

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2023

Subsection 10B(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister for Health and Aged Care may, by legislative instrument, determine to which Medicare items subsections 10ACA(7A) and 10ADA(8A) apply and the maximum increases in Medicare benefits payable for those items under the Extended Medicare Safety Net (EMSN).

Subsections 10ACA(7A) and 10ADA(8A) of the Act provide that where a Medicare item is listed in a determination made under section 10B, the EMSN benefit must not exceed the amount determined as the EMSN benefit cap.

This instrument relies 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 EMSN provides an additional benefit for Australian families and singles who incur high out-of-pocket costs for Medicare eligible out-of-hospital services. Once the relevant annual threshold of out-of-pocket costs has been met, Medicare will pay up to 80 per cent of any future out-of-pocket costs for out-of-hospital Medicare services for the remainder of the calendar year.

Under subsection 10B(1) of the Act, the Minister of Health and Aged Care may by legislative instrument apply caps on the maximum additional benefit paid, the EMSN benefit cap, to items under the EMSN. These items and their relevant EMSN benefit caps are prescribed in the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (the Principal Determination).

The purpose of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination* (the Amendment Determination) is to amend the Principal Determination to index the fixed dollar EMSN benefit cap of 86 items by 5.4 per cent to provide a greater benefit for patients, and to update the caps of four obstetric telehealth and phone consultation items to align them with EMSN arrangements for equivalent face-to-face items.

Consultation

Consultation was not undertaken on the indexation of EMSN fixed benefit caps as it is machinery in nature. Indexation of EMSN fixed benefit caps is a business-as-usual process which is completed on 1 January of each year to ensure the value of the fixed cap remains relative with the value of the respective item's schedule fee, which is indexed on 1 July of each year.

In the 2012-13 Budget under the *Extended Medicare Safety Net – capping benefits including for items with excessive fees* measure, the Government announced that an EMSN benefit cap would be applied to all attendance items from 1 November 2012. While stakeholders expect all attendance items to be subject to EMSN benefit cap of 300 percent of the schedule fee or \$500.00 (whichever is the lesser amount), they will be notified of the capping arrangements for the new attendance groups in the Medicare Benefits Schedule XML data file which will be made available for download on MBS Online (www.mbsonline.gov.au).

Consultation on the amendment to EMSN benefit caps for obstetric telehealth and phone services was not undertaken as the changes are administrative in nature to align them with EMSN arrangements for equivalent face-to-face items.

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

Section 1 to 4 Amendment Determination commence the later of the day after it is registered, and the day after it has been approved by each House of Parliament. Schedule 1 of the Amendment Determination commences the later of 1 January 2024 and the day after it has been approved by each House of Parliament.

Details of the Amendment Determination are set out in the [Attachment](#).

Authority: Subsection 10B(1) of the
Health Insurance Act 1973

Details of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2023*

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2023* (Amendment Determination).

Section 2 – Commencement

Section 2 provides that the Amendment Determination will not commence until after it has been approved by each House of Parliament. Subject to Parliament's approval, the Amendment will commence the later of the day after registration or the day after the Amendment Determination has been approved by each House of Parliament.

Subject to Parliament's approval, Schedule 1 of the Amendment Determination will commence on 1 January 2024. If Parliament approves the Amendment Determination after 1 January 2024, Schedule 1 will commence the day after it has been approved by each House of Parliament.

Section 3 – Authority

Section 3 provides that the Amendment Determination is made under subsection 10B(1) of the *Health Insurance Act 1973*.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to this Amendment 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 Amendment Determination has effect according to its terms.

Schedule 1 – Amendments

Health Insurance (Extended Medicare Safety Net) Determination 2017 (Principal Determination)

Schedule 1 amends the Principal Determination to index the EMSN fixed benefit caps to 86 MBS items and amend the EMSN benefit caps of four obstetrics telehealth and phone consultation items to align them with the EMSN arrangements of their face-to-face equivalent items.

Amendment item 1 – Paragraph 4(1)(b) (table)

Amendment 1 repeals the table under paragraph 4(1)(b) of the Principal Determination and substitutes a new table of EMSN benefit cap amounts. For the 58 items with fixed EMSN benefit cap amounts that have been retained, the 'maximum increase' amount in column 2 has been replaced with new values.

The new amounts have been indexed by an indexation factor of 5.4 per cent, which is the annual All Groups Consumer Price Index as reported in the September quarter of 2023, rounded down to the nearest 10 cents. The September quarter 2023 is available at www.abs.gov.au.

As per existing authority for the application of EMSN caps to attendance items, on 1 January 2023, EMSN caps were applied to four obstetric telehealth and phone consultation items (91851, 91852, 91856 and 91857). Due to an administrative error, the EMSN caps were applied as fixed caps rather than percentage caps. Items 91851, 91852, 91856 and 91857 will be updated to reflect the percentage-based caps for the equivalent face-to-face obstetrics items. A cap of 65 percent of the schedule fee for these four items will be applied.

Amendment item 2 – Paragraph 4(6)(b) (table)

Amendment 2 repeals the table under paragraph 4(6)(b) of the Principal Determination and substitutes a new table of EMSN benefit cap amounts. For the 28 items with fixed EMSN benefit cap amounts that were in the Principal Determination, the ‘maximum increase’ amount in column 2 has been replaced with new values. The new amounts have been indexed by an indexation factor of 5.4 per cent, which is the annual All Groups Consumer Price Index as reported in the September quarter 2023, rounded down to the nearest 10 cents. The September quarter 2023 is available at www.abs.gov.au.

Statement of Compatibility with Human Rights

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

*Health Insurance (Extended Medicare Safety Net) Amendment (Indexation)
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 Amendment Determination

The EMSN provides an additional benefit for Australian families and singles who incur high out-of-pocket costs for Medicare eligible out-of-hospital services. Once the relevant annual threshold of out-of-pocket costs has been met, Medicare will pay up to 80 per cent of any future out-of-pocket costs for out-of-hospital Medicare services for the remainder of the calendar year.

Under subsection 10B(1) of the Act, the Minister of Health and Aged Care may by legislative instrument apply caps on the maximum additional benefit paid, the EMSN benefit cap, to items under the EMSN. These items and their relevant EMSN benefit caps are prescribed in the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (the Principal Determination).

The purpose of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination* (the Amendment Determination) is to amend the Principal Determination to index the fixed dollar EMSN benefit cap of 86 items by 5.4 per cent to provide a greater benefit for patients, and to update the caps of four obstetric telehealth and phone consultation items to align them with EMSN arrangements for equivalent face-to-face items.

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

The instrument maintains rights to health, social security and the right of equality and non-discrimination by ensuring access to publicly subsidised health services which are clinically effective and cost-effective.

The instrument makes machinery change to EMSN fixed benefits caps by applying indexation by the Consumer Price Index on 1 January 2024 to provide a greater benefit for patients.

Conclusion

This instrument is compatible with human rights as it maintains the right to health and the right to social security and the right of equality and non-discrimination. It will ensure that health services are appropriately subsidised, and that patient access is maintained.

Mark Butler
Minister for Health and Aged Care