

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance Legislative Amendment (Hospital-Only Services) Determination 2025

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 (the Table) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

The Table is set out in the regulations made under subsection 4(1) of the Act. The most recent version of the regulations is the *Health Insurance (General Medical Services Table) Regulations 2021*.

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 purpose of the *Health Insurance Legislative Amendment (Hospital-Only Services) Determination 2025* (the Determination) is to amend six MBS items (13761, 13762, 14247, 14249, 32221, and 75203) to limit the services to being performed or provided in a hospital by amending the following Principal Determinations:

- *Health Insurance (Section 3C General Medical Services – Extracorporeal Photophoresis for Chronic Graft Versus Host Disease) Determination 2022*
- *Health Insurance (Section 3C General Medical Services – Extracorporeal Photophoresis) Determination 2020*
- *Health Insurance (Section 3C General Medical Services — Artificial Bowel Sphincter Services) Determination 2023*
- *Health Insurance (Section 3C General Medical Services – Cleft and Craniofacial Services) Determination 2024*

This will align the MBS to contemporary clinical practice and ensure services are only rendered in the appropriate clinical location. This change was announced in the 2024-25 Budget under the *Strengthening Medicare – an effective and clinically appropriate Medicare Benefits Schedule (MBS) measure* and in 2024-25 MYEFO under the *An Effective and Clinically Appropriate Medicare Benefits Schedule measure*.

Consultation

The Department of Health and Aged Care consulted with key stakeholders and offered an opportunity for them to provide input on the changes to hospital-only services. These stakeholders included the: Australian Medical Association, Australian

and New Zealand Association of Oral and Maxillofacial Surgeons, Australian Society of Plastic Surgeons, Royal Australasian College of Surgeons, Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Australasian College for Emergency Medicine, Australian and New Zealand College of Anaesthetists and Australasian College for Emergency Medicine.

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

The Determination commences on 1 March 2025.

Details of the Determination are set out in the Attachment.

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

Details of the *Health Insurance Legislative Amendment (Hospital-Only Services) Determination 2025*

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislative Amendment (Hospital-Only Services) Determination 2025*.

Section 2 – Commencement

Section 2 provides for the Determination to commence on 1 March 2025.

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 – Hospital-only Services

Schedule 1 of the Determination is split into two parts to cover the following amendments:

- Part 1 of the Schedule amends items to which “(H)” is to be added after the last word in the item descriptor.
- Part 2 of the Schedule amends items to which “(H)” is to be added before an existing anaesthesia flag in the item descriptor.

Item 1 adds the “(H)” flag to the end of the descriptor (column 2) of MBS items 13761 and 13762 as specified by the amending table. This will limit these services to being rendered in hospital only under the *Health Insurance (Section 3C General Medical Services – Extracorporeal Photopheresis for Chronic Graft Versus Host Disease) Determination 2022*

Item 2 adds the “(H)” flag to the end of the descriptor (column 2) of 14247 and 14249 as specified by the amending table. This will limit these services to being rendered in hospital only under the *Health Insurance (Section 3C General Medical Services – Extracorporeal Photopheresis) Determination 2020*

Item 3 adds the “(H)” flag to the end of the descriptor (column 2) of 75203 as specified by the amending table. This will limit these services to being rendered in hospital only under the *Health Insurance (Section 3C General Medical Services – Cleft and Craniofacial Services) Determination 2024*

Item 4 adds the “(H)” before “(Anaes.)” of MBS item 32221 as specified by the amending table. This will limit this service to being rendered in hospital only under the *Health Insurance (Section 3C General Medical Services — Artificial Bowel Sphincter Services) Determination 2023*.

Statement of Compatibility with Human Rights

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

Health Insurance Legislative Amendment (Hospital-Only Services) Determination 2025

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 purpose of the *Health Insurance Legislative Amendment (Hospital-Only Services) Determination 2025* (the Determination) is to amend six MBS items (13761, 13762, 14247, 14249, 32221, and 75203) to limit the services to being performed or provided in a hospital.

This will align the MBS to contemporary clinical practice and ensure services are only rendered in the appropriate clinical location. This change was announced in the 2024-25 Budget under the *Strengthening Medicare – an effective and clinically appropriate Medicare Benefits Schedule (MBS)* measure and in the 2024-25 MYEFO under the *An Effective and Clinically Appropriate Medicare Benefits Schedule* measure.

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 Determination will maintain the rights to health and social security by ensuring conditions on the location particular Medicare services can be rendered reflects contemporary and appropriate clinical practice. The Determination makes no change to the right of equality and non-discrimination, as a Medicare-eligible person (as defined in the *Health Insurance Act 1973*) continues to have access to all Medicare services based on clinical need consistent with a universal health insurance program.

Conclusion

This instrument is compatible with human rights because it maintains existing arrangements and the protection of human rights.

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