

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health and Aged Care

Private Health Insurance Act 2007

Private Health Insurance Legislation Amendment Rules (No. 4) 2021

Authority

Section 333-20(1) of the *Private Health Insurance Act 2007* (the Act) authorises the Minister to, by legislative instrument, make specified 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.

The *Private Health Insurance Legislation Amendment Rules (No.4) 2021* (the Amendment Rules) amends the:

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

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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 Amendment Rules make consequential amendments to the Benefit Requirements Rules and the Complying Product Rules to implement changes to the private health insurance clinical categorisations and procedure type classification of items of the Medicare Benefits Schedule (MBS) to reflect changes to MBS items that take effect from 1 July 2021.

Changes to the clinical categorisations and procedure type classification of MBS items are achieved by amending:

- Schedules 1 and 3 of the Benefit Requirements Rules for the purpose of specifying minimum hospital accommodation benefit requirements, to classify new, amended and reviewed MBS items against procedure type classifications, and remove deleted items, as appropriate;
- Schedules 5, 6 and 7 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, common or support treatments list, and remove deleted items, as appropriate.

The MBS item changes relevant to these Amendment Rules, 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 (General Medical Services Table) Regulations 2021*
- *Health Insurance (General Medical Services Table) Amendment (2021 Measures No. 1) Regulations 2021*
- *Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021*
- *Health Insurance Legislation Amendment (Section 3C General Medical and Diagnostic Imaging Services – Medicare Indexation) Determination 2021*
- *Health Insurance (Section 3C General Medical Services—Transcatheter Mitral Valve Repair) Determination 2021*
- *Health Insurance (Section 3C General Medical Services – Anterior and Posterior Pelvic Ring Disruption) Determination 2021*

General surgery MBS item changes introduce over 35 new items, 50 amended items and delete 70 items relating to laparoscopies and laparotomies, small bowel resections, abdominal wall hernia repairs, oncology and bariatric services, surgical excisions, and procedures relating to the oesophageal, stomach, liver, biliary, pancreas, spleen and lymph nodes.

Orthopaedic surgery changes to MBS items include over 165 new items, some 280 amended items for services considered as requiring change in order to improve clarity of services for patients and providers, and improve the MBS to better reflect contemporary clinical practice. Over 135 items were superseded where services have been consolidated into new or amended items. 9 items were deleted for services considered to be obsolete or no longer reflective of contemporary best practice.

Cardiac surgical MBS item changes include updates to item descriptors, combining similar surgical procedures, introducing items that represent a complete medical service, incentivising advanced techniques, removal of procedures that no longer represent best practice, and reducing low value angiography and coronary artery stenting by aligning the items with appropriate use criteria. There will also be some minor changes to existing cardiac imaging services to align co-claiming restrictions with other cardiac services.

These MBS changes implement Government's response to recommendations from the clinician-led MBS Review Taskforce regarding general surgery services, orthopaedic surgery and cardiac services. Other changes recommended by the clinician-led MBS Review Taskforce or the Medical Services Advisory Committee include new items for the provision of transcatheter mitral valve repair (TMVr). Administrative changes include indexation to most items of the MBS, and minor administrative corrections. Detailed information on MBS items, including fact sheets and quick reference guides, can be accessed at MBS Online available at www.mbsonline.gov.au.

The private health insurance classification and categorisation changes commencing 1 July 2021 are detailed in the Attachment to this Explanatory Statement. Further information can be accessed in detailed private health insurance spreadsheets provided online at www.health.gov.au.

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 by private health insurers associated with private patients' hospital treatment: benefits for overnight accommodation (Schedules 1 and 2); same-day accommodation (Schedule 3); Nursing-Home Type Patients (NHTP) (Schedule 4) and second-tier default benefits (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 (at Part 3 of Schedule 1).

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, including for accommodation, except in circumstances where a patient may receive as hospital treatment a Certified Type C Procedure (at Part 2 of Schedule 3).

Schedule 4 of the Benefit Requirements Rules (at clause 2) classifies a patient remaining in hospital after a continuous 35-day period, and receiving accommodation and nursing care as an end in itself, as a NHTP.

Schedule 5 of the Benefit Requirements Rules requires a health insurer to pay second tier default benefits for most episodes of hospital treatment provided in private hospital facilities that are specified in Schedule 5, if the health insurer does not have a negotiated agreement with the hospital for that type of hospital treatment. Schedule 5 generally sets a higher minimum level of benefit (for overnight treatment and day only treatment provided in specified facilities) than the minimum benefit set for such treatment by Schedules 1, 2 and 3 of the Benefit Requirements Rules.

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, 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 July 2021.

Details

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

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 MBS Regulations available online from FRL at www.legislation.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 MBS items. ILG consultation regularly encompasses private hospital and private health insurance sector representation, including from the Australian Private Hospitals Association (APHA) and Private Healthcare Australia (PHA).

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 proposed 1 July 2021 private health insurance amendments included seeking feedback about the proposed changes from those most likely to be directly impacted including:

- PHA
- APHA
- Day Hospitals Australia
- Members Health

- Catholic Health Australia
- HAMBS (Hospital and Medical Benefits System) software and IT
- Australian Health Service Alliance
- Clinical college and professional medical association representatives

The Department's weekly email to private health sector stakeholders including peak insurer and hospital representative associations, private health insurers and private hospitals, also provided information beginning in early October 2020 following Budget announcements on the anticipated 1 July 2021 changes to MBS items. Regular updates are provided in the Regulatory Amendments Calendar as part of this weekly email.

Consultation on proposed consequential private health insurance amendments also included direct invitation by email seeking formal submissions, including for:

- General Surgery Services from 22 February to 12 March 2021;
- Cardiac Services from 26 March to 30 April 2021; and
- Orthopaedic Services from 7 to 28 May 2021.

Responses received from the APHA, PHA and other industry representatives were taken into account when determining the final amendments.

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

Details of the *Private Health Insurance Legislation Amendment Rules (No. 4) 2021*

Section 1 Name

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 4) 2021*.

Section 2 Commencement

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

Schedule 1—Amendments—Clinical Categories, Common and Support Treatments

Private Health Insurance (Complying Product) Rules 2015

Schedule 1 of the Amendment Rules repeals the existing MBS items against the Clinical categories, Common and Support treatment lists, and substitutes amended lists that come into effect from 1 July 2021.

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.

Changes are detailed in the private health insurance clinical category and procedure type information provided at www.health.gov.au.

Item 1 provides for an amended list of MBS items categorised against Clinical category (Schedule 5), from 1 July 2021.

Item 2 provides for an amended list of MBS items categorised in the Common treatments list (Schedule 6), from 1 July 2021.

Item 3 provides for an amended list of MBS items categorised in the Support treatments list (Schedule 7), from 1 July 2021.

Schedule 2—Amendments—Type A procedures and Type B procedures

Private Health Insurance (Benefit Requirements) Rules 2011

Schedule 2 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 July 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 procedures Advanced Surgical patient, from 1 July 2021.

Item 2 provides for an amended list of MBS items classified as Type A procedures Surgical patient, from 1 July 2021.

Item 3 provides for the deletion of MBS item 50658 from Type B Band 1, following its deletion from 1 July 2021.

Item 4 provides for an amended list of MBS items classified as Non-band specific Type B procedures, from 1 July 2021.

Schedule 3—Amendments—Type C procedures

Private Health Insurance (Benefit Requirements) Rules 2011

Schedule 3 of the Amendment Rules repeals the existing MBS items listed as Type C procedures in the Benefit Requirements Rules, and substitutes a reformatted and amended table that comes into effect from 1 July 2021.

- Type C procedures normally do not involve hospital treatment.

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 C procedures, from 1 July 2021.

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. 4) 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. 4) 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, Common or Support treatment 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 minimum benefits for accommodation and, in relation to Type C procedures, access to any minimum benefits as hospital treatment unless provided as a Certified Type C procedure.

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 July 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 minimum 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.

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