital treatment that does not include part of an overnight stay ('Type B procedures').

Part 2 of Schedule 3 identifies MBS items against Type B procedure Band 1, or the Non-band specific Type B day procedure classification. Treatment Bands 1 to 4 are described based on anaesthesia and/or theatre time.

The treatment band applicable to a Non-band specific Type B day procedure item is that relevant to the circumstances of the hospital treatment provided to a patient.

The Benefit Requirements Rules also sets out circumstances in which benefits for accommodation including part of an overnight stay may be payable for patients receiving a Certified Type B Procedure (at Part 3 Schedule 1).

*Schedule 3— Type C procedures*

'Type C procedures' are those services that do not normally require hospital treatment. Schedule 3 Part 3 of the Benefit Requirements Rules identifies Type C procedures by MBS item.

The Benefit Requirements Rules, together with the *Private Health Insurance (Health Insurance Business) Rules 2018*, establish that Type C procedures do not normally qualify for minimum benefits for hospital treatment, including for accommodation, except in circumstances where a patient may receive as hospital treatment a Certified Type C Procedure (at Part 2 Schedule 3) or a Certified Overnight Type C procedure.

### **The Amendment Rules**

The consequential amendments in these Amendment Rules are administrative in nature and do not substantively alter existing arrangements established under the Act.

### Commencement

The Amendment Rules commence on 1 March 2023.

### Details

Details of the Amendment Rules are set out in the **Attachment**.

The Amendment Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

## ATTACHMENT

### Details of the *Private Health Insurance Legislation Amendment Rules (No. 1) 2023*

#### **Section 1 Name**

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 1) 2023* (the Amendment Rules)

#### **Section 2 Commencement**

Section 2 provides that the instrument commences on 1 March 2023.

#### **Section 3 Authority**

Section 3 provides that the Amendment Rules are made under section 333-20(1) of the *Private Health Insurance Act 2007*.

#### **Section 4 Schedules**

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

All Schedule changes commence 1 March 2023.

#### Schedule 1—Amendments—Clinical Categories, Common treatments and Support treatments

##### *Private Health Insurance (Complying Product) Rules 2015* (Complying Product Rules)

Schedule 1 of the Amendment Rules repeals the existing MBS items in the Clinical categories, Common treatments and Support treatments tables of MBS items in the Complying Product Rules, and substitutes amended tables.

Items added to the table may be new MBS items, or due to recategorisation following item amendments. Similarly, MBS items deleted may be due to deletion from the MBS, or recategorisation.

Changes are detailed in the private health insurance clinical category and procedure type information and PHI technical document that could in 2023 be viewed on the Department's website (<http://www.mbsonline.gov.au>).

**Item 1** provides for an amended list of MBS items categorised against Clinical category (Schedule 5) to include new items and remove items deleted from the MBS from 1 March 2023. The amended list reflects the amendments made to the following categories:

- 'Hospital psychiatric services'
- 'Brain and nervous system'



- ‘Digestive system’
- ‘Ear, nose and throat’
- ‘Eye (not cataracts)’
- ‘Gastrointestinal endoscopy’
- ‘Heart and vascular system’
- ‘Implantation of hearing devices’
- ‘Lung and chest’
- ‘Plastic and reconstructive surgery (medically necessary)’

**Item 2** provides for an amended list of MBS items categorised in the Common treatments list (Schedule 6), from 1 March 2023.

The amended Common treatments list reflects the following amendments:

- Additions: number = 1 (38864, replaces item 38456)
- Deletions: number = 1 (38456)

**Item 3** provides for an amended list of MBS items categorised in the Support treatments list (Schedule 7), from 1 March 2023.

MBS items of the DIST, PST and 3C Determination items are automatically categorised as Support Treatments under Schedule 7 of the Complying Product Rules, so are not individually listed in the Rules. Support list PST and DIST items are listed in PHI technical document.

The amended Support treatments list in the Amendment Rules reflects the following amendments:

- Additions: number = 6 (11300, 11302, 11340, 11341, 11343, 41764)
- Deletions: number = 5 (11327, 11330, 11333, 11336, 11339)

### Schedule 2—Amendments—Procedure types

*Private Health Insurance (Benefit Requirements) Rules 2011* (Benefit Requirements Rules)

Schedule 2 of the Amendment Rules repeals the existing MBS items listed as a Type A Advanced Surgical, Type A Surgical, Type B non-band specific day procedures, and Type C procedures in the Benefit Requirements Rules, and substitutes amended tables.

- Type A procedures normally involve hospital treatment that includes part of an overnight stay.
- Type B procedures normally involve hospital treatment that does not include any part of an overnight stay.
- Type C procedures normally do not require hospital treatment.

Items added to the lists of procedure types may be new MBS items, extended or renumbered items or due to procedure type reclassification following item amendments. Similarly, MBS items deleted from lists may be due to deletion from the MBS, renumbering or procedure type reclassification.

**Item 1** provides for an amended list of MBS items classified as Type A Advanced Surgical patient procedures, from 1 March 2023. The amended list of MBS items reflects the following item changes:

- Additions: number = 31 (38429, 38431, 38816, 38817, 38818, 38820, 38821, 38822, 38823, 38824, 38831, 38832, 38833, 38834, 38838, 38840, 38841, 38842, 38846, 38848, 38852, 38853, 38857, 38858, 38859, 38864, 41703, 41705, 41887, 41888, 41890)
- Deletions: number = 20 (41782, 38447, 38449, 38450, 38418, 38421, 38424, 38427, 38438, 38440, 38441, 38453, 38455, 38466, 38468, 38469, 38643, 38656, 38457)

**Item 2** provides for an amended list of MBS items classified as Type A procedures Surgical patient, from 1 March 2023. The amended list of MBS items reflects the following item changes:

- Additions: number = 10 (38837, 38839, 38845, 38847, 38849, 38850, 38851, 41825, 41689, 41692)
- Deletions: number = 17 (38430, 38448, 38452, 38458, 38460, 38462, 38464, 41672, 41716, 41729, 41731, 41767, 41773, 41787, 41858, 41864, 41868)

**Item 3** provides for an amended list of MBS items classified as Type B Band 1 – T8: Surgical Operations same day procedures. The amended MBS items reflect the following item change:

- Deletion: number =1 (41604)

**Item 4** provides for an amended list of MBS items classified as Non-band specific Type B day procedures. The amended list of MBS items reflects the following item changes:

- Additions: number = 9 (30257, 30473, 30478, 41693, 41702, 41722, 41855, 41861, 41870)
- Deletions: number = 5 (41653, 41716, 41816, 41858, 41864)

Note changes at items 2 and 4 include the deletion of 3 items formerly listed as both Type A Surgical and Type B Non-band specific procedures (41716, 41858, 41864).

**Item 5** provides for an amended list of MBS items classified as Type C procedures. The amended list of MBS items reflects the following item changes:

- Additions: number = 24 (135, 137, 139, 11300, 11302, 11340, 11341, 11343, 30278, 41647, 41668, 41764, 63399, 63564, 69506, 69507, 69508, 69509, 69510, 69511, 69512, 69513, 69514, 69515)
- Deletions: number = 8 (11327, 11333, 11336, 11339, 93300, 93303, 93306, 93309)

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Private Health Insurance Legislation Amendment Rules (No. 1) 2023***

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the disallowable legislative instrument**

The purpose of the *Private Health Insurance Legislation Amendment Rules (No. 1) 2023* (the Amendment Rules) is to amend the following instruments:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules); and,
- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules).

The Amendment Rules make consequential amendments to the:

- Benefit Requirements Rules to classify new and amended MBS items by procedure-type for the purposes of minimum benefits for accommodation and, in relation to Type C procedures, access to any minimum benefits as hospital treatment unless provided as a Certified Type C procedure; and,
- Complying Product Rules to categorise new items of the Medicare Benefits Schedule (MBS) into the appropriate Clinical category for the purpose of describing hospital treatment(s) that must be covered under health insurance policies; and,
- remove deleted MBS items from the above Rules.

#### **Human rights implications**

The Amendment Rules engage the right to health by facilitating the payment of private health insurance benefits for health care services, encouraging access to, and choice in, health care services. Under Article 12 of the International Covenant on Economic, Social and Cultural Rights, specifically the right to health, the Amendment Rules assist with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Private health insurance regulation assists with the advancement of these human rights by improving the governing framework for private health insurance in the interests of consumers. Private health insurance regulation aims to encourage insurers and providers of private health goods and services to provide better value for money to consumers, and to improve information provided to consumers of private health services to allow consumers to make more informed choices when purchasing services. Private health insurance regulation also requires that insurers do not differentiate the premiums they charge according to individual health characteristics such as poor health.

### *Analysis*

The amendments relating to omission or insertion of MBS items in the Benefit Requirements Rules and the Complying Product Rules, and under definitions of hospital treatment are as a consequence of the changes to the MBS that take effect on 1 March 2023.

The addition of new MBS items to accommodation benefit classifications, and specified clinical categories, allows for the specified treatments under those items and the related minimum benefit amounts to be claimed by patients who have the relevant private health insurance policies.

### **Conclusion**

This disallowable legislative instrument only engages human rights to the extent that it maintains current arrangements with respect to the regulation of private health insurance. Therefore, this instrument is compatible with human rights because these changes continue to ensure that existing arrangements advancing the protection of human rights are maintained.

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