

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

*Health Insurance Act 1973*

*Health Insurance (Permitted benefits – diagnostic imaging services) Determination 2018*

This Determination is made under section 23DZZIG of the *Health Insurance Act 1973* (the Act).

The purpose of the Determination is to provide that a specified class of benefits asked for or accepted by, or offered or provided to, a specified class of persons is a permitted benefit. The Determination repeals and replaces, with minimal change, the *Health Insurance (Permitted benefits – diagnostic imaging services) Determination 2008 (2008 Determination)*, which is due to sunset on 1 April 2018 due to the sunset provisions in the *Legislation Act 2003*.

The Act provides for payments of Medicare benefits in respect of professional services rendered to eligible persons. Part IIBA of the Act deals with prohibited practices in relation to pathology services and diagnostic imaging services.

Part IIBA of the Act regulates behaviour whereby providers (or persons connected to them) offer or provide benefits to requesters (or persons connected to them). It also regulates behaviour whereby requesters (or persons connected to them) seek or accept benefits from providers (or persons connected to them). Such behaviour may be prohibited by the Act unless the benefit in question is a “permitted benefit”. The Act prescribes a number of benefits which are permitted, and these generally relate to transactions that are of an arm’s length bona fide commercial nature. This Determination provides, in relation to diagnostic imaging services, for a specified class of benefits that would otherwise be unlawful under the Act, to be permitted benefits. A separate determination applies in relation to pathology services.

In summary, the types of benefits permitted under this Determination which meet the prescribed requirements are:

- items that help requesters to read films or make requests, for example image viewing equipment and computer software;
- stationing staff or diagnostic imaging equipment in hospitals and in requesters clinical rooms in remote areas and during surgical procedures;
- providing diagnostic imaging services to a patient who is a requester or a person connected to the requester for free or at a discounted rate;
- educational material;
- educational sessions;
- certain gifts and hospitality; and
- promotional material.

Consistent with the previous Determination, providers of diagnostic imaging services are under no compulsion to provide the benefits included in the Determination. This is a business

decision for providers. The Determination simply makes it lawful under the Act if providers do supply them.

Review of the 2008 Determination identified that the provisions remain appropriate and required only minor changes and small formal drafting updates.

Subsection 33(3) of the *Acts Interpretation Act 1901* is relied upon to support the revocation and remake of this Determination under section 23DZZIG of the Act. Subsection 33(3) is an interpretation rule providing that the power to make an instrument includes the power to repeal and remake the instrument.

The peak professional and industry bodies were consulted on the proposed remake of the Determination with minimal drafting changes. A list of all stakeholders consulted, based on the Diagnostic Imaging Advisory Committee membership, is shown at Attachment B. The Determination commences on the day after registration.

A detailed explanation of the provisions in the Determination is contained in Attachment A.

**Details of the *Health Insurance (Permitted Benefits – Diagnostic Imaging Services) Determination 2018***

**Section 1**

This section provides that the name of the Determination is the *Health Insurance (Permitted benefits – diagnostic imaging services) Determination 2018*.

**Section 2**

Section 2 provides that the Determination commences on the day after registration.

**Section 3**

This section provides the authority for the Determination which is section 23DZZIG of the *Health Insurance Act 1973* (the Act).

**Section 4**

This section relates to Definitions. It mostly lists examples of terms used in the Determination that, in accordance with statutory conventions, take their meaning from the Act.

**Section 5**

This section repeals the *Health Insurance (Permitted benefits – diagnostic imaging services) Determination 2008*.

**Section 6**

Under section 23DZZIG of the Act, the Minister may by legislative instrument determine that a specified class of benefits that are asked for or accepted by, or offered or provided to a specified class of persons is a permitted benefit. Subsection 6(1) provides that the benefits listed in Schedule 1 are permitted benefits, subject to subsection 6(2), where:

- a requester (or a person connected to the requester) asks for, or accepts the benefit from, a diagnostic imaging provider (or a person connected to the provider);
- a diagnostic imaging provider (or someone connected to them) offers or provides the benefit to a requester (or someone connected to the requester).

The concept of a person being “connected” to another takes its meaning from section 23DZZIJ of the Act.

Subsection 6(2) provides that even if a benefit is listed in Schedule 1, it is not permitted if it is related to the number or type or value of requests made by a requester or exceeds the normal supply for the needs of the requester's practice over a given time. For example, it would not be permitted to supply imaging viewing equipment only on the proviso that the requester ordered a certain number of diagnostic imaging services from a particular provider.

## **Schedule 1**

This Schedule lists those classes of benefits that are permitted benefits.

### **Item 1**

Diagnostic imaging service providers often provide diagnostic imaging related items to assist requesters in either reading films/images or making requests, for example light boxes, requesting software and digital imaging reading software.

This item provides that it is a permitted benefit for a provider to provide such items free of charge (and irrespective of their value) to a requester as long as they are of a type that:

- does not exclude the requester from dealing with other providers of diagnostic imaging services; and either
- can only be used for purposes connected with requests for diagnostic imaging services; or
- for items that have multiple uses, has special features that aid the requester in requesting diagnostic imaging services or viewing diagnostic images.

For example, it would be permissible to provide requesting or viewing software or special computer screens that enable multiple images to be viewed. However, it would not be permissible to provide a full computer operating system, unless it had special features to assist the requester in requesting or viewing diagnostic services or viewing the images.

It would also not be permissible if the item precludes the requester from using other providers of diagnostic imaging services. For example, if computer software was provided, it cannot be of a type that prevents other providers loading their software into the requester's computer.

### **Item 2**

Prior to the commencement of Part IIBA in 2008, the Act prohibited a diagnostic imaging provider from stationing staff or equipment at the premises of a requesting practitioner. There was an exception to this rule where the requester's practice was in a remote area.

Paragraph (a) makes it a permitted benefit for a diagnostic imaging provider to station staff or diagnostic imaging equipment in the premises of a requesting practitioner in a remote area. This exemption helps to ensure that remote areas have appropriate access to diagnostic imaging services.

Paragraphs (b) and (c) permit a provider of diagnostic imaging services to station staff or diagnostic imaging in the premises of a requesting practitioner where the premises is a

hospital (for example, in an emergency department) or during the course of a surgical procedure (for example, a biopsy taken in a clinic).

For example: in hospital operating theatres, surgeons often require radiological services during operative procedures; in breast clinics, it is often necessary for biopsies to be taken under x-ray or ultrasound guidance.

### **Item 3**

It is understood that, as a professional courtesy, a provider may wish to provide free or discounted diagnostic imaging services where the patient is a requester or a person connected to a requester, such as a family member.

The legislation is not intended to prohibit competition by providers on the basis of the quality or the cost of service they provide.

This item makes it a permitted benefit for a provider to provide free or discounted services to a requester, or a person connected to a requester.

### **Items 4 and 5**

Providers are well placed to provide appropriate, relevant and targeted educational information to assist requesters and patients to make efficient and effective use of diagnostic imaging services.

Item 4 makes it a permitted benefit for providers to supply free educational material about diagnostic imaging, including information that may be passed on to patients.

Item 5 makes it a permitted benefit for a diagnostic imaging provider to host relevant education sessions on diagnostic imaging for requesters and their staff where:

- the primary objective of the event is to provide relevant information about diagnostic imaging, for example, to discuss appropriate requesting of services or understanding reports of diagnostic imaging services;
- the venue is appropriate for the educational purpose of the meeting;
- any hospitality is secondary to the educational purpose of the event and the cost of any hospitality provided, having regard to the venue and conduct of the event, is reasonable. For example, if the event is a formal seminar in an expensive hotel, it would be reasonable to pay more for hospitality than if the event was a small meeting held in the offices of the provider;
- the participant's travel and accommodation costs, if any, are not met by the provider; and
- the event does not include and is not held in conjunction with any sporting event or other entertainment.

### **Item 6**

This item permits the provision of gifts or hospitality only if:

- they are not cash or convertible to cash, for example shares;
- they are provided infrequently and only for a significant occasion, for example, flowers for a condolence tribute or hospitality at Christmas; and
- they not given as an inducement, consideration or reward for requesting services. For example, it would not be in order for a provider to discriminate between large and small volume requesters; and
- the cost of the gift or hospitality is reasonable in the circumstances. For example, it would be reasonable to provide a modest hamper at Christmas, but it would be inappropriate to give the requester a case of expensive alcoholic spirits.

### **Item 7**

This item permits a diagnostic imaging provider to promote their business with requesters through the provision of request forms and other promotional material, so long as the material being provided is labelled as coming from the provider and has no resale value to the recipient of the benefit.

The purpose of requiring the material to be identified is to avoid creating the opportunity for gifts to be disguised as promotional items.

**List of organisations consulted**

Royal Australian and New Zealand College of Radiologists  
Australian Diagnostic Imaging Association  
Cardiac Society of Australia and New Zealand  
Australasian Association of Nuclear Medicine Specialists  
Australasian Sonographers Association  
Australian Society for Ultrasound in Medicine  
Australian Orthopaedic Association  
Royal Australian and New Zealand College of Obstetricians and Gynaecologists  
Consumers Health Forum of Australia  
Australasian College of Physical Scientists and Engineers in Medicine  
Australian Society of Medical Imaging and Radiation Therapy  
Royal Australian College of General Practitioners  
Diagnostic Imaging and Monitoring Association  
Australian Medical Association  
Chiropractors' Association of Australia  
Australian Radiation Protection and Nuclear Safety Agency  
Australian and New Zealand Society for Vascular Surgery  
Medical Imaging Nurses' Association of Australia

## **Statement of Compatibility with Human Rights**

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

*Health Insurance (Permitted benefits – diagnostic imaging services) Determination 2018*

This 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 Legislative Instrument**

The Determination sets out certain classes of benefits that are permitted benefits in relation to diagnostic imaging, which generally relate to transactions that are of an arm's length bona fide commercial nature. This Determination provides, in relation to diagnostic imaging services, for a specified class of benefits that would otherwise be unlawful under the *Health Insurance Act 1973*, to be permitted benefits.

The *Health Insurance (Permitted benefits – diagnostic imaging services) Determination 2008*, is due to sunset on 1 April 2018. This Determination, the *Health Insurance (Permitted benefits – diagnostic imaging services) Determination 2018*, repeals and replaces it, with minimal change.

### **Human rights implications**

The Determination 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 Determination assists in regulating when a Medicare benefit is payable for diagnostic imaging services. If the Determination is not remade, there will no longer be appropriate exemptions for certain permitted benefits.

The Determination supports access to quality, safe, clinically relevant and cost effective diagnostic imaging services. The Determination also promotes the right to health by assisting to ensure that providers and requesters of Medicare-eligible diagnostic imaging services provide safe and high quality services.

### **Conclusion**

This Determination is compatible with the human rights recognised in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**CELIA STREET**

**Assistant Secretary**

**Diagnostic Imaging and Pathology Branch**

**Medical Benefits Division**

**Department of Health**