

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2024

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 for Health and Aged Care may by legislative instrument apply caps on the maximum additional benefit paid (the EMSN benefit cap) to Medicare 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 2024* (the Amendment Determination) is to amend the Principal Determination to index the fixed dollar EMSN benefit cap of 86 items by 2.8 per cent to provide a greater benefit for patients, and to add EMSN benefit caps to two items for cleft dental services, and 24 items commonly co-claimed with varicose vein surgery (including an item for ambulatory blood pressure monitoring).

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 Australian 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 an 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 MBS XML data file which will be made available for download on MBS Online (www.mbsonline.gov.au).

In the 2022-23 Budget under the *Guaranteeing Medicare – Medicare Benefits Schedule New and Amended Listings* measure, items 75002 and 75005 for initial and subsequent attendance by an eligible medical or dental practitioner have replaced items 75001 and 75004. The Amendment Determination makes the necessary changes to reflect the new items implemented on 1 March 2024.

In the 2023-24 Mid-Year Economic and Fiscal Outlook under the *An Effective and Clinically Appropriate Medicare* measure, the Government announced that an EMSN benefit cap of 80 percent of the relevant schedule fee would be applied to a small number of MBS items co-claimed with varicose vein surgery.

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

Sections 1 to 4 of the 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 2025 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 3C(1) of the
Health Insurance Act 1973

Details of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2024*

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 2024* (the Amendment Determination).

Section 2 – Commencement

Subject to Parliament's approval, sections 1 to 4 of the Amendment Determination will commence the later of the day after registration of the Amendment Determination on the Federal Register of Legislation and 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 the later of the day of 1 January 2025 and the day after the Amendment Determination has been approved by each House of Parliament.

Section 2 provides that the Amendment Determination will not commence if the Amendment Determination is not 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 (the Principal Determination)

Schedule 1 amends the Principal Determination to index the fixed dollar EMSN benefit cap of 86 items by 2.8 per cent to provide a greater benefit for patients, and to add EMSN benefit caps to two items for cleft dental services, and 24 items commonly co-claimed with varicose vein surgery (including an item for ambulatory blood pressure monitoring).

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 2.8 per cent, which is the annual All Groups Consumer Price Index as reported in the September quarter of 2024, rounded down to the nearest 10 cents. The September quarter 2024 is available at www.abs.gov.au.

The updated table will also apply new EMSN benefit caps for 9 items for services commonly co-claimed with varicose vein surgery including items for ultrasound, angiography, vascular diagnostic procedures, anaesthetic injections and surgical procedures (11602, 11604, 11607, 11610, 18270, 18272, 30216, 30219, 35303).

Amendment item 2 – Paragraph 4(5)(a)

Amendment 2 removes references to two cleft dental service items (75001 and 75004) which ceased on 1 March 2024, and replaces them with references to equivalent new items (75002 and 75005), which were introduced on 1 March 2024.

Amendment item 3 – Paragraph 4(6)(b) (table)

Amendment 3 repeals the table under paragraph 4(4)(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 2.8 per cent, which is the annual All Groups Consumer Price Index as reported in the September quarter 2024, rounded down to the nearest 10 cents. The September quarter 2024 is available at www.abs.gov.au.

The substituted table will also apply new EMSN benefit caps to 15 items for services commonly co-claimed with varicose vein surgery including items for ultrasound, angiography, vascular diagnostic procedures, anaesthetic injections and surgical procedures (55238, 55244, 55246, 55252, 55276, 55296, 59970, 60024, 60027, 60030, 60033, 60048, 60051, 60054, 60057).

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 2024

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

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 for 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 2024* (the Amendment Determination) is to amend the Principal Determination to index the fixed dollar EMSN benefit cap of 86 items by 2.8 per cent to provide a greater benefit for patients, and to add EMSN benefit caps to two items for cleft dental services, and 24 items commonly co-claimed with varicose vein surgery (including an item for ambulatory blood pressure monitoring).

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 and 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 changes to EMSN fixed benefit caps by applying indexation by the Consumer Price Index on 1 January 2025 to provide a greater benefit for patients.

Conclusion

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

Mark Butler
Minister for Health and Aged Care