

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

*Health Insurance Act 1973*

*Health Insurance Legislation Amendment (Section 3C – Medical and Diagnostic Imaging Services) 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 general medical services table (the GMST) and the diagnostic imaging services table (the DIST) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in one of these tables.

The GMST is set out in the regulations made under subsection 4(1) of the Act. The GMST is currently prescribed in the *Health Insurance (General Medical Services Table) Regulations 2019*. This version will be remade on 1 May 2020 by the *Health Insurance (General Medical Services Table) Regulations (No. 1) 2020*.

The DIST is set out in the regulations made under subsection 4AA(1) of the Act. The DIST is currently prescribed in the *Health Insurance (Diagnostic Imaging Service Table) Regulations 2019*. This version will be remade on 1 May 2020 by the *Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 1) 2020*.

Subsection 33(3) of the *Acts Interpretation Act 1901* 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 Legislation Amendment (Section 3C – Medical and Diagnostic Imaging Services) Determination 2020* (the Determination) is to amend a number of determinations made under subsection 3C(1) of the Act to refer to clauses in the GMST and the DIST, as renumbered in the *Health Insurance (General Medical Services Table) Regulations (No. 1) 2020* and the *Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 1) 2020*.

The Determination updates references in the following determinations:

- *Health Insurance (Section 3C General Medical Services – Heart Health Assessment No.2) Determination 2019*
- *Health Insurance (Section 3C General Medical Services – Mental Health Services for Bushfire Response) Determination 2020*
- *Health Insurance (Optometric services) Determination 2016*
- *Health Insurance (Section 3C General Medical Services—Transvaginal repair of pelvic organ prolapse and procedures for the excision of graft material) Determination 2018*
- *Health Insurance (Health Care Homes) Determination 2017*
- *Health Insurance (Section 3C Diagnostic Imaging Services – 3D Breast Tomosynthesis) Determination 2018*

- *Health Insurance (Section 3C Diagnostic Imaging Services – Multiparametric MRI of the prostate) Determination 2018*
- *Health Insurance (Section 3C General Medical Services - General Practitioner Telehealth Services) Determination 2018*

The Determination will also implement the Government's response to recommendations of the clinician-led Medicare Benefits Schedule (MBS) Review Taskforce (the MBS Review Taskforce) to diagnostic imaging services. These changes were announced in the 2019-20 Budget under the *Guaranteeing Medicare – improved patient access to diagnostic imaging measure*.

### ***Changes to three dimensional breast tomosynthesis (3DBT) services***

The Determination will amend two items for three dimensional breast tomosynthesis (3DBT) services (items 59302 and 59305) to encourage patients to utilise BreastScreen services appropriately. These items are prescribed in the *Health Insurance (Section 3C Diagnostic Imaging Services – 3D Breast Tomosynthesis) Determination 2018*.

The Medicare Benefits Schedule (MBS) is not intended to be used for population-based screening of large numbers of asymptomatic women. Current mammography services under the MBS are intended for patients who have:

- symptoms of breast cancer or non-cancerous breast disease; and/or
- a significant family history of breast and/or ovarian cancer; and/or
- a previous diagnosis of breast cancer within the last five years.

The item descriptor of items 59302 and 59305 will be amended to include an additional requirement where the patient is to have a significant family history of breast or ovarian malignancy. Women with a less significant family history (including a first diagnosis of breast cancer in an elderly first-degree family member) should utilise BreastScreen services for screening mammography.

A further amendment will be made to specify that on examining the patient, the general practitioner finds symptoms or indications of breast disease, as opposed to symptoms or indications of malignancy. This will provide access in the investigation of some benign breast conditions under items 59302 and 59305.

### ***Promoting the use of modern diagnostic imaging equipment***

The Determination will promote the use of modern diagnostic imaging equipment by removing NK items which are prescribed in the *Health Insurance (Section 3C Diagnostic Imaging Services – 3D Breast Tomosynthesis) Determination 2018* and the *Health Insurance (Section 3C Diagnostic Imaging Services – Multiparametric MRI of the prostate) Determination 2018*.

Currently, items have two different schedule fees (i.e. 'mirror items') known as schedule K and schedule NK items. Schedule K items refer to services performed on newer/upgraded equipment and schedule NK items refer to services performed on older/aged equipment. NK items have a lower Medicare rebate than K items.

The removal of schedule NK items will mean that all equipment will need to meet the new effective life age or maximum extended life age requirements for Medicare benefits to be payable. Providers will only be able to claim for services performed on newer/upgraded equipment unless they have an exemption.

### **Consultation**

Consultation was not undertaken on updating the relevant clauses in the determinations as these changes are machinery in nature and do not alter existing arrangements. There is no change to the arrangements for patients or health professionals, and Medicare will continue to subsidise those services.

Consultation was undertaken on the changes to diagnostic imaging services that were recommended by the MBS Review Taskforce, and announced in the 2019-20 Budget under the *Guaranteeing Medicare – improved patient access to diagnostic imaging* measure.

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.

Details of the Determination are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Determination may be exercised.

The Determination commences on 1 May 2020.

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

The Determination 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* as set out in the attached Statement of Compatibility with Human Rights.

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

## ATTACHMENT

**Details of the *Health Insurance Legislation Amendment (Section 3C – Medical and Diagnostic Imaging Services) Determination 2020***Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislation Amendment (Section 3C – Medical and Diagnostic Imaging Services) Determination 2020*.

Section 2 – Commencement

Section 2 provides that the Determination commences on 1 May 2020.

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 – Amendments

*Health Insurance (Section 3C General Medical Services – Heart Health Assessment No.2) Determination 2019*

**Item [1] – Subsection 7(1)**

Item 1 makes a consequential amendment by replacing the reference to clause 2.17.1 (which prescribes that item 699 only applies to a service provided in the course of a personal attendance by a single general practitioner on a single patient) of the general medical services table with clause 2.15.1 (as renumbered). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

**Item [2] – Subsection 7(2)**

Item 2 makes a consequential amendment by replacing the reference to clause 2.17.14 (which prescribes the restrictions on health assessments) of the general medical services table with clause 2.15.14 (as renumbered). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

*Health Insurance (Section 3C General Medical Services – Mental Health Services for Bushfire Response) Determination 2020*

**Item [3] – Subsection 6(1)**

Item 3 makes a consequential amendment by replacing the reference to clause 1.2.4 (which outlines professional attendance items and their requirements) of the general medical services table with clause 1.2.5 (the renumbered clause). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

**Item [4] – Subsection 6(2)**

Item 4 makes a consequential amendment by replacing the reference to clause 1.2.5 (which prescribes personal attendance items by medical practitioners generally and their requirements) of the general medical services table with clause 1.2.6 (the renumbered clause). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

**Item [5] – Subsection 6(3)**

Item 5 makes a consequential amendment by replacing the reference to clause 1.2.6 (which prescribes personal attendance items by medical practitioners and their requirements) of the general medical services table with clause 1.2.7 (the renumbered clause). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

*Health Insurance (Optometric services) Determination 2016***Item [6] – Subsection 4(1)**

Item 6 makes a consequential amendment by repealing the definition of “institution”. This definition is no longer relevant, as the remake of the GMST does not include this definition.

**Item [7] – Subsection 14(1)**

Item 7 makes a consequential amendment by replacing the reference to clause 1.2.4 (which outlines professional attendance items and their requirements) of the general medical services table with clause 1.2.5 (the renumbered clause). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

**Item [8] – Subsection 14(2)**

Item 8 makes a consequential amendment by replacing the reference to clause 1.2.7 (lists the items that are restricted from being provided with a non-medicare service) and 1.2.8 (provides a list of services that cannot be provided under Medicare) of the general medical services table with clause 1.2.8 and 1.2.9 (the renumbered clauses). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

*Health Insurance (Section 3C General Medical Services—Transvaginal repair of pelvic organ prolapse and procedures for the excision of graft material) Determination 2018***Item [9] – Subsection 7(1)**

Item 9 makes a consequential amendment by replacing the reference to clause 1.2.5 (which prescribes personal attendance items by medical practitioners generally and the requirements) and subclause 1.2.5(1) of the general medical services table with clause 1.2.6 (the renumbered clause) and subclause 1.2.6(1). The clauses in the GMST have been to reflect current drafting standards and formatting.

**Item [10] – Subsection 7(2)**

Item 10 makes a consequential amendment by replacing the reference to clause 1.2.6 (which prescribes personal attendance items by medical practitioners and their requirements) and subclause 1.2.6(1) of the general medical services table with clause 1.2.7 (the renumbered clause) and subclause 1.2.7(1). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

*Health Insurance (Health Care Homes) Determination 2017*

**Item [11] – Section 8**

Item 11 makes a consequential amendment by replacing the reference to clause 1.2.7 (lists the items that are restricted from being provided with a non-medicare service), 1.2.8 (provides a list of services that cannot be provided under Medicare) and 1.2.9 (restricts all items in the table from being provided with harvesting, storage, in vitro processing or injection of non-haematopoietic stem cells) of the general medical services table with clause 1.2.8, 1.2.9 and 1.2.10 (the renumbered clauses). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

*Health Insurance (Section 3C Diagnostic Imaging Services – 3D Breast Tomosynthesis) Determination 2018*

**Item [12] – Subsection 6(1)**

Item 12 makes a consequential amendment by replacing the reference to clause 2.3.3 (lists the requirements for mammography services in Subgroup 10 of Group I3) of the diagnostic imaging services table with clause 2.3.5 (the renumbered clause). The clauses in the DIST have been renumbered to reflect current drafting standards and formatting.

**Item [13] – Schedule 1 (below the heading)**

Item 13 repeals the table and replaces it with a new table in Schedule 1. The new table includes amended item descriptors for items 59302 and 59305 to include an additional requirement where the patient is to have a significant family history of breast or ovarian malignancy, and to specify that on examining the patient, the general practitioner finds symptoms or indications of breast disease, as opposed to symptoms or indications of malignancy. The (K) designation is also removed as it is no longer relevant due to the removal of NK items (items for older/aged equipment).

*Health Insurance (Section 3C Diagnostic Imaging Services—Multiparametric MRI of the prostate) Determination 2018*

**Item [14] – Subsection 7(1)**

Item 14 makes a consequential amendment by removing reference to NK item 63542 as this item will cease on 1 May 2020.

**Item [15] – Subsection 7(2)**

Item 15 makes a consequential amendment by removing reference to NK item 63544 as this item will cease on 1 May 2020.

**Item [16] – Subsection 7(3)**

Item 16 makes a consequential amendment by removing reference to NK item 63544 as this item will cease on 1 May 2020.

**Item [17] – Schedule 1 (below the heading)**

Item 17 repeals the table and replaces it with a new table in Schedule 1. The new table does not include NK items 63542 or 63543 as these items will cease on 1 May 2020. The (K) designation in items 63541 and 63543 has also been removed, as it is no longer relevant.

*Health Insurance (Section 3C General Medical Services - General Practitioner Telehealth Services) Determination 2018*

**Item [18] – Section 7**

Item 23 makes a consequential amendment by replacing the reference to clause 2.22.7 (prescribes restrictions on items in Subgroup 2 of Group A20 - focussed psychological strategies) of the general medical services table with clause 2.20.7 (the renumbered clause). The clauses in the GMST have been renumbered to reflect current drafting standards and formatting.

## Statement of Compatibility with Human Rights

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

### ***Health Insurance Legislation Amendment (Section 3C – Medical and Diagnostic Imaging Services) 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 Legislation Amendment (Section 3C – Medical and Diagnostic Imaging Services) Determination 2020* (the Determination) is to amend a number of determinations made under subsection 3C(1) of the Act to refer to clauses in the GMST and the DIST, as renumbered in the *Health Insurance (General Medical Services Table) Regulations (No. 1) 2020* and the *Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 1) 2020*.

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- *Health Insurance (Section 3C Diagnostic Imaging Services – Multiparametric MRI of the prostate) Determination 2018*
- *Health Insurance (Section 3C General Medical Services – Eating Disorders Treatment Plan and Psychological Treatment Services) Determination 2019*
- *Health Insurance (Section 3C General Medical Services - General Practitioner Telehealth Services) Determination 2018*

The Determination will also implement the Government's response to recommendations of the clinician-led Medicare Benefits Schedule (MBS) Review Taskforce (the MBS Review Taskforce) to diagnostic imaging services. These changes were announced in the 2019-20 Budget under the *Guaranteeing Medicare – improved patient access to diagnostic imaging* measure.

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The removal of schedule NK items will mean that all equipment will need to meet the new effective life age or maximum extended life age requirements for Medicare benefits to be payable. Providers will only be able to claim for services performed on newer/upgraded equipment unless they have an exemption.

### **Human rights implications**

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

**Conclusion**

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

**David Weiss**  
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