

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Health Insurance Act 1973

Health Insurance (Extended Medicare Safety Net) Amendment (Eating Disorders Capping) Determination 2019

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

The increase in the Medicare benefit payable under the EMSN is commonly referred to as the 'EMSN benefit' and the maximum increase amount is known as the 'EMSN benefit cap'. 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.

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.

Purpose

In the 2018-19 Mid-year Economic and Fiscal Outlook, the Government announced it would support a recommendation from the Medicare Benefits Schedule Review Taskforce (the Taskforce) to enable patients with anorexia nervosa and other eligible eating disorders to access Medicare-funded services for the treatment and management of their condition.

From 1 November 2019, eligible patients will be able to access up to 40 psychological treatment services and 20 dietetic services each year if they have a comprehensive treatment and management plan from a general practitioner (GP), paediatrician or psychiatrist.

The purpose of Schedule 1 of the *Health Insurance (Extended Medicare Safety Net) Amendment (Eating Disorders Capping) Determination 2019* (the EMSN Amendment Determination) is to amend the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (the Principal Determination) to apply EMSN benefit caps to the new eating disorder items from 1 November 2019.

Schedule 1 of the EMSN Amendment Determination will apply an EMSN benefit cap of 300 per cent of the schedule fee or \$500 (whichever represents the lesser amount) to the new eating disorder items. This includes the services provided by GPs, paediatricians or psychiatrists in Group A36 of the Medical Benefits Schedule (MBS), and the mental health and dietetic allied health items in Group M16 of the MBS.

This will make the new items consistent with the EMSN benefit cap arrangements for GP, specialist and allied health consultation services.

The purpose of Schedule 2 of the EMSN Amendment Determination is to index EMSN benefit caps of a fixed dollar amount. From 1 January 2020, all EMSN benefit caps of a fixed dollar amount will be substituted by a new value which has been indexed by the Consumer Price Index. The fixed EMSN benefit caps have been increased by 1.6 per cent (annual CPI as reported in the June quarter 2019). Indexing the EMSN benefit caps will provide a greater benefit for patients.

The EMSN Amendment Determination also makes machinery changes by removing ten items that do not apply an EMSN benefit cap from the Principal Determination in Schedule 2.

Consultation

Consultation was undertaken on the eating disorder items as part of the MBS Review process. The MBS Review is conducted by expert committees and working groups focusing on specific areas of the MBS. The Taskforce endorsed reports were released for public comment prior to finalisation of the recommendations to Government. This was undertaken through the public consultation process during consideration by the Taskforce.

Consultation was not undertaken on Schedule 2 of the EMSN Amendment Determination as it is machinery in nature. Applying a fixed cap to the items in Schedule 2 was informed by two independent reviews by the Centre for Health Economics Research and Evaluation (CHERE) in two reports; the *Extended Medicare Safety Net Review Report 2009* and the *2011 Extended Medicare Safety Net Review Report*.

Details of the Determination are set out in the Attachment.

The EMSN Amendment Determination will not commence until it has been approved by each House of Parliament. This instrument will commence the later of the day it is approved by each House of Parliament or the day after registration. Schedule 1 of the Determination will commence on 1 November 2019 or the day this instrument is approved by each House of Parliament, whichever occurs later. Schedule 2 of the Determination will commence on 1 January 2020 or the day this instrument is approved by each House of Parliament, whichever occurs later.

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

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

ATTACHMENT

Details of the *Health Insurance (Extended Medicare Safety Net) Amendment (Eating Disorders Capping) Determination 2019*Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Extended Medicare Safety Net) Amendment (Eating Disorders Capping) Determination 2019*.

Section 2 – Commencement

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

Subject to Parliament's approval, Schedule 1 of the Determination will commence on 1 November 2019. If Parliament approves the Determination after 1 November 2019, Schedule 1 will commence the day after it has been approved by each House of Parliament.

Subject to Parliament's approval, Schedule 2 of the Determination will commence on 1 January 2020. If Parliament approves the Determination after 1 January 2020, Schedule 2 will commence the day after it has been approved by each House of Parliament.

Section 3 – Authority

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

Section 4 – Schedules

Section 4 provides that 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 – Amendments commencing on 1 November 2019

Schedule 1 sets out the amendments to the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (Principal Determination) that will commence on 1 November 2019.

Item 1 – Paragraph 4(3)(a)

Item 1 repeals and replaces paragraph 4(3)(a) to make it clear that the items in the Group listed in the table are items in the general medical services table and items in determinations made under subsection 3C(1) of the Act.

Item 2 – Subsection 4(3) (after table item dealing with group A30)

Services under Group A36 are in relation to eating disorders services provided by GPs, paediatricians and psychiatrists. Item 2 will provide that an Extended Medicare Safety Net

(EMSN) benefit cap of 300 per cent of the schedule fee or \$500.00 (whichever is the lesser amount) will be applied to the eating disorder items.

Item 3 – Subsection 4(3) (note)

Item 3 repeals the note since it will be made clear (through item 1 above) that some services in the table are specified in a determination made under subsection 3C(1) of the Act.

Item 4 – Paragraph 4(4)(a)

Item 4 repeals and replaces paragraph 4(4)(a) to make it clear that the items in the Group listed in the table are items in the general medical services table and items in determinations made under subsection 3C(1) of the Act.

Item 5 – Subsection 4(4) (after table item dealing with group M15)

Services under group M16 are in relation to eating disorders allied health services. Item 5 will provide that an EMSN benefit cap of 300 per cent of the schedule fee or \$500.00 (whichever is the lesser amount) will be applied to the eating disorder items.

Item 6 – Subsection 4(4) (note)

Item 6 repeals the note since it will be made clear (through item 4 above) that some services in the table are specified in a determination made under subsection 3C(1) of the Act with respect to allied health services.

Item 7 – Paragraph 4(5)(a)

Item 7 repeals and replaces paragraph 4(5)(a) to make it clear that the items stated are in a determination made under subsection 3C(1) of the Act.

Item 8 – Subsection 4(5) (note)

Item 8 repeals the note since it will be made clear (through item 7 above) that the items are specified in a determination made under subsection 3C(1) of the Act.

Item 9 – Paragraph 4(6)(a)

Item 9 repeals and replaces paragraph 4(6)(a) to make it clear that the items listed are items in the diagnostic imaging services table and items in a determination made under subsection 3C(1) of the Act.

Item 10 – Subsection 4(6) (note)

Item 10 repeals the note since it will be made clear (through item 9 above) that some items are specified in a determination made under subsection 3C(1) of the Act.

Schedule 2 – Amendments commencing on 1 January 2020

Schedule 2 sets out the amendments to the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (Principal Determination) that will commence on 1 January 2020.

Item 1 – Paragraph 4(1)(a)

Item 1 repeals and replaces paragraph 4(1)(a) to make it clear that the items listed in the table are items in the general medical services table and items in determinations made under subsection 3C(1) of the Act.

Item 2 – Subsection 4(1) (table)

Item 2 provides that the table in subsection 4(1) is repealed and substituted with a new table of EMSN benefit cap amounts. For 53 items with fixed EMSN benefit cap amounts, the 'maximum increase' amounts in column 2 have been replaced with new values. The new amounts have been indexed by the Consumer Price Index (CPI) in the June quarter 2019. The CPI is released by the Australian Bureau of Statistics. The June quarter 2019 is available at www.abs.gov.au.

The new table does not include item 16504 as this item has ceased. The new table also does not include items 16522, 16531, 16533 and 16534 as no EMSN is payable on these items as they are hospital services only.

Item 3 – Subsection 4(1) (note)

Item 3 repeals the note since it will be made clear (through item 1 above) that some items in the table are specified in a determination made under subsection 3C(1) of the Act.

Item 4 – Paragraph 4(2)(a)

Subsection 4(2) provides that a maximum increase of 80 per cent of the schedule fee under the EMSN is applied to the items in paragraph 4(2)(a). Item 4 provides that paragraph (a) is repealed and substituted with a new paragraph, which does not include items 35533, 45584, 45585, 45587 and 45659. No EMSN is payable on these items as they are hospital services only.

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 (Eating Disorders Capping) Determination 2019

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

In the 2018-19 Mid-year Economic and Fiscal Outlook, the Government announced it would support recommendations from the Medicare Benefits Schedule Review Taskforce (the Taskforce) to enable patients with anorexia nervosa and other eligible eating disorders to access Medicare-funded services for the treatment and management of their condition from 1 November 2019.

The purpose of Schedule 1 of the *Health Insurance (Extended Medicare Safety Net) Amendment (Eating Disorders Capping) Determination 2019* (the EMSN Amendment Determination) is to amend the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (the Principal Determination) to apply Extended Medicare Safety Net (EMSN) benefit caps to the new eating disorder items from 1 November 2019.

Schedule 1 of the EMSN Amendment Determination will apply an EMSN benefit cap of 300 per cent of the schedule fee or \$500 (whichever represents the lesser amount) to the new eating disorder items. This includes the comprehensive treatment and management plan items provided by general practitioner (GPs), paediatricians or psychiatrists in Group A36 of the Medical Benefits Schedule (MBS), and the mental health and dietetic allied health items in Group M16 of the MBS.

The purpose of Schedule 2 of the EMSN Amendment Determination is to index EMSN benefit caps of a fixed dollar amount. From 1 January 2020, all EMSN benefit caps of a fixed dollar amount will be substituted by a new value which has been indexed by the Consumer Price Index. The fixed EMSN benefits caps have been increased by 1.6 per cent (annual CPI as reported in the June quarter 2019). Indexing the EMSN benefit caps will provide a greater benefit for patients.

The EMSN Amendment Determination also makes machinery changes by removing ten items that do not apply an EMSN benefit cap from the Principal Determination in Schedule 2.

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.

Analysis

This instrument maintains or advances rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective.

This instrument amends existing arrangements by applying an EMSN benefit cap to new eating disorder items provided by a GP, paediatrician or psychiatrist from 1 November 2019. This will make the EMSN benefit cap for the new items consistent with the EMSN benefit cap arrangements for other GP, specialist and allied health consultation services.

The instrument also makes consequential amendments by indexing the EMSN benefit caps of items with a fixed maximum increase amount by CPI to commence on 1 January 2020. Indexing the EMSN benefit caps will provide a greater benefit for patients as the benefit caps will be consistent with increases in CPI.

Conclusion

This instrument is compatible with human rights as it maintains the right to health and the right to social security.

Greg Hunt
Minister for Health