

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Senior Australians and Aged Care Services

Aged Care Legislation Amendment (Improved Home Care Payment Administration) Instrument 2021

Authority

Section 96-1 of the *Aged Care Act 1997* (the **Act**) provides that the Minister may, by legislative instrument, make Principles specified in the second column of the table in that section providing for matters required or permitted, or necessary or convenient, in order to give effect to the corresponding Part or section of the Act specified in the third column of the table. Those include Subsidy Principles in relation to matters in Parts 3.1, 3.2 and 3.3 of the Act, the User Rights Principles in relation to matters in Part 4.2 of the Act, and the Records Principles in relation to Part 6.3 of the Act,

Section 96-1 of the *Aged Care (Transitional Provisions) Act 1997* (**Transitional Provisions Act**) provides that the Minister may, by legislative instrument, make Aged Care (Transitional Provisions) Principles providing for matters required or permitted by that Act to be provided; or necessary or convenient to be provided in order to carry out or give effect to that Act. The Transitional Provisions Act also allows the Minister to determine, by legislative instrument, the amounts of subsidy and supplements.

Section 77 of the *Aged Care and Quality Safety Commission Act 2018* provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by that Act to be prescribed by the rules; or necessary or convenient for carrying out or giving effect to that Act.

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 purpose of the *Aged Care Legislation Amendment (Improved Home Care Payment Administration) Instrument 2021* (**amending instrument**) is to improve the Home Care Packages Program administration arrangements of paying home care subsidies to approved providers. This instrument supports the implementation of changes made by the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No.2) Act 2021*.

The amending instrument amends the *Aged Care (Transitional Provisions) Principles 2014*, the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*, the *User Rights Principles 2014* and the *Subsidy Principles 2014* to support implementation of Phase 2 of Improved Payment Arrangements for Home Care (**IPA**).

The amending instrument also makes consequential amendments to the *Aged Care Quality and Safety Commission Rules 2018 and the Records Principles 2014* and the *Records Principles 2014*.

The changes made by the amending instrument include:

- defining the **price** of the home care services and care that can be included in the claim for payment of home care subsidy made by approved providers,
- the order in which deductions are made from a home care recipient's home care funds,
- the information approved providers need to include in the monthly statements they provide to home care recipients,
- amended time periods for variations of claims for payment of home care subsidy made by providers,
- requirement for all providers to report to Services Australia the Commonwealth portion of unspent home care funds they held for each of their home care recipients,
- allowing for approved providers to voluntarily elect to opt-in to return the Commonwealth portion of those care recipient's unspent home care funds, by drawing down on them.

The *User Rights Principles 2014 and Subsidy Principles 2014* are legislative instruments for the purposes of the *Legislation Act 2003*.

Background

To implement the two phases of IPA the Act was updated. Firstly, by the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1)* then the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Act 2021*. These allowed for changes to the way approved providers are paid home care subsidies, for payment of home care subsidy to be based on the **price** of services delivered. From 1 September 2021, the Government will begin to hold, on behalf of home care recipients, the Commonwealth portion of unspent funds in individual home care accounts.

The *User Rights Principles 2014* and the *Subsidy Principles 2014* are being updated to support the implementation of measures included in the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No.2) Act 2021*. The *Aged Care Legislation Amendment (Improved Home Care Payment Administration No.2) Act 2021* introduced the **shortfall amount calculator** which refers to the **price** of home care and which references the definition of **price** in the *Subsidy Principles 2014*.

These changes also address a possible unintended consequence from 1 September 2021 as part of phase 2 of the improved home care payment arrangements, being where approved providers may have continued to accumulate unspent amounts contributed to the home care package by the consumer such as the Basic Daily Fee (**BDF**). The amending instruments provides approved providers can only charge an exit fee when they cease providing home care to a consumer if they hold unspent consumer funds.

The effect of these amendments is that approved providers will no longer accumulate unspent consumer fees from 1 September 2021 as the home care fees paid by consumers will be taken into account before subsidy is paid to the approved providers.

Commencement

The amending instrument commences on 1 September 2021 to align with the commencement of the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Act 2021*.

Consultation

The Aged Care Financing Authority (ACFA) were asked by the Minister for Aged Care and Senior Australians to examine the potential financial impact on home care providers of the Government's 2019-20 Budget measure to change the way providers are paid Government subsidies. ACFA was also asked to advise on any significant impact of the new arrangements on consumers and assess the cash flow and viability impacts on providers expected as a result of these changes. Notwithstanding concerns about implementation timeframes attached to these changes, ACFA's report concluded that the vast majority of home care providers would manage these changes from a cash flow perspective.

Details of the amending instrument are set out at [Attachment A](#).

The amending instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation has advised that a regulation impact statement (RIS) is not necessary as the Deputy Secretary of the Ageing and Aged Care Group has determined that the consultation process undertaken by the Department and ACFA is equivalent in nature to a RIS analysis.

Details of the Aged Care Legislation Amendment (Improved Home Care Payment Administration) Instrument 2021

Section 1 provides that the name of the instrument is the *Aged Care Legislation Amendment (Improved Home Care Payment Administration) Instrument 2021* (the amending instrument).

Section 2 provides that the amending instrument commences on 1 September 2021.

Section 3 provides that the authority for the amending instrument is the *Aged Care Act 1997*, the *Aged Care Quality and Safety Commission Act 2018* and the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

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

SCHEDULE 1 – AMENDMENTS

Part 1 – Main Amendments

Aged Care (Transitional Provisions) Principles 2014:

Item 1 – Section 4

This item amends Section 4 of the *Aged Care (Transitional Provisions) Principles* to provide definitions of the following terms:

- enteral feeding supplement
- extended aged care at home—dementia
- KICA-Cog
- medical practitioner
- nurse practitioner
- oxygen supplement
- Psychogeriatric Assessment Scales
- registered nurse
- Rowland Universal Dementia Assessment Scale; and
- suspension period.

Enteral feeding supplement means the enteral feeding supplement referred to in section 44-14 of the Transitional Provisions Act.

Extended aged care at home—dementia has the meaning given by section 15.8 of the *Flexible Care Subsidy Principles 1997* as in force immediately before 1 August 2013.

KICA-Cog has the meaning given by section 4 of the *Subsidy Principles 2014*.

Medical practitioner, nurse practitioner and registered nurse have the meaning given in the *Health Insurance Act 1973*.

Oxygen supplement means the oxygen supplement referred to in section 44-13 of the Transitional Provisions Act.

Psychogeriatric Assessment Scales has the meaning given by section 4 of the *Subsidy Principles 2014*.

Registered nurse has the same meaning as the *Health Insurance Act 1973*.

Rowland Universal Dementia Assessment Scale has the meaning given by section 4 of the *Subsidy Principles 2014*.

Suspension period, in relation to the provision of home care, means the period for which the provision of home care is suspended under section 46-2 of the Transitional Provisions Act.

Item 2 – Part 2 of Chapter 3

This item repeals and substitutes Part 2 – On what basis is home care subsidy paid? As part of Phase 1 of Improved Payment Arrangements the government began paying home care providers subsidies in arrears from 1 February 2021. Prior to 1 February 2021 this item included that approved providers were paid subsidies in advance of each payment period. The change to paying in arrears means the previous Part 2 of Chapter 3 ceased to have effect on 1 February 2021, and section 47-3 – Advances was repealed as subsidies are no longer paid in advance.

The new sections introduced by this item are as follows.

Section 67 states that for the purposes of Division 47 of the Transitional Provisions Act, this Part specifies the period within which an approved provider may vary a claim made for payment for home care subsidy.

Section 67A applies to a variation of a claim for home care subsidy in relation to a care recipient which the approved provider has ceased to provide home care. The period which an approved provider may vary a claim made for payment for home care subsidy is 70 days after the approved provider ceases to provide home care to a care recipient; a client exits the Home Care Packages Program; or 70 days after an approved provider ceases to provide home care to a care recipient through a particular home care service and that same approved provider starts to provide home care to that same recipient through another home care service.

Section 67B states this Part specifies the method to work out the amount of home care subsidy payable to an approved provider.

Section 67C specifies the amount of home care subsidy payable to an approved provider is the sum of home care subsidy payable per day for that payment period. The payment period for home care is one calendar month.

Section 67D states the amount of subsidy payable is the sum of the basic daily amount worked out under Division 2, and any supplements the care recipient is eligible to receive including the amount of the, viability supplement, dementia and cognition supplement, veterans' supplement, the top-up supplement, oxygen supplement, and the enteral feeding supplement. This section also covers if a payment is suspended under the Transitional Provisions Act, on a day referred to in paragraphs 67F(2)(b),

(4)(b) or (5)(b) of these principles, the subsidy payable is the amount referred to in that paragraph and the viability supplement, with none of the other supplements being payable for that day. This section also states if more than one approved provider is eligible for subsidy for a day for a particular care recipient, subsidy will only be payable to the approved provider which first entered into a home care agreement with the care recipient.

Section 67E states the dollar amount of basic subsidy payable for a care recipient, per day, based on the level of care they are receiving. The Home Care Packages Program has four levels of care (Level 1, Level 2, Level 3, Level 4) ranging from lowest subsidy payable in Level 1, to the highest subsidy payable in Level 4.

Section 67F sets out the basis subsidy amount payable when provision of home care is temporarily suspended because the care recipient is receiving transition care or hospital treatment, or respite care, or another reason not referenced in this section. If home care has been temporarily suspended because the care recipient is receiving transition care or receiving hospital treatment, for up to 28 consecutive days the amount is the one specified in the table in Section 67E.

For subsequent consecutive days this amount is 25 per cent of the amount specified in the table in Section 67E. If a suspension period for transition care or hospital treatment starts in one financial year and ends in the next, the number of consecutive days for the purposes of this section restarts on 1 July of that next financial year. If home care has been temporarily suspended because the care recipient is receiving respite care for which subsidy is payable to the approved provider, or suspended for another reason, the amount for the first 28 days in a financial year is the one specified in the table in Section 67E.

Unlike for transition care or hospital treatment, those 28 days do not need to be consecutive days. For each subsequent day in a financial year, the amount is 25 per cent of the amount specified in the table in Section 67E. If a care recipient begins receiving a higher level of care while their package is on suspension, only days at the new level of care are to be counted for the purpose of calculating the number of days paid at the higher level.

Section 67G sets out that the amount of viability supplement payable for a care recipient is under Division 2 of Part 4 of Chapter 3 of the *Aged Care (Subsidy, Fees and Payments) Determination 2014*.

Section 67H provides the dementia and cognition supplement applies to a care recipient in specified circumstances, including:

- if they have been assessed by a registered nurse, nurse practitioner or medical practitioner using the Psychogeriatric Assessment Scales which resulted in a score of 10 or more,
- if they are from a culturally or linguistically diverse background, and have been assessed by a registered nurse, nurse practitioner or medical practitioner with the Rowland Universal Dementia Assessment Scale which resulted in a score of 22 or less,
- if the care recipient is an Aboriginal person, or a Torres Strait Islander, who lives in a rural or remote area; who has been assessed a registered nurse, nurse practitioner, medical practitioner, another health practitioner trained in

assessing in accordance with KICA-Cog, using the KICA-Cog which resulted in a score of 33 or less.

This section also applies to a care recipient if they were receiving care, or was approved to receive care, before 1 August 2013, in respect of a place allocated for the provision of flexible care in the form of “extended aged care at home—dementia”.

Section 67J states the amount of the dementia and cognition supplement is 11.5 per cent of the basic subsidy amount payable under Section 67E.

Section 67K provides the veterans’ supplement applies to a care recipient if the care recipient was a veteran who had an accepted mental health condition, and they had authorised either or both of the following to disclose this to the approved provider: the Secretary of the Department administered by the Minister administering the *Veterans’ Entitlements Act 1986*; the Secretary of the Department administered by the Minister administering the *Human Services (Centrelink) Act 1997*.

Section 67L states the amount of the veterans’ supplement is 11.5 per cent of the basic subsidy amount payable under Section 67E.

Section 67M sets out the provision of the top-up supplement. The top-up supplement applies if the care recipient was being provided with flexible care in the form of “extended aged care at home—dementia” within 28 days ending immediately before 1 August 2013, and during the relevant day they had a home care agreement in place to be provided with Level 4 care by an approved provider, and there had not been a consecutive 28 day gap where care was not provided to the care recipient.

Section 67N states the amount of the top-up supplement payable per day for an eligible care recipient is \$2.84.

***Aged Care (Transitional Provisions) (Subsidy and Other Measures)
Determination 2014***

Item 3 – Chapter 3

This chapter is being repealed. The existing Part 2 of Chapter 3 ceased to have effect on 1 February 2021, when the government began paying home care subsidies in arrears, due to the repeal of section 47-3 - Advances of the Transitional Provisions Act. This is due to subsidies no longer being paid in advance from 1 February 2021 onwards.

Subsidy Principles 2014

Item 4 – Section 4

Item 4 amends section 4 to insert definitions for the following words:

- available home care fees amount
- home care fees.

Available home care fees amount has the meaning given by section 99A of the Subsidy Principles.

Home care fees has the meaning given by section 52D-1 of the *Aged Care Act 1997*.

Item 5 – Part 1 of Chapter 3

Section 72A states that for the purposes of Division 47 of the *Aged Care Act 1997*, this Part specifies the period within which an approved provider may vary a claim made in respect of a payment period for home care subsidy.

Section 72B inserts the variations of claims for home care subsidy. This section applies to a variation that relates to a care recipient to whom the approved provider has ceased to provide home care. The period which an approved provider may vary a claim made for payment for home care subsidy is 70 days after a client exits the Home Care Packages Program; or 70 days an approved provider ceases to provide home care to a care recipient through a particular home care service and that same approved provider starts to provide home care to that same recipient through another home care service.

Item 6 – Section 73

This section is being repealed and substituted to reflect the amendments made to the calculation of home care subsidy, specifically the introduction of “shortfall amounts” and “home care accounts” for care recipients.

Item 7 – Part 2 of Chapter 3

Section 99A states the available home care fees amount for a care recipient in respect of a payment period is worked out using the available home care fees amount calculator. This calculator has two steps:

- Step 1 work out the amount of home care fees paid or payable by the care recipient for the payment period.
- Step 2 subtract the care subsidy reduction, if any. The care subsidy reduction is worked out using the care subsidy reduction calculator in the Act. Under Division 52D of the Act, the income tested care fee for a care recipient is equal to the care subsidy reduction for the care recipient.

The result of these two steps is the available home care fees amount.

Section 99B relates to the definition of price in the shortfall amount calculator in the Act. Step 1 of this calculator refers to the price for home care provided during the payment period for a care recipient. This section sets out the calculator for price for home care in a four-step process:

- Step 1 work out the total amount of the prices that the provider charged for care and services to the care recipient during the payment period.
- Step 2 work out the total amount of the prices, if any, that fall into the categories of certain travel, subcontracting arrangements and package management as listed in paragraphs 19B(1)(b), (c) and (d) of the User Rights Principles.
- Step 3 add the total amounts worked out under steps 1 and 2.
- Step 4 subtract the available home care fees amount from this total. If the result is negative the amount is taken to be nil.

This result is the price for home care which is used in Step 1 of the shortfall amount calculator in the Act.

Section 99C sets out to the definition of care recipient contribution amount in the shortfall amount calculator in the Act. Step 2 of this calculator refers to the care recipient contribution amount and this amount is equal to the care subsidy reduction (if any) for the care recipient for the payment period worked out under subsection 48-7(1) of the Act. Under Division 52D of the Act, the income tested care fee for a care recipient is equal to the care subsidy reduction for the care recipient.

Section 99D sets out circumstances in which a credit arises in a care recipient's home care account, the amount of the credit and the time the credit arises.

The first circumstance covers when an approved provider ceases to provide home care (and this is not due to the care recipient dying or the care recipient entering into a new agreement with another home care provider). The amount of this credit is the Commonwealth portion of the care recipient's unspent home care amount, as payable to the Commonwealth. The Commonwealth portion is payable at the end of 70 days after the cessation day. The credit in the care recipient's home account arises when the Commonwealth portion is paid to the Commonwealth.

The second circumstance covers when an approved provider ceases to provide home care services to a care recipient through a particular home care service, then begins to provide home care services to the care recipient, through a different home care service operated by the same approved provider. The amount of this credit is the Commonwealth portion of the care recipient's unspent home care amount, as payable to the Commonwealth. The Commonwealth portion is payable at the end of 70 days

after the cessation day. The credit in the care recipient's home account arises when the Commonwealth portion is paid to the Commonwealth.

The third circumstance covers when an approved provider ceases to provide home care services to a care recipient before 1 September 2021, the transfer portion of the care recipient's unspent home care amount was more than nil, the provider is notified within 56 days of care ceasing that the care recipient has entered into a home care agreement with a different provider, and immediately before 1 September 2021 that first provider had not paid the transfer portion to the new provider. The amount of this credit is the Commonwealth portion of the care recipient's unspent home care amount, as payable to the Commonwealth. The Commonwealth portion is payable is at the end of 70 days after the cessation day. The credit in the care recipient's home account arises when the Commonwealth portion is paid to the Commonwealth.

User Rights Principles 2014

Item 8 – Section 4

Section 4, under Definitions insert: available home care fees amount has the same meaning as in the Subsidy Principles.

Item 9 – Section 4 (definition of care recipient portion)

Section 4, under the definition of care recipient portion omit “step 7 of the calculator in section 21D” and substitute “section 21CB” so the definition will read as: care recipient portion has the meaning given by section 21CB. 21CB states the meaning of care recipient portion and includes the care recipient portion calculator.

Item 10 – Section 4

Section 4 insert ceasing home care provider has the meaning given by section 21D.

Item 11 – Section 4 (definition of Commonwealth portion)

Section 4, under the definition of Commonwealth portion omit “step 6 of the calculator in section 21D” and substitute “section 21CA” so the definition will read as: Commonwealth portion has the meaning given by 21CA. 21CA states the meaning of the Commonwealth portion and includes the Commonwealth portion calculator if no election made, and the Commonwealth portion calculator if election made. This allows for the calculation of the Commonwealth portion of unspent funds depending on whether the provider has opted in to return the Commonwealth portion or not.

Item 12 – Section 4 (definition of exit amount)

Section 4, after “out” substitute “the care recipient portion of” so the definition will read as: exit amount means an amount deducted by an approved provider in working out the care recipient portion of unspent home care amount when the approved provider ceases to provide home care to the care recipient.

Item 13 – Section 4

Insert the definitions for:

- home care account balance
- home care cessation day
- home care fees
- home care service cessation day
- implementation date care recipient portion
- implementation date Commonwealth portion
- implementation date unpaid fees
- implementation date unspent home care amount
- ongoing home care recipient

Home care account balance has the meaning given by section 48-17 of the Act. This meaning is: the home care account balance in a care recipient’s home care account at a particular time equals the sum of the home care credits in that account, less the sum of the home care debits in that account at the time.

Home care cessation day has the meaning given by section 21D. This meaning is: the particular day the home care provider ceases providing home care to a care recipient.

Home care fees has the meaning given by subsection 52D-1(1) of the Act. This meaning is: fees charged to a care recipient for, or in connection with, home care provided to the care recipient through a home care service.

Home care service cessation day has the meaning given by section 21JA. This meaning is: the particular day an approved provider ceases to provide home care to a care recipient through a particular home care service.

Implementation date care recipient portion has the meaning given by section 21BD. This meaning is: the amount that would have been the care recipient portion of the care recipient's implementation date unspent home care amount, worked out in accordance with section 21D of this instrument as that section was in force immediately before 1 September 2021

Implementation date Commonwealth portion has the meaning given by section 21BC. This meaning is: the amount that would have been the Commonwealth portion of the care recipient's implementation date unspent home care amount, worked out in accordance with section 21D of this instrument as that section was in force immediately before 1 September 2021.

Implementation date unpaid fees, for an ongoing care recipient, means an amount of home care fees that was payable by the care recipient to the approved provider, but had not been paid, immediately before 1 September 2021.

Implementation date unspent home care amount has the meaning given by section 21BB. This meaning is: the amount that would have been the unspent home care amount of the care recipient, worked out in accordance with section 21C of this instrument as that section was in force immediately before 1 September 2021

Ongoing care recipient meaning: a care recipient who is being provided with home care by an approved provider through a home care service on 1 September 2021 is an ongoing home care recipient if the approved provider was providing home care to the care recipient through a home care service immediately before 1 September 2021.

Item 14 – Section 4 (note to definition of package management)

Repeal and substitute that package management includes activities required to comply with responsibilities under section 63-1 of the Act (accountability), activities required to comply with standards set out in the *Quality of Care Principles 2014*, making claims for home care subsidy under section 47-4 of the Act and the preparation of individualised budgets and financial information statements for payment period under sections 21A and 21B of these principles.

Item 15 – Section 4

Insert new definition: price. With the meaning, for home care provided during a payment period to a care recipient by an approved provider, price has the meaning given by section 99B of the *Subsidy Principles 2014*.

Item 16 – Section 4 (definition of transfer portion)

Repeal the definition of transfer portion. The transfer portion definition is repealed from 1 September 2021 as it no longer applies from that date. From 1 September 2021

the Commonwealth portion of any unspent funds will be returned to the Commonwealth instead of being transferred to another approved provider; and the care recipient portion of any unspent funds will be returned to the care recipient instead of being transferred to another approved provider.

Item 17 - After paragraph 16(2)(a)

Insert the following: for the purposes of step 1A of the shortfall amount calculator in subsection 48-13(1) of the Act, how an approved provider may elect to return the Commonwealth portion of a care recipient's unspent home care amount to the Commonwealth. This item addresses the step in the shortfall amount calculator in the Act which enables the cost of the shortfall amount to be worked out if a provider has elected to opt-in to return the Commonwealth portion of a care recipient's unspent home care amount.

Item 18 – Section 21B

Section 21B will be repealed and substituted. This section sets out the information approved providers must give to care recipients in their detailed monthly statement.

Each statement must be per care recipient, per payment period and must contain:

- transactions
- any unpaid home care fees
- the amount of home care subsidy
- the amount of home care fees (if any) paid or payable by the care recipient
- itemised list of the care and services provided (including certain travel, subcontracting arrangements and package management)
- the price that the approved provider charged for each item of care and services
- the total price (from the dot point above)
- the care recipient's unspent home care amount (provider-held unspent funds) in respect of the previous payment period; and the payment period
- if, during the payment period, the approved provider received an amount of the care recipient portion of the care recipient's unspent home care amount from another approved provider—the amount that was received

This section also includes that the statement must make sure to cover any partial periods (if the provider did not provide care to the care recipient for the whole payment period). The provider must give the care recipient the statement as soon as is practicable after the provider has all the necessary information to complete it. And the care recipient must be informed of, and helped to understand, the statement.

Item 19 – Division 3A of Part 3

This Division is being repealed and substituted with the following information.

Section 21BA states an approved provider may elect to return the Commonwealth portion of a care recipient's unspent home care amount to the Commonwealth. The election must be in writing; and must be made before 1 March 2022; and must be made in a claim for home care subsidy in respect of a payment period; and must state the Commonwealth portion of the care recipient's unspent home care amount at the end of the previous payment period. The election is irrevocable.

Section 21BAA states an approved provider must report the Commonwealth portion of the unspent home care amount for each care recipient they are providing care to on 1 September 2021. No later than 31 December 2021 the approved provider must report to the Commonwealth, during the payment periods beginning on 1 September 2021, 1 October 2021, or 1 November 2021, the Commonwealth portion of the unspent home care amount. The provider does not need to report the Commonwealth portion a second time if they have reported and elected to return the portion by 31 December 2021.

Section 21BB inserts the meaning of implementation date unspent home care amount for ongoing home care recipients. The implementation date unspent home care amount is the amount that would have been the unspent home care amount of the care recipient, worked out in accordance with section 21C of this instrument as that section was in force immediately before 1 September 2021 in circumstances where the approved provider ceased providing home care to the care recipient immediately before 1 September 2021; and disregarding step 4 of the method statement in that section (which deals with exit amounts).

Section 21BC inserts the meaning of implementation date Commonwealth portion. The implementation date Commonwealth portion is the amount that would have been the Commonwealth portion of the care recipient's implementation date unspent home care amount, worked out in accordance with section 21D of this instrument as that section was in force immediately before 1 September 2021 in circumstances where the approved provider ceased providing home care to the care recipient immediately before 1 September 2021; and as if references in that section to the care recipient's unspent home care amount were references to the implementation date unspent home care amount of the care recipient.

Section 21BD inserts the meaning of implementation date care recipient portion. The implementation date care recipient portion is the amount that would have been the care recipient portion of the care recipient's implementation date unspent home care amount, worked out in accordance with section 21D of this instrument as that section was in force immediately before 1 September 2021 in circumstances where the approved provider ceased providing home care to the care recipient immediately before 1 September 2021; and as if references in that section to the care recipient's unspent home care amount were references to the implementation date unspent home care amount of the care recipient.

Section 21BE sets out the responsibility to give notice to the Commonwealth of the implementation date Commonwealth portion for each care recipient. This will be reported by the provider through the Services Australia aged care payment system, as part of the claims process. This section applies to an approved provider if, on 1 September 2021, a care recipient to whom the approved provider is providing home care through a home care service is an ongoing home care recipient. The approved provider must, not later than 31 December 2021, give a notice to the Secretary, in a form approved, in writing, by the Secretary, stating the implementation date Commonwealth portion.

Section 21C inserts the meaning of unspent home care amount. This is the sum of the Commonwealth portion of the care recipient's unspent home care amount and the care

recipient portion of the care recipient's unspent home care amount, in respect of the payment period.

Section 21CA allows providers to work out the Commonwealth portion of the unspent home care amount with two different calculators depending on whether the provider has opted-in to return the Commonwealth portion or if the provider has not opted-in.

If the approved provider has not made an election to opt-in under section 21BA they will use the following steps:

- Step 1. Identify the amount of the Commonwealth portion of the care recipient's unspent home care amount in respect of the previous payment period.
- Step 2. If section 21CC applies, subtract the amount (if any) of the second difference amount under that section. If the result is negative, the amount is taken to be nil.

The amount (including a nil amount) is the Commonwealth portion of a care recipient's unspent home care amount in respect of the payment period.

If the approved provider has made an election to opt-in under section 21BA they will use the following steps:

- Step 1. Identify the amount of the Commonwealth portion of the care recipient's unspent home care amount in respect of the previous payment period.
- Step 2. Subtract the amount (if any) by which, under Step 1A of the shortfall amount calculator in subsection 48 13(1) of the Act, the price for the home care provided during the payment period to the care recipient was reduced.

The amount (including a nil amount) is the Commonwealth portion of a care recipient's unspent home care amount in respect of the payment period.

Section 21CB meaning of care recipient portion has been amended to allow providers to work out the care recipient portion of the unspent home care amount with a seven step calculator for use after phase 2 of IPA is implemented, using updated terminology to be correct with the IPA changes to unspent funds.

The steps are as follows:

- Step 1. Identify the amount of the care recipient portion of the care recipient's unspent home care amount in respect of the previous payment period.
- Step 2. Add the amount (if any) of the care recipient portion of the care recipient's unspent home care amount paid to the approved provider providing the care recipient with home care in the payment period (the current provider) by another approved provider under subsection 21F(2) or 37(2).
- Step 3. Add the amount (if any) of the care recipient's implementation date unpaid fees paid in the payment period by the care recipient to the current provider.
- Step 4. Add the amount (if any) by which the available home care fees amount for the care recipient in respect of the payment period (if any) exceeds the total amount worked out under step 3 of the calculator in section 99B of the Subsidy Principles 2014.

This is the base care recipient portion for the payment period.

- Step 5. If section 21CC applies, subtract the amount of the first difference amount under that section. If the result is negative, the amount is taken to be nil.
- Step 6. If the current provider ceases to provide home care to the care recipient on a day in the payment period and Subdivision D applies, subtract the amount of any home care fees that are payable by the care recipient to the current provider, but have not been paid. If the result is negative, the amount is taken to be nil.
- Step 7. If the current provider ceases to provide home care to the care recipient on a day in the payment period and Subdivision D applies; and an exit amount may be deducted by the current provider in accordance with section 21H; subtract the exit amount from the amount worked out under step 6.

The amount (including a nil amount) worked out under step 6 or 7 (as applicable) is the care recipient portion.

Section 21CC sets out when difference amounts apply and how to calculate them. Subsection 21CC(1) sets out that difference amounts apply when the price for the home care provided to a care recipient during a payment period is greater than the sum of the amount (if any) by which the price was reduced under step 1A of the shortfall amount calculator in subsection 48-13(1) of the Act; plus the care recipient contribution amount (if any) under section 99C of the *Subsidy Principles 2014* for the care recipient in respect of the payment period; plus the amount of home care subsidy for the care recipient in respect of the payment period. Subsection 21CC(2) sets out how to calculate the first difference amount for step 5 of the Care recipient portion calculator in section 21CB. Subsection 21CC(3) sets out how to calculate the second difference amount for step 2 of the Commonwealth portion calculator in section 21CA.

Section 21D states that Subdivision D applies if an approved provider ceases to provide home care to a care recipient and the care recipient is not entering into care with a service operated by the same approved provider.

Section 21E covers the responsibility for providers to give notice to the care recipient or their estate when the care recipient exits care. The notice must be given within 56 days after the home care cessation day to the care recipient or the care recipient legal personal representative if the care recipient has died. The notice must specify the home care cessation day, the care recipient's unspent home care amount (including a nil amount), the Commonwealth portion and care recipient portion of the care recipient's unspent home care amount (including nil amounts), the amount of unpaid home care fees that were deducted by the ceasing home care provider (if any), and the exit amount (if deducted).

Section 21F covers the responsibility for providers to pay the care recipient portion and the Commonwealth portion of the unspent home care amount when the care recipient leaves one home care service and enters care with another or exits from care. The Commonwealth portion must be paid by the approved provider to the Commonwealth at the end of 70 days after the home care cessation day.

The ceasing home care provider must pay the care recipient portion in accordance with the rules inserted in the table under 21F which state the following:

- If the provider ceases to provide home care because the care recipient dies, the approved provider must pay the care recipient portion to the care recipient's estate. It must be paid within 14 days after the ceasing home care provider is shown the probate of the will of the care recipient or letters of administration of the estate of the care recipient.
- If the provider is notified, within 56 days after the home care cessation day that the care recipient has entered into a home care agreement with a new approved provider; the ceasing approved provider must pay the new approved provider within 70 days after the home care cessation day.
- If neither of these circumstances apply, the approved provider must pay the care recipient the care recipient portion within 70 days after the home care cessation day.

Section 21G covers the responsibility of the provider to give notices to the new provider and to the Commonwealth the care recipient leaves one home care service and enters care with another or exits from care. The ceasing provider must give a copy of the notice to the new approved provider at the time the care recipient portion is paid to them. The ceasing provider must give a copy of the notice to the Commonwealth of the Commonwealth portion within 70 days after the home care cessation day.

Section 21H covers the responsibility of the provider in relation to exit amounts. An exit amount can only be charged if the approved provider and care recipient specify an agreed exit amount in the home care agreement, and the exit amount has been provided to the Secretary, and there is an available care recipient portion of unspent home care amount.

Subdivision E covers the responsibilities of the provider if a care recipient transfers between home care services operated by the same approved provider. Section 21JA states that a provider must give notice to the Commonwealth of their published exit amount, and this can be provided to the Secretary. The Secretary has delegated this power to include the My Aged Care website where providers can publish their maximum exit amount so care recipients can see the published amount.

Section 21JB covers that the approved provider must pay the Commonwealth portion of the unspent home care amount to the Commonwealth at the end of 70 days after the home care service cessation day.

Section 21JC covers that the approved provider must give written notice of this amount, including if the amount is nil, to the Commonwealth within 70 days after the home care service cessation day.

Item 20 – Paragraph 23(2)(cba)

This section inserts “the care recipient portion of” after the word “out” so that paragraph 23(2)(cba) reads as follows: if the provider intends to deduct an exit amount in working out the care recipient portion of the care recipient's unspent home care amount when the provider ceases to provide home care to the care recipient—a statement of the maximum exit amount (the agreement exit amount) that may be deducted under the agreement.

Item 21 – Paragraph 21(2)(cc)

This section omits “or transfer portion” in paragraph 21(2)(cc) so that it reads as follows: a statement that any care recipient portion of the care recipient’s unspent home care amount will be paid in accordance with Division 3A of this Part.

Item 22 – In the appropriate position in Part 5

Insert the following: Division 6 Transitional provisions relating to the Aged Care Legislation Amendment (Improved Home Care Payment Administration) Instrument 2021

Section 35 insert the following definitions:

- care recipient portion
- cessation day
- Commonwealth portion
- old principles
- transfer portion
- unspent home care amount.

Care recipient portion has the same meaning as in the old principles.

Cessation day has the same meaning as in sections 21E, 21F and 21G of the old principles.

Commonwealth portion has the same meaning as in the old principles.

Old principles mean these principles as in force immediately before 1 September 2021.

Transfer portion has the same meaning as in the old principles.

Unspent home care amount has the same meaning as in the old principles.

Section 36 states that this section applies if before 1 September 2021, an approved provider ceased to provide home care to a care recipient; and immediately before 1 September 2021 that provider had not:

- given a notice under section 21E; or
- if the care recipient portion or the Commonwealth portions of the unspent home care amount was more than nil, and item 1 or 3 of the table in subsection 21F(2) applies – paid that portion; or
- given a notice relating to the Commonwealth portion under subsection 21G(3)

Section 36 states that despite the amendments made by the Aged Care Legislation Amendment (Improved Home Care Payment Administration) Instrument 2021, the old principles continue to apply to the approved provider in relation to each thing mentioned above that the approved provider had not done before 1 September 2021.

Section 37 states that this section applies if before 1 September 2021, an approved provider had ceased to provide home care to a care recipient; and the transfer portion of the care recipient’s unspent home care amount was more than nil; and the first provider is notified, within 56 days after the cessation day, that the care recipient has entered into a home care agreement with a new approved provider; and the first

provider had not paid the transfer portion of the care recipient's unspent home care amount to the new approved provider in accordance with item 2 of the table in subsection 21F(2) of the old principles.

Then the first provider must pay the care recipient portion of the care recipient's unspent home care amount to the new approved provider within 70 days after the cessation day; and, give the new approved provider a copy of the notice given by the first provider under section 21E. And the Commonwealth portion of the care recipient's unspent home care amount is due and payable by the first provider to the Commonwealth at the end of 70 days after the cessation day.

If the Commonwealth portion of the care recipient's unspent home care amount is nil; the first provider must, within 70 days after the cessation day, give a notice containing that information to the Secretary.

Part 2 – Consequential Amendments

Aged Care Quality and Safety Commission Rules 2018

Item 23 – Paragraph 111D(a)

Item 23 repeals paragraph 111D(a) of the *Aged Care Quality and Safety Commission Rules 2018* and substitutes:

- if an approved provider has not made a payment as required under section 21F of the *User Rights Principles 2014* (as in force before 1 September 2021)—requiring the provider to make the payment within a specified period;
- if an approved provider has not made a payment as required under section 21F or 37 of the *User Rights Principles 2014* (as in force on or after 1 September 2021)—requiring the provider to make the payment within a specified period;

Records Principles 2014

24 Paragraph 7(t)

Item 24 omits “2014;”, in paragraph 7 Records about care recipients, (t) which states “records relating to the payment of the care recipient portion or transfer portion of care recipients’ unspent home care amounts under section 21F of the *User Rights Principles 2014*;” This item substitutes “2014” for the following “2014 (as in force before 1 September 2021);”.

25 After paragraph 7(t)

Item 25 inserts a new paragraph which states: records relating to the payment of the care recipient portion of a care recipient’s unspent home care amount under section 21F or 37 of the *User Rights Principles 2014* (as in force on or after 1 September 2021). This brings the *Records Principles* in line with the amendments made in the *User Rights Principles* to differentiate between the amendments made on or after 1 September 2021 when Phase 2 of Improved Payment Arrangements commences.

Statement of Compatibility with Human Rights

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

AGED CARE LEGISLATION AMENDMENT (IMPROVED HOME CARE PAYMENT ADMINISTRATION) INSTRUMENT 2021

The Aged Care Legislation Amendment (Improved Home Care Payment Administration) Instrument 2021 (the Amending 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 Amending Instrument

The Amending Instrument amends the *Aged Care (Transitional Provisions) Principles 2014*, the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*, the *User Rights Principles 2014* and the *Subsidy Principles 2014*. The Amending Instrument makes necessary amendments consequential to the *Aged Care Legislation (Improved Home Care Payment Administration No. 2) Act 2021*.

The Amending Instrument makes amendments to improve financial accountability and allow for better transparency over the actual use of funds for home care service delivery by requiring approved providers to report the cost of the services provided to home care recipients to the Commonwealth in order to be paid subsidy. The Amending Instrument specifies that the Commonwealth will retain, on behalf of home care recipients, the Commonwealth subsidy that may be in excess of the services provided, to be drawn down in future. Providers maintain the responsibility for managing consumer contributions towards their home care package.

The measures in the Amending Instrument improve financial accountability and allow for better transparency over the actual use of funds for home care service delivery by requiring approved providers to also report to the Commonwealth the cost of care and services delivered to the home care recipient each month in order for the subsidies to be paid to the approved provider.

In the 2019-20 Budget, the Government announced reforms to improve payment administration for home care packages to address concerns regarding unspent funds and align home care arrangements with other Government programs.

Currently, approved providers hold and manage any accumulated unspent funds that may arise over time on behalf of the home care recipient if the cost of the care and services they access is less than the sum of their home care fees and subsidies paid by the Commonwealth.

The Amending Instrument supports the second stage of reforms to improve payment administration arrangements for home care packages announced by the Government in the 2019-20 Budget consequential to the *Aged Care Legislation (Improved Home Care Payment Administration No. 2) Act 2021*.

The first stage of the reforms to change home care subsidy from being paid in advance to being paid in arrears was introduced by the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1) Act 2020*.

In the first stage, the home care subsidy paid to an approved provider changed from being a payment made in advance of the home care services being delivered to a consumer, to a payment made in arrears after the services have been delivered to a home care consumer. The home care subsidy continues to be paid at the full rate.

In the second stage of the reforms introduced by the *Aged Care Legislation (Improved Home Care Payment Administration No. 2) Act 2021* and the measures in this Amending Instrument, the Government intends to continue to pay home care subsidy in arrears, however the payments will be based on actual care and services delivered. This will allow unspent home care subsidy to accumulate with the Commonwealth on behalf of the home care recipient instead of with an approved provider and will provide better transparency over the actual use of funds for home care service delivery.

The Amending Instrument supports the introduction of a mechanism whereby the Commonwealth portion of the provider held unspent funds is taken into account for the purposes of the home care subsidy calculator if the provider elects to return unspent funds to the Commonwealth.

The Amending Instrument also requires that any home care fees paid by consumers will be first used to pay for their home care services rather than accumulating with the approved provider.

Providers who elect to return unspent funds will do this through a 100 per cent subsidy reduction from the cost of the care and services provided until the unspent funds are exhausted.

Human rights implications

The Amending Instrument engages the following human rights as contained in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Articles 3, 5, 25 and 28 of Convention of the Rights of Persons with Disabilities (CRPD):

- the right to an adequate standard of living;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the rights of equality and non-discrimination; and
- the right to choice for persons with disabilities.

The Government recognises that older people want to remain living in their own home for as long as possible and may need to receive care to do so. As such, the Government subsidises home care packages to provide comprehensive home based care that can improve older Australians quality of life and help them remain active and connected to their communities.

This involves the payment of subsidy to approved providers for the provision of care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health.

The home care package program ensures access to care that is affordable by, and appropriate to, the needs of people who require it.

The measures in the Amending Instrument improve financial accountability and allow for better transparency over the actual use of funds for home care service delivery by requiring approved providers to report to the Commonwealth cost of care and services delivered to the home care recipient each month in order for the subsidies to be paid to the approved provider. The Amending Instrument will also allow the Commonwealth to retain the Commonwealth subsidy that may be in excess of the services provided, to be drawn down in future.

In doing so, the Amending Instrument positively engages the rights set out in Articles 11 and 12 of the ICESCR and Articles 25 and 28 of the CRPD by promoting the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health.

The Amending Instrument promotes the rights of equality and non-discrimination, as set out in Article 5 of the CRPD, by improving the financial accountability of, and allowing for better transparency over the actual use of the subsidies paid to provide care and services to those who need them, regardless of race, culture, language, gender, economic circumstances or geographic location.

The home care package program positively engages the rights for persons with disabilities set out in Articles 25 and 28 of the CRPD, including the right to enjoyment of the highest attainable standard of health and the right to an adequate standard of living without discrimination on the basis of disability, by providing genuine consumer direction of care. Improving the home care payment administration arrangements by introducing more transparency over the actual use of home care subsidy further engages these rights.

The Amending Instrument is part of the second stage of reforms to improve payment administration arrangements for home care packages and strengthens the integrity of the home care package program. As facilitated by this Amending Instrument, strengthening the home care package program leads to an improvement in the lives of older Australians, including those with disabilities.

The Amending Instrument will not affect the eligibility of home care recipients for home care subsidy or the amount of home care subsidy payable for eligible home care recipients.

Conclusion

The Amending Instrument promotes human rights to the highest attainable standard of physical and mental health and is compatible with the human rights and freedoms recognized and declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Senator the Hon Richard Colbeck, Minister for Senior Australians and Aged Care Services