

EXPLANATORY STATEMENT

NATIONAL HEALTH ACT 1953

NATIONAL HEALTH (IVF PROGRAM) SPECIAL ARRANGEMENT AMENDMENT INSTRUMENT 2022 (No. 2)

PB 91 of 2022

Purpose

This is the *National Health (IVF Program) Special Arrangement Amendment Instrument 2022 (No. 2)* (the Amendment Instrument). The purpose of the Amendment Instrument is to amend the *National Health (IVF Program) Special Arrangement 2015* (PB 60 of 2015) (the Special Arrangement), to make changes relating to the IVF Program.

The purpose of the Special Arrangement is to ensure that an adequate supply of pharmaceutical benefits is available for patients who require in vitro fertilisation treatment. Restrictions on the provision of this treatment mean that these pharmaceutical benefits can more conveniently or efficiently be supplied under a special arrangement.

The amendments made by this Instrument reflect amendments to the *National Health (Listing of Pharmaceutical Benefits) Instrument 2012* (PB 71 of 2012), which commence on the same day. The *National Health (Listing of Pharmaceutical Benefits) Instrument 2012* (PB 71 of 2012) is made under sections 84AF, 84AK, 85, 85A, 88 and 101 of the Act.

Schedule 1 to this Instrument provides for the deletion of forms of the listed drug chorionic gonadotrophin from the Special Arrangement.

These changes are summarised, by subject matter, in the Attachment.

Authority

Subsection 100(1) of the *National Health Act 1953* (the Act) enables the Minister to make special arrangements for the supply of pharmaceutical benefits.

Subsection 100(2) of the Act provides that the Minister may vary or revoke a special arrangement made under subsection 100(1).

Subsection 100(3) of the Act provides that Part VII of the Act, and instruments made for the purposes of Part VII, have effect subject to a special arrangement made under subsection 100(1).

Consultation

The amendments made by this Instrument accord with recommendations made by the Pharmaceutical Benefits Advisory Committee (PBAC).

An ongoing and formal process of consultation in relation to matters relevant to the Special Arrangement includes the involvement of interested parties through the membership of the PBAC.

PBAC is an independent expert body established by section 100A of the Act which makes recommendations to the Minister about which drugs and medicinal preparations should be available as pharmaceutical benefits. PBAC members are appointed following nomination by prescribed organisations and associations from consumers, health economists, practising community pharmacists, general practitioners, clinical pharmacologists and specialists, with at least one member selected from each of those interests or professions. Remaining members are persons whom the Minister is satisfied have qualifications and experience in a field relevant to the functions of PBAC, and that would enable them to contribute meaningfully to the deliberations of PBAC. In addition, an industry nominee has been appointed to the PBAC membership. When recommending the listing of a medicine on the Pharmaceutical Benefits Scheme (PBS), PBAC takes into account the medical

conditions for which the medicine has been approved for use in Australia, its clinical effectiveness, safety and cost-effectiveness compared with other treatments.

Pharmaceutical companies were consulted throughout the process of changes to the listings on the PBS. This includes consultation through the PBAC process.

Further consultation for this Instrument was considered unnecessary due to the nature of the consultation that had already taken place in the decision to list the medication.

General

Details of the instrument are set out in the Attachment.

This Instrument commences on 1 October 2022.

This Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

PROVISION-BY-PROVISION DESCRIPTION OF NATIONAL HEALTH (IVF PROGRAM) SPECIAL ARRANGEMENT AMENDMENT INSTRUMENT 2022 (No. 2)

Section 1 Name of Instrument

This section provides the name of this instrument as the *National Health (IVF Program) Special Arrangement Amendment Instrument 2022 (No. 2)* and may also be cited as PB 91 of 2022.

Section 2 Commencement

This section provides that this instrument commences on 1 October 2022.

Section 3 Authority

This section states that this instrument is made under subsection 100(2) of the *National Health Act 1953*.

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.

Schedule Amendments

The amendments in Schedule 1 involve the deletion of forms of a listed drug from the Special Arrangement. These changes are summarised below.

SUMMARY OF CHANGES TO THE NATIONAL HEALTH (IVF PROGRAM) SPECIAL ARRANGEMENT 2015 MADE BY THIS INSTRUMENT

Forms Deleted

<i>Listed Drug</i>	<i>Form</i>
Chorionic Gonadotrophin	Injection set containing powder for injection 1,500 units, 3 and solvent 1 mL, 3 Powder for injection 5,000 units with solvent

Statement of Compatibility with Human Rights

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

National Health (IVF Program) Special Arrangement Amendment Instrument 2022 (No. 2)

(PB 91 of 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 Instrument

The purpose of this Instrument, made under subsection 100(2) of the *National Health Act 1953* (the Act), is to amend the *National Health (IVF Program) Special Arrangement 2015 (PB 60 of 2015)* (the Special Arrangement), to make changes to the Special Arrangement relating to the IVF Program.

The purpose of the Special Arrangement is to ensure that an adequate supply of pharmaceutical benefits is available for patients who require in vitro fertilisation treatment. Restrictions on the provision of this treatment mean that these pharmaceutical benefits can more conveniently or efficiently be supplied under a special arrangement.

Human rights implications

The Instrument engages Articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically the rights to social security and 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 UN Committee on Economic Social and Cultural Rights 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 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 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.

Analysis

This Instrument advances the right to health and the right to social security by ensuring that the amendments to the *National Health (Listing of Pharmaceutical Benefits) Instrument 2012* (the Listing Instrument), that affect the pharmaceutical benefits that may be supplied under the Special Arrangement, are made concurrently. This Instrument provides for the deletion of forms of the listed drug chorionic gonadotrophin from the Special Arrangement.

The Listing Instrument determines the pharmaceutical benefits that are on the Pharmaceutical Benefits Scheme (PBS) through declarations of drugs and medicinal preparations, and determinations of forms, manners of administration and brands. The PBS is a benefit scheme which assists with advancement of these human rights by providing for subsidised access by patients to medicines. The recommendatory role of the Pharmaceutical Benefits Advisory Committee (PBAC) ensures that decisions about subsidised access to medicines on the PBS are evidence-based.

When a sponsor submits a request to delist a drug from the PBS, subsection 101(4AAB) of the *National Health Act 1953* requires that the Minister or their delegate obtain advice from the Pharmaceutical Benefits Advisory Committee (PBAC), an independent and expert advisory body, before varying or revoking declarations under subsection 85(2) so as to delist the drug. In these instances, one of the matters which the PBAC provides advice on is whether the delisting of a drug will result in an unmet clinical need for patients. The PBAC also considers whether the delisting of a form of a drug will result in an unmet clinical need for patients.

The drug chorionic gonadotrophin (Pregnyl[®]), in the forms injection set containing powder for injection 1,500 units, 3 and solvent 1 mL, 3 and powder for injection 5,000 units with solvent, were requested to be delisted from the PBS by the sponsor due to the discontinuation of the product from manufacture. The PBAC advised that the delisting of human chorionic gonadotrophin would result in an unmet clinical need; however the sponsor confirmed the product has been discontinued and that retention on the PBS was not possible. The Department of Health and Aged Care (Department) and the PBAC sought alternative arrangements for the populations affected by this delisting.

Conclusion

This Legislative Instrument is compatible with human rights because it advances the protection of human rights.

Nikolai Tsyganov
Assistant Secretary (Acting)
Pricing and PBS Policy Branch
Technology Assessment and Access Division
Department of Health and Aged Care