

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance Legislation Amendment (2023 Measures No. 2) Determination 2023

Subsection 3C(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister may, by legislative instrument, determine that a health service not specified in an item in the General Medical Services Table (GMST) and Pathology Services Table (PST) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the GMST or PST.

Subsection 4(1) of the Act provides that regulations may prescribe a table of general medical services which sets out items of general medical services, the fees applicable for each item, and rules for interpreting the table. The table made under this section is referred to as the GMST. The most recent version of the regulations is the *Health Insurance (General Medical Services Table) Regulations 2021*.

Section 4A of the Act provides that regulations may prescribe a table of pathology services which set out items of pathology services, the fees applicable for each item, and rules for interpreting the table. The table made under this section is referred to as the PST. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulations 2020*.

These instruments rely on subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Subsection 33(3) of the AIA provides that 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 purpose of the *Health Insurance Legislation Amendment (2023 Measures No. 2) Determination 2023* (the Determination) is to amend the following instruments:

- *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Telehealth Determination);
- *Health Insurance (Section 3C Co-Dependent Pathology Services) Determination 2018* (the Pathology Determination); and
- *Health Insurance (Section 3C General Medical Services – Heart Health Assessment No.2) Determination 2019* (the Heart Health Determination).

Policy authority for changes made by the Determination were provided through the 2023-24 Budget under the *A Modern and Clinically Appropriate Medicare Benefits Schedule* measure.

Schedule 1 of the Determination will amend the Telehealth Determination to extend access to temporary telehealth and phone services for consultations related to blood borne viruses, sexual or reproductive health until 31 December 2023.

Schedule 2 of the Determination will amend the Telehealth Determination temporary telehealth and phone services for consultations related to blood borne viruses, sexual or reproductive health under Schedule 5, by applying annual fee indexation by increasing the schedule fees by 3.6% from 1 July 2023.

Schedule 3 of the Determination will amend the Pathology Determination to repeal item 73343. Item 73343 will be reintroduced by the *Health Insurance (Section 3C Pathology –17p chromosomal deletion testing) Determination 2023* and the item descriptor will be amended to:

- expand the eligible patient population to all patients who suffer from Chronic Lymphocytic Leukaemia or Small Lymphocytic Lymphoma;
- include lymph node samples as an appropriate sample type;
- remove the requirement for item 73343 to be used to determine access to a Pharmaceutical Benefits Scheme listed drug; and
- to remove the frequency restriction limiting the item to not more than once in 12 months.

Schedule 4 of the Determination will amend the Heart Health Determination to apply annual fee indexation by increasing the schedule fees of heart health items 699 and 177, which provide services for patients over 29 years to receive heart health assessments, by 3.6%% from 1 July 2023.

Schedule 4 will also amend subsections 7(3) and 8(6) of the Heart Health Determination to remove the restrictions preventing heart health items 177 and 699 being claimed within 12 months of an MBS Aboriginal and Torres Strait Islander Peoples Health Assessment service under items 715 or 228.

Consultation

No consultation was undertaken regarding annual indexation, as these changes continue business-as-usual implementation of the Government's policy on Medicare indexation, which is expected by stakeholders to be applied on 1 July of each year.

There was no consultation undertaken with the medical sector on the extension of telehealth and telephone access for consultations related to blood borne viruses, as it is administrative in nature and the amendment merely extends the cessation date to 31 December 2023.

Consultation has been undertaken with peak medical bodies including the Royal College of Pathologists of Australasia and the Haematological Society of Australia and New Zealand regarding changes to item 73343 implemented by the Chromosomal Deletion Testing Determination. The repeal and reintroduction of item 73343 under that instrument is administrative in nature and no specific consultation has been undertaken.

The pathology changes to item 73343 were recommended by the Medical Services Advisory Committee (MSAC) at its November meeting under MSAC application 1560 and MSAC application 1544.

Targeted consultation was undertaken with a range of medical and cardiovascular disease stakeholders regarding the changes to claiming restrictions for Heart Health assessment items 177 and 699.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Sections 1-4 of the Determination commence immediately after registration. Schedule 1 commences on 29 June 2023. Schedules 2-4 of the Determination commence on 1 July 2023.

Details of the Determination are set out in the Attachment.

Authority: Subsection 3C(1) of the
Health Insurance Act 1973

ATTACHMENT

Details of the *Health Insurance Legislation Amendment (2023 Measures No. 2) Determination 2023*

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislation Amendment (2023 Measures No. 2) Determination 2023* (the Determination).

Section 2 – Commencement

Section 2 provides that Sections 1-4 of the Determination commence immediately after registration, Schedule 1 commences on 29 June 2023 and Schedules 2-4 of the Determination commence on 1 July 2023.

Section 3 – Authority

Section 3 provides that the Determination is made under subsection 3C(1) of the *Health Insurance Act 1973*.

Section 4 – Schedules

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

Schedule 1 – Amendment to telehealth services

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021

Item 1 amends paragraph 4(b) to extend the cessation date of Schedule 5 from 30 June 2023 to 31 December 2023.

Schedule 2 – Amendment to telehealth services

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021

Item 1 amends items 92717, 92720, 92723, 92726, 92733, 92736, 92739 and 92742 to apply annual fee indexation by increasing the schedule fees by 3.6%.

Schedule 3 – Amendment to pathology services

Health Insurance (Section 3C Co-Dependent Pathology Services) Determination 2018 (the Pathology Determination)

Item 1 repeals item 73343. Item 73343 will be reintroduced by the *Health Insurance (Section 3C Pathology –17p chromosomal deletion testing) Determination 2023* (the Pathology Determination).

Schedule 4 – Amendments to heart health services

Health Insurance (Section 3C General Medical Services – Heart Health Assessment No.2) Determination 2019 (the Heart Health Determination)

Items 1 and 2 amend paragraphs 7(3)(b) and 8(6)(b), which prevent heart health items 177 and 699 being claimed within 12 months of an Aboriginal and Torres Strait Islander Peoples Health Assessment via items 715 and 228.

Items 3 and 4 amend items 699 and 177 to apply annual fee indexation by increasing the schedule fees by 3.6 per cent.

Statement of Compatibility with Human Rights

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

Health Insurance Legislation Amendment (2023 Measures No. 2) Determination 2023

This 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 Determination

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Human rights implications

This instrument engages Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

The Right to Health

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee reports that the *'highest attainable standard of health'* takes into account the country's available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

The Right to Social Security

The right to social security is contained in Article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee reports that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them. However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

The right of equality and non-discrimination

The rights of equality and non-discrimination are contained in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the ICCPR requires that all persons are equal before the law, are entitled without any discrimination to the equal protection of the law and in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Analysis

This instrument advances the rights to health and social security and the right of equality and non-discrimination by increasing the Medicare benefit patients will receive when accessing the services listed in the determinations specified, allowing First Nations peoples to access more regular heart health assessment services and by extending the cessation date for which blood

borne viruses, sexual or reproductive health telehealth services will be subsidised services on the MBS. These changes will assist patients to continue accessing clinically relevant health services.

This instrument also maintains the rights to health and social security and the right of equality and non-discrimination by repealing item 73343 as part of a process of introducing the service elsewhere within the MBS with less restrictive claiming criteria.

Conclusion

This instrument is compatible with human rights as it maintains and advances the right to health, the right to social security and the right of equality and non-discrimination.

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