

## EXPLANATORY STATEMENT

Issued by the Minister for Health

*Health Insurance Act 1973*

*Health Insurance (Section 3C Pathology Services – COVID-19) Amendment  
Determination 2020*

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 pathology 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 4A(1) of the Act. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulations 2019*.

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 (Section 3C Pathology Services – COVID-19) Amendment Determination 2020* (the Amendment Determination) is to amend the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* to decouple the requirement to test for SARS-COV-2 with testing for other respiratory viruses.

Previously, item 69485 was required to be provided in conjunction with a test described in items 69494, 69495 or 69496 to determine if the patient had COVID-19 or another respiratory virus such as influenza. However, updated clinical advice is that this requirement is not necessary and is now putting an unnecessary burden on pathology testing resources.

The revised item 69485 will still be able to be requested by all medical practitioners and will still only be claimable where the service has been bulk billed. The arrangements to claim Medicare benefit item 69485 without having to claim items 69494, 69495 or 69496 in the same single patient episode will commence on 17 March 2020.

Medical practitioners and pathologists retain the ability to test for SARS-COV-2 and other respiratory viruses in the same single patient episode if, in their medical opinion, it is appropriate to do so.

### Consultation

Consultation on item 69485 was undertaken with the Royal College of Pathologists of Australasia and Australian Pathology.

Details of the Amendment Determination are set out in the Attachment.

The Amendment Determination commences on 17 March 2020. 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 (Section 3C Pathology Services – COVID-19) Amendment Determination 2020***Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance (Section 3C Pathology Services – COVID-19) Amendment Determination 2020* (Amendment Determination).

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences on 17 March 2020.

Section 3 – Amendment of *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020*

Section 3 provides that Schedule 1 of the Amendment Determination amends the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020*.

Section 4 - Authority

Section 4 provides that the Determination is made under subsection 3C(1) of the *Health Insurance Act 1973*.

Schedule – Relevant services

The Schedule specifies the amended service and the associated fee for item 69485.

## Statement of Compatibility with Human Rights

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

*Health Insurance (Section 3C Pathology Services – COVID-19) Amendment Determination 2020*

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 (Section 3C Pathology Services – COVID-19) Amendment Determination 2020* (the Amendment Determination) is to amend the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* to decouple the requirement to test for SARS-COV-2 with testing for other respiratory viruses.

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Medical practitioners and pathologists retain the ability to test for SARS-COV-2 and other respiratory viruses in the same single patient episode if, in their medical opinion, it is appropriate to do so.

### 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 advances the right to health and the right to social security by ensuring people who may have been affected by COVID-19 can access pathology services for specific testing of the virus, which are clinically effective, safe and cost-effective.

### **Conclusion**

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

**The Hon Greg Hunt MP  
Minister for Health**