

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Amendment (Extension of Access) Determination 2022

Subsection 3C(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister may, by legislative instrument, determine that a health service not specified in an item in the diagnostic imaging services table (the Table) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

The Table is set out in the regulations made under subsection 4AA of the Act. The most recent version of the regulations is the *Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 2) 2020*.

This instrument relies on subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Subsection 33(3) of the AIA provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Purpose

The purpose of the *Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Amendment (Extension of Access) Determination 2022* (the Amendment Determination) is to make minor amendments to the *Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Determination 2022* (the Principal Determination), to extend the Schedule 2 closed period of application end date, from 30 September 2022 to 30 June 2023.

The Principal Determination introduced a new temporary nuclear medicine item, item 61644 for cardiac investigation to assess the extent and severity of non-viable myocardium, and therefore patient suitability for cardiac surgery. The service uses positron emission tomography (PET) equipment and an alternative radiopharmaceutical (fluorodeoxyglucose, or FDG).

Item 61644 allows patients time-sensitive access to appropriate diagnostic imaging services and reduces the increased risk of morbidity caused by service delays during the supply shortage of imported radioisotope, thallium-201 (Tl-201). Schedule 2 of the Principal Determination ceases services to item 61644 being delivered to patients through the application of an end date provision effective from 30 September 2022. The Amendment Determination extends the end date to 30 June 2023, due to the ongoing supply interruptions and shortages of Tl-201, to enable patients continued access to nuclear medicine services in the Medicare Benefits Schedule.

Consultation

Consultation was undertaken with the Australasian Association of Nuclear Medicine Specialists, the Australian Diagnostic Imaging Association and the Australian and

New Zealand Society of Nuclear Medicine regarding this new item. The sector supports the decision to extend the end date of item 61644 from 30 September 2022 to 30 June 2023.

Details of the Amendment Determination are set out in the Attachment.

The Amendment Determination commences on 1 October 2022.

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

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

ATTACHMENT***Details of the Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Amendment (Extension of Access) Determination 2022*****Section 1 – Name**

Section 1 provides for the instrument to be referred to as the *Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Amendment (Extension of Access) Determination 2022* (Amendment Determination).

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences on 1 October 2022.

Section 3 – Authority

Section 3 provides that the Amendment Determination is made under subsection 3C(1) of the *Health Insurance Act 1973*.

Section 4 – Schedules

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

Schedule 1 – Amendments***Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Determination 2022*****Amendment item – Schedule 2**

The amendment will repeal the table in Schedule 2 of the *Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Determination 2022* (the Principal Determination), so that the period for which the temporary item 61644 applies is from 1 April 2022 until 30 June 2023.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 3C Diagnostic Imaging – Additional Nuclear Medicine Services) Amendment (Extension of Access) Determination 2022

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

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The Principal Determination introduced a new temporary nuclear medicine item, item 61644 for cardiac investigation to assess the extent and severity of non-viable myocardium, and therefore patient suitability for cardiac surgery. The service uses positron emission tomography (PET) equipment and an alternative radiopharmaceutical (fluorodeoxyglucose, or FDG).

Item 61644 allows patients time-sensitive access to appropriate diagnostic imaging services and reduces the increased risk of morbidity caused by service delays during the supply shortage of imported radioisotope, thallium-201 (TI-201). Schedule 2 of the Principal Determination ceases services to item 61644 being delivered to patients through the application of an end date provision effective from 30 September 2022. The Amendment Determination extends the end date to 30 June 2023, due to the ongoing supply interruptions and shortages of TI-201, to enable patients continued access to nuclear medicine services in the Medicare Benefits Schedule.

Human rights implications

This instrument engages Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

The Right to Health

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee reports that the ‘*highest attainable standard of health*’ takes into account the country’s available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

The Right to Social Security

The right to social security is contained in Article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable

them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee reports that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them. However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

The right of equality and non-discrimination

The rights of equality and non-discrimination are contained in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the ICCPR requires that all persons are equal before the law, are entitled without any discrimination to the equal protection of the law and in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Analysis

This instrument maintains the right to health and social security and the right of equality and non-discrimination, providing continued access for patients to nuclear medicine services for cardiac investigations to assess the extent and severity of non-viable myocardium, and therefore patient suitability for cardiac surgery. The extension of this temporary item will allow patients time-sensitive access to appropriate diagnostic imaging services and reduce the increased risk of morbidity caused by service delays during the supply shortage of Tl-201.

Conclusion

This instrument is compatible with human rights as it maintains the right to health, the right to social security and the right of equality and non-discrimination by providing patient with continued access to critical nuclear medicine services.

Travis Haslam
Acting First Assistant Secretary
Medical Benefits Division
Health Resourcing Group
Department of Health and Aged Care