

## 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. 7) 2023*

### Authority

Section 333-20(1) of the *Private Health Insurance Act 2007* (the Act) authorises the Minister to, by legislative instrument, make 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.

Subsection 33(3) of the *Acts Interpretation Act 1901*, 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 *Private Health Insurance Legislation Amendment Rules (No. 7) 2023* (the Amendment Rules) amends the:

- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules) to update the daily patient contribution payable by nursing-home type patients (NHTPs) for hospital accommodation in private hospitals nationally and in public hospitals in all state and territory jurisdictions except for public hospitals in the Australian Capital Territory (ACT).
- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules), to -
  - index the monetary qualifiers for Medicare Benefits Schedule (MBS) items to be included in Type A procedure patient classifications for “advanced surgical patient” and “surgical patient” by amending Schedule 1;
  - remove MBS items 30473, 30478, 41647 and 45027 from the list of Band 1 Type B procedures, by amending Schedule 3; and
  - update the minimum benefits payable by private health insurers per night for NHTP at private hospitals nationally and at public hospitals except for the ACT, South Australia (SA) and Victoria (VIC) by amending Schedule 4.

The changes to the NHTP rates and benefits take account of indexation applied to the Adult Pension Basic Rate and the Maximum Daily Rate of Rental Assistance (Pension and Rental Assistance Rates), which take effect on 20 September 2023.

The indexation changes to Type A MBS thresholds are in line with additional indexation of MBS fees of 0.5 per cent from 1 November 2023 announced by the Government as part of the 2023-34 Budget.

The removal of the four MBS items from the list of Band 1 Type B procedures corrects inadvertent retention of the items in the list from 1 March 2023 (30473, 30478 and 41647) and from 1 July 2023 (45027), respectively.

## Background

### **MBS fee indexation**

From 1 November 2023 additional indexation will be applied to the MBS fees for most medical services in the General Medical Services Tables. This aligns with the Government announcement of 9 May 2023, as part of the 2023-24 Budget, which included changes to the indexation methodology applying to Government programs, including the MBS, to better align with changes in economic conditions.

### **Procedure type corrections**

From 1 March 2023 the *Private Health Insurance Legislation Amendment Rules (No. 1) 2023* made amendments to the Benefit Requirements Rules to reclassify three MBS items 30473, 30478 (to non-band specific Type B) and 41647 (to Type C).

From 1 July 2023 the *Private Health Insurance Legislation Amendment Rules (No. 5) 2023* reclassified MBS item 45027 to non-band specific Type B).

Due to administrative oversight the items were inadvertently retained in the list of Band 1 Type B procedures. The Amendment Rules will ensure the Benefit Requirements Rules clearly reflect the intended procedure type classifications of the items.

### **Nursing-home type patient minimum accommodation benefits history**

A NHTP, in relation to a hospital, means a patient in the hospital who has been provided with accommodation and nursing care, as an end in itself, for a continuous period exceeding 35 days. NHTPs are not accommodated for the purpose of receiving hospital level treatment, so charges for their accommodation and nursing vary to that for overnight or same-day patients receiving hospital treatment. Similar to arrangements for residential aged care facilities, NHTPs in both public and private hospitals also pay a non-insurable contribution towards the costs of their accommodation and care.

The Australian Government Department of Health and Aged Care (the Department) administers 'default' benefits payable by private health insurers for the purposes of the Act. The Benefit Requirements Rules Part 2, sub-Rule 6(2) provides that the benefit payable by an insurer for a NHTP in hospital will not exceed the fees or charges incurred, less the amount of the daily patient contribution.

The National Health Reform Agreement (NHRA) between the Australian Government and the States and Territories defines the roles and responsibilities for the delivery of health care services in Australia. A consolidated version of the Addendum to the NHRA 2020-2025 could, in 2023, be viewed at <https://federalfinancialrelations.gov.au>. Clause G3 of the NHRA provides that privately insured patients may be charged an amount for public hospital services as determined by the state or territory in which the patient is receiving treatment. The states and territories have established a variety of processes for determining their relevant charges for public hospital treatment.

The Commonwealth and jurisdictions also agree under the NHRA that States can charge public NHTPs a total daily amount no more than 87.5 per cent of the current daily rate of the single aged pension and the maximum daily rate of rental assistance (Clause G2).

NHTP contribution rates and benefits are routinely reviewed to remain aligned with pension and rental assistance rates. Base pensions are indexed twice a year, in March and September, to reflect changes in pensioners' cost of living and wages. The pension is adjusted to reflect growth in the Consumer Price Index (CPI) and the Pensioner and Beneficiary Living Cost Index (PBLCI), whichever is higher. When wages grow more quickly than prices, the pension is increased to the wages benchmark. After CPI, PBLCI and Male Total Average Weekly Earnings figures are released by the Australian Bureau of Statistics (ABS), the Australian Government Department of Social Services (DSS) finalises calculations and shares changes to pension and rental assistance rates that come into effect from the first pay day following each 20 March or 20 September.

Upon the commencement of Medicare on 1 February 1984 changes were made to the Commonwealth bed day subsidy to reflect differences in complexity of care and hospital facilities for patients needing advanced surgical services compared to long-stay NHTP. A cap was introduced to the combined total of the fund benefits payable daily for NHTPs plus the non-insurable patient contribution with notification of the changes issued in Private Hospitals (PH) Circular No. 33. As the indexed patient contribution increased, the portion of the benefit paid by the insurer decreased to maintain the combined figure within the cap. Circular PH No.57 detailed an increase from 1 October 1986 to the cap for private hospitals in recognition of Commonwealth reforms withdrawing bed day subsidies from private hospitals.

In May 2000 amendments to Schedule 4 of the *National Health Act 1953* set the combined cap for the default benefit paid by insurers for NHTP accommodated in private hospitals plus the patient contribution to \$111.10 per day. Circular HBF 643 PH 385 conveyed the changes and in 2023, notification of this amendment through the Commonwealth of Australia Special Gazette No S 260 of 18 May 2000 could be accessed on the Federal Register of Legislation <https://www.legislation.gov.au>.

Using the DSS adjusted pension and rental assistance rates, the Department calculates changes to the NHTP patient total contribution rate, and insurer benefit payable for private patients in private hospitals and notifies jurisdictions. The minimum insurer benefit payable is calculated by subtracting the daily patient contribution from the cap, e.g. from 20 September 2023, \$111.10 (total cap private hospitals) - \$74.20 (non-insurable patient contribution) = \$36.90 (benefit payable by insurers for private hospitals).

The Department also consults each jurisdiction seeking confirmation of their intended total charge for NHTP accommodation and the patient contribution in their public hospitals, confirming the difference between the total charge set by jurisdictions less the patient contribution to determine the amount of insurer benefit payable for private patients in public hospitals.

Public hospital NHTP total charges and means of local implementation (e.g. by publication in official gazette or through legislative instrument) vary across jurisdictions and can be obtained from State and Territory government health departments. Some jurisdictions, such as the ACT, choose to commence implementation of rate changes from 1 July annually, only

then reflecting updates made by other jurisdictions in March and/or September of the previous year.

The total daily NHTP patient contribution payable by privately insured NHTPs in private hospitals nationally, and in public hospitals in each jurisdiction, is specified in the Complying Product Rules, Part 2-subsection 8A(3)-*Benefit requirement – nursing-home type patients*.

The minimum benefit payable by private health insurers for NHTP accommodation and care is specified in the Benefit Requirements Rules *Schedule 4 – Nursing-home type patient accommodation: hospitals in all States/Territories*, Clause 6, Tables 1 and 2.

### **The Amendment Rules**

The Amendment Rules make minor changes to the definition of “patient contribution” in subsection 8A(3) of the Complying Product Rules by updating the NHTP contribution rate at public hospitals in each state and territory which chooses to increase this contribution and private hospitals nationally.

The Amendment Rules also amend Schedules of the Benefit Requirements Rules as follows:

- Schedule 1 to index MBS fee thresholds consistent with MBS item fee indexation;
- Schedule 3 to correct an administrative error; and
- Schedule 4 to update the NHTP minimum benefit payable by private health insurers per night.

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

### Commencement

Schedules 1 and 2 commence on 20 September 2023 and Schedule 3 on 1 November 2023.

### Details

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

### Consultation

On 23 August 2023, the Commonwealth notified jurisdictions that from 20 September 2023, for all private patients in Australian private hospitals nationally:

- daily patient contribution rate payable by NHTP would be \$74.20 (from \$70.55); and
- benefit payable by insurers for NHTP would be \$36.90 (from \$40.55).

Jurisdictions provided the Commonwealth with the following advice regarding the daily private patient contribution rates payable by NHTPs in public hospitals, from 20 September 2023:

- NSW, NT, QLD, SA, TAS, VIC, and WA advised intent to increase the NHTP contribution rates in their public hospitals to \$74.20.
- The ACT advised that rates would remain unchanged at present, in line with the ACT’s annual practice of applying adjustments each July.

Jurisdictions provided the Commonwealth with the following advice regarding the minimum benefit payable by insurers for NHTPs in public hospitals, from 20 September 2023:

- NSW, NT, QLD, TAS, and WA advised intent to increase the total charge for private NHTPs in public hospitals, resulting in an increase to the minimum benefit payable by private health insurers for NHTP accommodation, as detailed in the Attachment.
- The ACT, SA and VIC advised no change and the minimum benefit payable by private health insurers for NHTP accommodation remains unchanged.
  - The ACT advised their annual adjustment of benefits occurs each July.

No consultation was undertaken regarding the changes to MBS fee thresholds which are consequential to MBS indexation changes intended to align the MBS with the Government's policy on Medicare indexation, following the announcement in the 2023-24 Budget of revisions to the indexation methodology.

No additional consultation was undertaken regarding the procedure corrections as they will more clearly reflect the intended procedure types as included in consultation material provided to the sector before the 1 March 2023 and 1 July 2023 changes to the Benefit Requirements Rules.

The changes detailed in the Amendment Rules reflect responses received.

#### The Amendment Rules

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. 7) 2023***

#### **Section 1 Name**

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 7) 2023*.

#### **Section 2 Commencement**

Section 2 provides that the instrument commences as follows:

- Sections 1 to 4 of the instrument commence the day after registration;
- Schedules 1 and 2 of the instrument commence on 20 September 2023; and
- Schedule 3 of the instrument commences on 1 November 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.

#### **Schedule 1—Amendments—Nursing-home type patient contribution**

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

#### **Item 1 – Subsection 8A(3) (subparagraph (a) of the definition of patient contribution)**

Item 1 amends the *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules) to repeal the subparagraph 8A(3)(a) in the definition of ‘patient contribution’ and substitute a new subparagraph of rates at all jurisdictions. The effect of this change is that the daily rate for patient contribution (to fees for hospital treatment) payable by nursing-home type patients to \$74.20, except for the ACT which will remain unchanged at \$70.55.

#### **Item 2 – Subsection 8A(3) (paragraph (b) of the definition of patient contribution)**

Item 2 amends the Complying Product Rules to update the nursing-home type patient contribution at private hospitals in Australia from \$70.55 to \$74.20.

Schedule 2—Amendments— Procedure types and nursing-home type patient minimum accommodation benefits

*Private Health Insurance (Benefit Requirements) Rules 2011*

**Item 1** – Subclause 4(1) of Schedule 3

Item 1 repeals the existing MBS items listed as Band 1 Type B procedures in the Benefit Requirements Rules, and substitutes amended items. From 20 September 2023, the list reflects corrections removing MBS items 30473, 30478, 41647 and 45027 which were inadvertently retained on the list due to administrative error.

**Item 2** – Clause 6 of Schedule 4 (table 1, table item dealing with New South Wales)

Item 2 amends clause 6 of Schedule 4 of the Benefit Requirements Rules to increase the minimum benefits payable by private health insurers for hospital treatment provided to nursing-home type patients in public hospitals in NSW from \$160.20 to \$165.60.

**Item 3** – Clause 6 of Schedule 4 (table 1, table item dealing with Northern Territory)

Item 3 amends clause 6 of Schedule 4 of the Benefit Requirements Rules to decrease the minimum benefits payable by private health insurers for hospital treatment provided to nursing-home type patients in public hospitals in NT from \$140.05 to \$147.19.

**Item 4** – Clause 6 of Schedule 4 (table 1, table item dealing with Queensland)

Item 4 amends clause 6 of Schedule 4 of the Benefit Requirements Rules to decrease the minimum benefits payable by private health insurers for hospital treatment provided to nursing-home type patients in public hospitals in QLD from \$141.00 to \$145.80.

**Item 5** – Clause 6 of Schedule 4 (table 1, table item dealing with Tasmania)

Item 5 amends clause 6 of Schedule 4 of the Benefit Requirements Rules to decrease the minimum benefits payable by private health insurers for hospital treatment provided to nursing-home type patients in public hospitals in TAS from \$169.31 to \$178.10.

**Item 6** – Clause 6 of Schedule 4 (table 1, table item dealing with Western Australia)

Item 6 amends clause 6 of Schedule 4 of the Benefit Requirements Rules to decrease the minimum benefits payable by private health insurers for hospital treatment provided to nursing-home type patients in public hospitals in WA from \$144.75 to \$148.40.

**Item 7** – Clause 6 of Schedule 4 (Table 2, table item dealing with Private hospitals, column headed “Minimum benefit per night”)

Item 7 provides that Table 2 of clause 6 in Schedule 4 of the Benefit Requirements Rules is amended by updating the minimum benefit payable per night by private health insurers for hospital treatment provided to nursing-home type patients in private hospitals from \$44.55 to \$36.90.

## Schedule 3—Amendments— Procedure types

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

#### **Item 1 – Subclause 4(3) of Schedule 1**

Subclause 4(3) of Schedule 1 of the *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules) sets out the MBS item numbers that form part of the criteria for a patient to be considered an “advanced surgical patient” for the purposes of the Benefit Requirements Rules. This subclause also includes a qualifier – the MBS fee for the professional service the patient will receive must be greater than a specified amount.

Item 1 amends the value of this specified amount from \$934.15 to be \$938.80 (indexed by 0.5 per cent, the indexation rate for MBS fees effective 1 November 2023).

#### **Item 2 – Subclause 6(3) of Schedule 1**

Subclause 6(3) of Schedule 1 sets out the MBS item numbers that form part of the criteria for a patient to be considered a “surgical patient” for the purposes of the Benefit Requirements Rules. This subclause also includes a qualifier – the MBS fee for the professional service the patient will receive must fall within a range of two specified amounts.

Item 2 amends the range of this specified amount from “\$278.15 to \$934.15” to the new range of \$279.55 to \$938.80 (indexed by 0.5 per cent, the indexation rate for MBS fees effective 1 November 2023).



## **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. 7) 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. 7) 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).

These Amendment Rules amend the Complying Product Rules to update the daily patient contribution payable by nursing-home type patients (NHTPs) for hospital accommodation in all private hospitals nationally, and public hospitals in all states and territories except the Australian Capital Territory.

These Amendment Rules also amend the Benefit Requirements Rules to:

- update minimum benefits for nursing-home type patients payable by insurers for NHTP hospital accommodation at all private hospitals nationally, and public hospitals in New South Wales, Northern Territory, Queensland, Tasmania and Western Australia;
- index Type A procedure MBS thresholds in line with additional indexation of MBS fees of 0.5 per cent from 1 November 2023; and
- remove four MBS items from the list of Band 1 Type B procedures to correct inadvertent retention of the items in the list from 1 March 2023 (30473, 30478 and 41647) and from 1 July 2023 (45027), respectively.

#### **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 the updated minimum benefits and patient contributions for private nursing-home type patients at private and public hospitals, in the Benefit Requirements Rules and Complying Product Rules respectively, reflect regular indexation practices for both Commonwealth, state and territory jurisdictions and therefore maintain the status quo arrangements.

Indexation of MBS fee thresholds for Type A procedures in line with MBS fee indexation and removal of reclassified items from the Band 1 Type B procedures in the Benefit Requirements Rules are consistent with current classification of procedure types therefore also maintain the status quo arrangements.

### **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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