

EXPLANATORY STATEMENT

Therapeutic Goods Act 1989

Therapeutic Goods (Biologicals—Authorised Supply) Rules 2020

The *Therapeutic Goods Act 1989* (“the Act”) provides for the establishment and maintenance of a national system of controls for the quality, safety, efficacy and timely availability of therapeutic goods that are used in or exported from Australia. The Act is administered by the Therapeutic Goods Administration (“the TGA”) within the Commonwealth Department of Health.

Subsection 32CM(7A) of the Act provides that the Minister may, by legislative instrument, make rules authorising classes of health practitioners to supply specified biologicals for use in the treatment of specified recipients, provided the goods are supplied in specified circumstances and the specified conditions (if any) are satisfied.

Subsection 32CM(7B) of the Act provides that, in making rules under subsection 32CM(7A), the Minister must comply with such requirements, restrictions or limitations (if any) prescribed in the regulations. No regulations have been made for the purposes of subsection 32CM(7B).

Health practitioners who supply biologicals pursuant to rules made under subsection 32CM(7A) are required to notify the Secretary in accordance with subsections 32CM(7C) and 32CM(7D) of the Act. These provisions are mainly intended to facilitate access to therapeutic goods with an established history of safe use in Australia and overseas, in circumstances where those goods are not included in the Australian Register of Therapeutic Goods (“the Register”), or not otherwise the subject of an exemption, approval or authority under the Act..

The *Therapeutic Goods (Biologicals—Authorised Supply) Rules 2020* (“the Rules”) are made under subsection 32CM(7A) of the Act. The Rules specify health practitioners, biologicals, circumstances and conditions for the purposes of that subsection. The Rules repeal and replace the *Therapeutic Goods (Authorised Supply of Specified Biologicals) Rules April 2018* “the former Rules”).

The Rules make a small number of changes as compared to the former Rules. The Rules reproduce the biologicals specified in the former Rules, and also include an additional item for MinerOss cortical and cancellous (human bone allograft), which is included as it has an established history of use.

Consultation

The Office of Best Practice Regulation advised that a regulation impact statement was not required in relation to the making of the Rules (OBPR ID 43030).

Consultation in relation to the making of the Rules was appropriately undertaken with internal client advisors within the Department of Health. Consultation with internal clinical advisors was to confirm that products added to the Rules met the safety and established history of use criteria.

Incorporation by reference

The Rules incorporate by reference the document titled *Special Access Scheme Guidance for health practitioners and sponsors* (Version 1.1, September 2017) (“the SAS Guidance”), which is published by the TGA. This document provides guidance for health practitioners and sponsors involved in providing patients with access to therapeutic goods that are not included in the Register (and are not otherwise the subject of an exemption, approval or authority under the Act) through the Special Access Scheme. It outlines the various access pathways and the regulatory obligations when accessing and supplying such therapeutic goods.

The Rules incorporate the SAS Guidance as in force or existing at the commencement of the Rules, in accordance with paragraph 14(1)(b) of the *Legislation Act 2003*, which permits a legislative instrument to incorporate a document (that is not an Act or legislative instrument) as it exists at, or before, the time the instrument commences..

The SAS Guidance is available for free from the TGA website and can be accessed at www.tga.gov.au.

Details of the Rules are set out in **Attachment A**.

The Rules are compatible with human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

The Rules are disallowable for the purposes of the *Legislation Act 2003* and commence on the day following registration on the Federal Register of Legislation.

Details of the *Therapeutic Goods (Biologicals—Authorised Supply) Rules 2020*

Section 1 – Name

This section provides that the name of the instrument is the *Therapeutic Goods (Biologicals—Authorised Supply) Rules 2020* (“the Rules”).

Section 2 – Commencement

This section provides that the Rules commence on the day following registration on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the legislative authority for making the Rules is subsection 32CM(7A) of the *Therapeutic Goods Act 1989* (“the Act”).

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, 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.

This instrument is made in accordance with that provision.

Section 4 – Definitions

This section provides the definitions of terms used in the Rules. In particular, this section defines ‘SAS Guidance’. The section also notes that a number of terms have the meaning given by subsection 3(1) of the Act, including ‘health practitioner’, ‘sponsor’ and ‘supply’.

Section 5 – Authorisation

This section is the substantive provision that authorises the supply of specified biologicals by a health practitioner, with reference to certain matters specified in Schedule 1.

Subsection 5(1) provides that a health practitioner specified in column 5 of an item in the table in Schedule 1 is authorised to supply a biological specified in column 2 of that item, to a patient of that practitioner, where the other circumstances specified in that provision are met. Those circumstances include that the conditions specified in subsection 5(2) are satisfied.

Similarly, subsection 5(3) provides that a health practitioner is authorised to supply a biological specified in column 2 of an item in the table in Schedule 1 to patients of a health practitioner specified in column 5 of that item (“the treating practitioner”), provided the supply is requested by the treating practitioner, and the other circumstances specified in that provision, including that the conditions specified in subsection 5(4), are satisfied.

Section 6 – Repeals

This section provides that each instrument that is specified in Schedule 2 to the Rules is repealed as set out in the applicable items in that Schedule.

Schedule 1 – Biologicals authorised for supply

This Schedule specifies the biologicals and circumstances mentioned in section 5 with reference to the biological, route of administration, indication and authorised health practitioner.

Schedule 2 – Repeals

This Schedule repeals the *Therapeutic Goods (Authorised Supply of Specified Biologicals) Rules April 2018*. The Rules therefore comprise a consolidated version of all biologicals specified pursuant to subsection 32CM(7A) of the Act.

Statement of Compatibility with Human Rights

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

Therapeutic Goods (Biologicals—Authorised Supply) Rules 2020

This disallowable 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 legislative instrument

The *Therapeutic Goods (Biologicals—Authorised Supply) Rules 2020* (“the instrument”) is made under subsection 32CM(7A) of the *Therapeutic Goods Act 1989* (“the Act”). The instrument specifies classes of health practitioners, biologicals, circumstances and conditions for the purposes of that subsection. The instrument repeals and replaces the *Therapeutic Goods (Authorised Supply of Specified Biologicals) Rules April 2018* (“the former instrument”).

Health practitioners who supply therapeutic goods pursuant to rules made under subsection 32CM(7A) are required to notify the Secretary in accordance with subsections 32CM(7C) and 32CM(7D) of the Act. These provisions are mainly intended to facilitate access to therapeutic goods with an established history of safe use in Australia and overseas, in circumstances where those goods are not included in the Australian Register of Therapeutic Goods (“the Register”), or not otherwise the subject of an exemption, approval or authority under the Act.

The instrument makes a small number of changes as compared to the former instrument. The instrument reproduces the biologicals specified in the former instrument, and includes one additional item for MinerOss cortical and cancellous (human bone allograft), which is included as it has an established history of use.

Human rights implications

The instrument engages the right to health in Article 12 of the International Covenant on Economic, Social and Cultural rights (“ICESCR”). Article 12 of the ICESCR promotes the right of all individuals to enjoy the highest attainable standards of physical and mental health.

In *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12) (2000), the United Nations Committee on Economic, Social and Cultural Rights states that health is a ‘fundamental human right indispensable for the exercise of other human rights’, and that the right to health is not to be understood as the right to be healthy, but includes the right to a system of health protection which provides equal opportunity for people to enjoy the highest attainable level of health.

The instrument takes positive steps to promote the right to health by facilitating the supply of certain biologicals by health practitioners in specified circumstances, and subject to certain conditions. As a consequence of the instrument, a practitioner is able to supply a specified biological by way of notification rather than approval; thus enabling the timely availability of such biologicals to Australian patients in need.

Conclusion

This instrument is compatible with human rights because it promotes the right to health in Article 12 of the ICESCR and otherwise does not raise any other human rights issues.