EXPLANATORY STATEMENT

Private Health Insurance Act 2007

Private Health Insurance Legislation Amendment Rules (No. 1) 2021

Authority

Section 333-20(1) of the *Private Health Insurance Act 2007* (the Act) authorises the Minister to, by legislative instrument, make Private Health Insurance Rules providing for matters required or permitted by the corresponding Chapter, Part or section to be provided; or necessary or convenient to be provided in order to carry out or give effect to that Chapter, Part or section.

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 *Private Health Insurance Legislation Amendment Rules (No. 1) 2021* (the Amendment Rules) amends the:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules); and,
- *Private Health Insurance (Complying Products) Rules 2015* (the Complying Product Rules).

The Amendment Rules make consequential amendments to the Benefit Requirements Rules and the Complying Product Rules to reflect changes to items of the Medicare Benefits Schedule (MBS) that take effect from 1 March 2021. The MBS changes, are given effect by, and detailed in, the following legislative instruments, accessible on the Federal Register of Legislation (FRL) at www.legislation.gov.au:

- *Health Insurance Legislation Amendment (2020 Measures No. 3) Regulations 2020* (the Regulations).

The MBS changes commencing 1 March 2021 reflect implementation in the MBS of some minor policy changes from the 2020-21 Budget under the *Guaranteeing Medicare – Medicare Benefits Schedule review measure*, and minor policy changes which were recommended by the clinician-led MBS Review Taskforce or the Medical Services Advisory Committee. The 1 March 2021 MBS changes also implement several editorial and drafting improvements to better reflect the original policy, and incorporate legislative instruments which are made under subsection 3C(1) of the *Health Insurance Act 1973.* Detailed information on MBS items, including fact sheets and quick reference guides, can be accessed at MBS Online available at www.mbsonline.gov.au.

All changes to MBS items have been reviewed for their impact on, and implementation as appropriate to, the Private Health Insurance Rules.

MBS changes reflected in the consequential Amendment Rules include:

- an increase in the MBS Fee for item 30630 for insertion of testicular prosthesis;
- introduction to the MBS of new item 45658 for the correction of a congenital deformity of the ear for a patient in any age group;
- repeal and substitution of the following 8 renumbered MBS items following relocation of MBS sub-group;
  - Item 30696 will become item 38416
  - Item 30710 will become item 38417
  - Item 41889 will become item 38419
  - Item 41892 will become item 38420
  - Item 41895 will become item 38422
  - Item 41898 will become item 38423
  - Item 41901 will become item 38425
  - Item 41905 will become item 38426; and,
- Minor administrative amendments.

The private health insurance classification and categorisation changes commencing 1 March 2021 are detailed in the Attachment to this Explanatory Statement.

These changes are achieved by amending:

- Schedules 1and 3 of the Benefit Requirements Rules for the purpose of specifying minimum hospital accommodation benefit requirements, to classify new, amended and reviewed MBS services against procedure type classifications, and remove deleted items, as appropriate; and,
- Schedule 5 of the Complying Product Rules for the purpose of describing hospital treatment(s) that must be covered under insurance policies, to categorise new, amended and reviewed MBS items by clinical category, and remove deleted items, as appropriate.

Background

MBS items with the potential to be provided to privately insured patients as hospital treatment are allocated to clinical treatment categories and hospital accommodation procedure type classifications, to provide clarity in the administration of treatments to be covered by insurers, and facilitate claims and benefit payments.

Benefit Requirements Rules

The Benefit Requirements Rules provide for minimum benefit requirements for psychiatric care, rehabilitation, palliative care and other hospital treatments. Schedules 1 to 5 of the Benefit Requirements Rules set out the minimum levels of accommodation benefits payable for hospital treatment where the treatment is provided in the circumstances specified in the particular Schedule relevant to that treatment.

Overnight hospital accommodation benefits payable by insurers are in Schedules 1 and 2 of the Benefits Requirement Rules. Same-day hospital accommodation benefits payable by insurers are in Schedule 3. Schedule 3 also lists MBS items not normally considered hospital treatment. Nursing-home type patient accommodation benefits payable by insurers are in Schedule 4. Second-tier default benefit arrangements are in Schedule 5.

Schedule 1 of the Benefit Requirements Rules also sets benefits for different patient categories by categorising MBS item numbers into patient classifications for accommodation benefits. Procedures requiring hospital treatment that includes part of an overnight stay ('Type A procedures') comprise 'Advanced surgical patient', 'Obstetric patient', 'Surgical patient', 'Psychiatric patient', 'Rehabilitation patient' and 'Other patients.'

Against these patient classifications, Schedule 1 sets out the minimum accommodation benefit payable by insurers per night for overnight accommodation for private patients at private hospitals in all states and territories, and for private patients in overnight shared ward accommodation at public hospitals in Victoria and Tasmania.

Schedule 2 of the Benefit Requirements Rules states the minimum accommodation benefit payable by insurers per night, for private patients in overnight shared-ward accommodation at all other State and Territory public hospitals. For each jurisdiction listed in Schedule 2, the minimum benefit payable by insurers per night is averaged across all patients, rather than being specific to patient classification as for Schedule 1.

Schedule 3 of the Benefit Requirements Rules sets out minimum same-day hospital accommodation benefits payable by insurers for procedures requiring hospital treatment that does not include part of an overnight stay at a hospital ('Type B procedures'). Type B procedures are further classified into four separate treatment bands (1 to 4) based on anaesthesia type and/or theatre time, and a fifth 'non-band specific' classification for items that could fall into different bands depending on how treatment is delivered to an individual patient. Part 2 of Schedule 3 identifies MBS items against Type B procedure Band 1, or the Type B non-band specific classification. The Benefit Requirements Rules also sets out circumstances in which benefits for accommodation including part of an overnight stay may be payable for patients receiving a Certified Type B Procedure.

Schedule 3 of the Benefit Requirements Rules also identifies by MBS item those services that do not normally require hospital treatment ('Type C procedures'). The Benefit Requirements Rules, together with the *Private Health Insurance (Health Insurance Business) Rules 2018*, establish that Type C procedures do not normally qualify for minimum benefits for hospital treatment nor accommodation, except in circumstances where a patient may receive as hospital treatment a Certified Type C Procedure.

Schedule 5 of the Benefit Requirements Rules provides for the categorisation of private hospitals, and calculation of minimum benefits, for the purposes of second-tier default benefits. Second-tier default benefits are benefits payable by insurers for treatment where the insurers do not otherwise have an agreement with the hospital, and the hospital has been assessed and included in the class of hospitals eligible for second-tier default benefits.

Complying Product Rules

The Complying Product Rules sets out the gold, silver, bronze and basic product tiers for hospital cover, and which clinical treatment categories are included in each Hospital Treatment Product Tier.

The 38 clinical categories (Schedule 5) are treatments that must be covered by private health insurance products in the product tiers basic, bronze, silver and gold, when delivered as hospital treatment.

MBS items that are likely to be relevant to the scope of cover for only one clinical category have been placed against that category in the table at Schedule 5 of the Complying Product Rules. Where an MBS item is not likely to be a reason for admission for hospital treatment it has generally been placed in the Support treatments list, even if specific to a single body system.

MBS items that may be relevant to the scope of cover for two clinical categories are placed against the clinical category that is in the lowest product tier for which the MBS item is likely to apply.

The Common treatments list (Schedule 6) consists of MBS items that are used across, and therefore common to, multiple clinical categories (more than 2). For example, professional attendances by a medical practitioner are on the Common treatments list except where the MBS descriptor expressly prevents claims for hospital treatment. MBS items on the Common treatments list will generally be for treatments that may be the primary reason for an admission. In some cases they may also be associated with, or support, another treatment that is the reason for admission. Insurers are required to cover MBS items in the Common treatments list where the treatment falls within the scope of cover for the clinical categories included in an insurance policy, and the treatment is delivered as hospital treatment.

The Support treatments list (Schedule 7) consists of MBS items, such as pathology tests and diagnostic tests, which are generally used to support the provision of a primary treatment in one of the clinical categories, or in the Common treatments list. Items in the Support treatments list are unlikely to be the primary reason for treatment in hospital.

MBS items of the Diagnostic Imaging Services Table (DIST), Pathology Services Table (PST) and 3C Determination items are automatically categorised as Support Treatments under Schedule 7 of the Complying Product Rules.

Insurers are required to provide cover for MBS items in the Common and Support treatments lists where the MBS item is for hospital treatment within the scope of cover for a clinical category included in a patient's private health insurance policy.

'Type C' procedures under the *Private Health Insurance (Benefit Requirements) Rules 2011* are also listed in the clinical categories or the Common or Support treatments list. Type C services do not normally require, but may be provided as, hospital treatment with the appropriate certification.

Inclusion of an MBS item against a clinical category or in the Common or Support treatments lists has no bearing on whether that service requires a hospital admission and does not imply these services necessarily require admission.

MBS items which cannot be claimed for services provided as hospital treatment are not intended to be listed in the clinical categories, Common treatment or Support treatment lists.

The Amendment Rules

The consequential amendments in these Amendment Rules are administrative in nature and do not substantively alter existing arrangements established under the Act.

Commencement

The Amendment Rules commence on 1 March 2021.

Consultation

MBS item related consultation
The Amendment Rules relating to clinical categorisations and procedure type classifications are consequential to MBS items changes. Detail on the MBS items and consultations undertaken, including by the MBS Review Taskforce, can be found in the Explanatory Statements to the Regulations available online from FRL at www.legisation.gov.au, and in information factsheets and quick reference guides available from the MBS Online website at www.mbsonline.gov.au.

Implementation liaison groups (ILGs) involving professional bodies and clinical experts inform development of regulations. Consultation encompasses private hospital and private health insurance sector representation, including from the Australian Private Hospitals Association (APHA) and Private Healthcare Australia.

Private health insurance consultation on classifications and categorisations for MBS items
Medical officers with the Department provide expert clinical advice to assist in determining the appropriate private health insurance clinical category and level of accommodation benefits for MBS items in Private Health Insurance Rules.

Consultation for the 1 March 2021 amendments included seeking feedback about the proposed changes from those most likely to be directly impacted. On 18 December 2020, the Department's weekly email to private health sector stakeholders including peak insurer and hospital representative associations, private health insurers and private hospitals, provided information on the changes to MBS items from 1 March 2021 and sought feedback on proposed consequential private health insurance amendments. Responses were received from the APHA, a private health insurer and private hospital representatives, and this feedback has been taken into account when determining the final amendments.

The Amendment Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

ATTACHMENT

Details of the *Private Health Insurance Legislation Amendment Rules (No. 1) 2021*

Section 1 Name

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 1) 2021*.

Section 2 Commencement

Section 2 provides that the instrument commences on 1 March 2021.

Section 3 Authority

Section 3 provides that the Amendment Rules are made under section 333-20 of the *Private Health Insurance Act 2007*.

Section 4 Schedules

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

All Schedule changes come into effect from 1 March 2021.

Schedule 1—Amendments—Minimum Accommodation Benefits

Private Health Insurance (Benefit Requirements) Rules 2011

Schedule 1 of the Amendment Rules repeals the existing MBS items listed as a Type A- Surgical or Type B non-band specific procedures in the Benefit Requirements Rules, and substitutes amended tables that come into effect from 1 March 2021.

- Type A procedures normally involve hospital treatment that includes part of an overnight stay.
- Type B procedures normally involve hospital treatment that does not include any part of an overnight stay.

Items added to the lists of procedure types may be new MBS items, or due to procedure type reclassification following item amendments. Similarly, MBS items deleted from lists may be due to deletion from the MBS, or procedure type reclassification.

Item 1 provides for an amended list of MBS items classified as Type A procedure Surgical patient**,** from 1 March 2021; the amended list of MBS items reflects the following item changes:

- Additions: n = 8 (renumbered items 38416, 38417, 38422, 38423, 38425, 38426; new item 45658; and item 30630 following an increase in the MBS Fee)

- Deletions: n= 6 (removal of renumbered items 30696, 30710, 41895, 41898, 41901 and 41905)

Item 2 provides for an amended list of MBS items classified as Non-band specific Type B procedures, from 1 March 2021; the amended list of MBS items reflects the following item changes:

- Additions: n = 3 (renumbered items 38419, 38420 and 38423)
- Corrections (deletion of items previously removed from the MBS or renumbered): n = 27 (60001, 60004, 60007, 60010, 60013, 60016, 60019, 60022, 60025, 60028, 60031, 60034, 60037, 60040, 60043, 60046, 60049, 60052, 60055, 60058, 60061, 60064, 60067, 60070, 60073, 60076 and 60079)

Schedule 2—Amendments—Clinical categories table

Private Health Insurance (Complying Product) Rules 2015

Schedule 2 of the Amendment Rules repeals the existing MBS items Clinical categories list, and substitutes an amended list that comes into effect from 1 March 2021.

- Clinical categories are the 38 categories described in Schedule 5 of the Complying Product Rules. The clinical categories 'Scope of cover' describes treatments that must be covered by an insurance policy for hospital treatment including that particular clinical category.

Items added to the list may be new MBS items, or due to recategorisation following item amendments. Similarly, MBS items deleted may be due to deletion from the MBS, or recategorisation.

Item 1 provides for an amended list of MBS items categorised against clinical categories**,** from 1 March 2021; the amended list reflects the following changes:

Clinical category MBS items:

- Additions: n = 9 (renumbered items 38416 and 38417 to Lung and chest; and 38419, 38420, 38422, 38423, 38425 and 38426 to Ear, nose and throat; and new item 45658 to Plastic and reconstructive surgery)
- Deletions: n= 6 (old item numbers 30696 and 30710 from Lung and chest; and 41895, 41898, 41901 and 41905 from Ear, nose and throat)

The text, "and spinal replacement" has also been reinstated within the examples given in the 'Scope of cover' for clinical category 'Back, neck and spine,' and items 51130 and 51131 reinstated under 'Back, neck and spine' rather than 'Joint replacement' to correct this inadvertent error in the text of the *Private Health Insurance Legislation Amendment Rules (No. 7) 2020*.

Statement of Compatibility with Human Rights

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

Private Health Insurance Legislation Amendment Rules (No. 1) 2021

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 the disallowable legislative instrument

The purpose of the *Private Health Insurance Legislation Amendment Rules (No. 1) 2021* (the Amendment Rules) is to amend the following instruments:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules); and,
- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules).

The Amendment Rules make consequential amendments to the:

- Complying Product Rules to categorise new MBS items into the appropriate clinical category for the purpose of describing hospital treatment(s) that must be covered under insurance policies; and,
- Benefit Requirements Rules to classify new and amended MBS items by procedure type for the purposes of benefits for accommodation, MBS fees for treatment or prostheses.

Human rights implications

The Amendment Rules engage the right to health by facilitating the payment of private health insurance benefits for health care services, encouraging access to, and choice in, health care services. Under Article 12 of the International Covenant on Economic, Social and Cultural Rights, specifically the right to health, the Amendment Rules assist with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Private health insurance regulation assists with the advancement of these human rights by improving the governing framework for private health insurance in the interests of consumers. Private health insurance regulation aims to encourage insurers and providers of private health goods and services to provide better value for money to consumers, and to improve information provided to consumers of private health services to allow consumers to make more informed choices when purchasing services. Private health insurance regulation also requires that insurers do not differentiate the premiums they charge according to individual health characteristics such as poor health.

Analysis

The amendments relating to omission or insertion of MBS items in the Benefit Requirements Rules and the Complying Product Rules are as a consequence of the changes to the MBS that take effect on 1 March 2021.

The addition of new MBS items to accommodation benefit classifications, and specified clinical categories, allows for the specified treatments under those items and the related benefit amounts to be claimed by patients who have the relevant private health insurance policies.

Conclusion

This disallowable legislative instrument only engages human rights to the extent that it maintains current arrangements with respect to the regulation of private health insurance. Therefore, this instrument is compatible with human rights because these changes continue to ensure that existing arrangements advancing the protection of human rights are maintained.