

EXPLANATORY STATEMENT

Aged Care Act 1997 *Aged Care (Transitional Provisions) Act 1997*

Aged Care Legislation Amendment (September Indexation and Other Measures) Instrument 2023

Purpose and operation

The *Aged Care Legislation Amendment (September Indexation and Other Measures) Instrument 2023* (the Amending Instrument) amends the *Subsidy Principles 2014* (Subsidy Principles); *Aged Care (Subsidy, Fees and Payments) Determination 2014* (the Subsidy, Fees and Payments Determination); the *Aged Care (Transitional Provisions) Principles 2014* (the Transitional Provisions Principles); and the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* (the Transitional Provisions Determination).

The purpose of the Amending Instrument is to increase the dollar amount of certain accommodation related supplements payable to approved providers of aged care services in respect of a day on or after 20 September 2023 in line with the change to the Australian consumer price index (CPI) over the 6 months to the end of the March 2023 quarter, in addition to increasing the value of the annual and lifetime caps and income and asset testing thresholds in line with the changes to the age pension rates.

The Amending Instrument also updates the specified amount of the maximum accommodation charge for a post-2008 reform aged care resident as a result of routine indexation. Section 44-5C of the *Aged Care (Transitional Provisions) Act 1997* (the Transitional Provisions Act) provides that a person is a post-2008 reform resident if they are being provided with care through a residential care service and the person is not a pre-2008 reform resident (as defined in section 44-5D of the Transitional Provisions Act).

In addition, the Amending Instrument also amends the Subsidy Principles and the Transitional Provisions Principles to allow nurse practitioners, as well as medical practitioners, to certify that a care recipient has a continual need for the provision of oxygen for the purposes of eligibility for the residential care and home care oxygen supplements. This helps remove barriers affecting the nurse practitioner workforce, and increases utilisation of nurse practitioners to meet consumer needs. It also assists older Australians in rural and remote areas where access to medical practitioners can be limited.

Background

The Amending Instrument is made under the *Aged Care Act 1997* (the Aged Care Act) and the Transitional Provisions Act, which provide for the regulation and funding of aged care services. Persons or bodies approved under the *Aged Care Quality and Safety Commission Act 2018* to provide aged care services (approved providers) can be eligible to receive subsidy and supplement payments in respect of the care they provide to approved care recipients under the Aged Care Act and continuing care recipients under the Transitional Provisions Act.

Authority

The Aged Care Act and Transitional Provisions Act provide that for each type of aged care, the Minister for Aged Care may determine the amounts of particular components of the subsidy and the amounts of supplements payable to an approved provider for the provision of that type of aged care. Specifically, the authority provisions in the Aged Care Act for making the determinations that are amended by the Amending Instrument are set out in the following table:

Type of care and type of payment	Section of the Aged Care Act
Residential care	
Respite supplement	subsection 44-5(3)
Annual cap	subsection 44-21(7)
Lifetime cap	subsection 44-21(8)
First asset threshold	subsection 44-22(3)
Second asset threshold	subsection 44-22(3)
Maximum home value	subsection 44-26B(1)
Hotelling supplement	subsection 44- 27(3)
Accommodation supplement	subsections 44-28(4) and 44-28(5)
Home care	
First cap	subsection 48-7(2) Step 4, paragraph (c)
Second cap	subsection 48-7(2) Step 5, paragraph (c)
Income threshold	subsection 48-7(6)
Annual cap	subsection 48-7(7)
Lifetime cap	subsection 48-7(8)
Basic daily care fee	paragraph 52D-3(a)

The authority provisions in the Transitional Provisions Act for making the determinations that are amended by the Amending Instrument are set out in the following table:

Type of Care and type of payment	Section of the Transitional Provisions Act
Residential Care	
Accommodation supplement	subsections 44-5A(3) and 44-5A(4)
Concessional resident supplement	subsections 44-6(4) and 44-6(5)
Transitional accommodation supplement	subsection 44-16(3)
Pensioner supplement	subsection 44-28(7)

Additionally, section 96-1 of the Transitional Provisions Act allows the Minister to make Aged Care (Transitional Provisions) Principles providing for matters required or permitted, or necessary or convenient, to carry out or give effect to the Transitional Provisions Act. Relevantly:

- Paragraph 44-13(1)(c) permits the Transitional Provisions Principles to specify circumstances in which administering oxygen as part of residential care is eligible for the oxygen supplement.
- Paragraph 57A-6(1)(c) permits the Transitional Provisions Principles to specify a maximum daily amount at which an accommodation charge accrues for the entry of a person as a care recipient to a residential care service.

Item 22A of the table in section 96-1 of the Aged Care Act allows the Minister to make Subsidy Principles providing for matters required or permitted, or necessary or convenient to

carry out or give effect to Parts 3.1, 3.2 and 3.3 of the Aged Care Act. Relevantly:

- Subsection 44-5(2) permits the Subsidy Principles to specify the circumstances in which the oxygen supplement will apply to a care recipient in respect of a payment period, for residential care.
- Subsection 44-8(2) permits the Subsidy Principles to specify the circumstances in which the oxygen supplement will apply to a care recipient in respect of a payment period, for home care.

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

Commencement

The Amending Instrument commences on 20 September 2023.

Consultation

Routine indexation of supplements, rates and thresholds in this instrument are calculated using a well-established formula based on the CPI as a measure of the movements in the non-labour costs of providers. Accordingly, no specific consultation was undertaken with respect to the amounts to which routine indexation has been applied in this Amending Instrument.

Information about the increase in rates and relevant thresholds from 20 September 2023 will be disseminated by the Department of Health and Aged Care via electronic media to approved providers.

Within the Department of Health and Aged Care, the Health Workforce Division and the Chief Nursing and Midwifery Division were consulted about including nurse practitioners, as well as medical practitioners, to certify that a care recipient has a continual need for the provision of oxygen for the purposes of eligibility for the residential care and home care oxygen supplements.

General

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

Details of this instrument are set out in **Attachment A**.

This instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

Details of the Aged Care Legislation Amendment (September Indexation and Other Measures) Instrument 2023

Section 1 – Name

Section 1 provides that the name of the instrument is the *Aged Care Legislation Amendment (September Indexation and Other Measures) Instrument 2023*.

Section 2 – Commencement

Section 2 provides that the instrument commences on 20 September 2023.

Section 3 – Authority

Section 3 provides that the instrument is made under the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997*.

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 1 – Amendments

Aged Care (Subsidy, Fees and Payments) Determination 2014

Item 1 – Amendments of listed provisions – indexation of amounts

Item 1 provides for the indexation of amounts in relation to the following:

- Items 1-3: the ‘applicable amount’, which is used to calculate the residential care accommodation supplement and the residential care respite supplement for a care recipient;
- Items 4-5, 10-11, 15-18: the annual and lifetime caps which limit the amount of means tested and income tested care fees payable by recipients of residential care and home care;
- Items 6-7: the first and second asset thresholds that apply in the asset test component of the means assessment;
- Item 8: the cap on the maximum home value included in the asset test component of the means assessment;
- Item 9: the hotelling supplement;
- Items 12-14: the income thresholds at which the first and second annual caps on the income tested care fees in home care apply; and
- Items 19-22: the maximum rate of basic daily care fee for each home care package level.

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

Item 2 – Amendment of listed provisions – indexation of amounts

Item 2 provides for the indexation of amounts in relation to the following supplements:

- Items 1-3: the ‘applicable amount’, which is used to calculate the accommodation supplement and the concessional resident supplement for a care recipient;
- Items 4-6: the transitional accommodation supplement;
- Item 7: the pensioner supplement; and
- Item 8: the hotelling supplement.

Aged Care (Transitional Provisions) Principles 2014 (the Transitional Provisions Principles)

Item 3 – Paragraph 27(c)

Item 3 repeals the existing paragraph 27(c) and substitutes a new paragraph that allows nurse practitioners, in addition to medical practitioners, to certify that a care recipient has a continual need for the provision of oxygen. This paragraph is relevant to section 44-13(1)(c) of the *Aged Care (Transitional Provisions) Act 1997*, which sets out criteria for the oxygen supplement in residential care.

Item 4 – Subsection 118(1) (after table item 31)

Item 4 inserts a new item (item 32) into the table in subsection 118(1) of the Transitional Provisions Principles to specify the amount of maximum daily accommodation charge for a post-2008 reform resident who first entered residential care before 1 July 2004 and re-enters care on or after 20 September 2023 and before 20 March 2024.

The effect of this amendment is to specify, for the purpose of paragraph 57A-6(1)(c) of the Transitional Provisions Act, an amount of maximum daily accommodation charge for these care recipients. The new amount is \$23.71.

Item 5 – Subsection 118(2) (after table item 31)

Item 5 inserts a new item (item 32) into the table in subsection 118(2) of the Transitional Provisions Principles to specify the amount of maximum daily accommodation charge for a post-2008 reform resident who first entered residential care on or after 1 July 2004, receives an income support payment and enters care on or after 20 September 2023 and before 20 March 2024.

The effect of this amendment is to specify, for the purpose of paragraph 57A-6(1)(c) of the Transitional Provisions Act, an amount of maximum daily accommodation charge for these care recipients. The new amount is \$43.65.

Item 6 – Subsection 118(3) (after table item 27)

Item 6 inserts a new item (item 28) into the table in subsection 118(3) of the Transitional Provisions Principles to specify the amount of maximum daily accommodation charge for a post-2008 reform resident who first entered residential care on or after 1 July 2004, does not receive an income support payment and is receiving care through a service that meets the building requirements referred to in Schedule 1 to the Transitional Provisions Principles, and enters a residential care service on or after 20 September 2023 and before 20 March 2024.

The effect of this amendment is to specify, for the purpose of paragraph 57A-6(1)(c) of the Transitional Provisions Act, an amount of maximum daily accommodation charge for these care recipients. The new amount is \$43.65.

Item 7 – Subsection 118(4) (after table item 31)

Item 7 inserts a new item (item 32) into the table to subsection 118(4) of the Transitional

Provisions Principles to specify the amount of maximum daily accommodation charge for a post-2008 reform resident who first entered residential care on or after 1 July 2004, does not receive an income support payment and is receiving care through a service that does not meet the building requirements referred to in Schedule 1 to the Transitional Provisions Principles, and enters a residential care service, on or after 20 September 2023 and before 20 March 2024.

The effect of this amendment is to specify, for the purpose of paragraph 57A-6(1)(c) of the Transitional Provisions Act, an amount of maximum daily accommodation charge for these care recipients. The new amount is \$36.67.

Subsidy Principles 2014

Item 8 – Paragraph 26(c)

Item 8 repeals the existing paragraph 26(c) and substitutes a new paragraph that allows nurse practitioners, in addition to medical practitioners, to certify that a care recipient has a continual need for the provision of oxygen for the purposes of eligibility for the oxygen supplement in residential care.

Item 9 – Paragraph 76(c)

Item 9 repeals the existing paragraph 76(c) and substitutes a new paragraph that allows nurse practitioners, in addition to medical practitioners, to certify that a care recipient has a continual need for the provision of oxygen for the purposes of eligibility for the oxygen supplement in home care.

Statement of Compatibility with Human Rights

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

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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) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Aged Care Legislation Amendment (September Indexation and Other Measures) Instrument 2023* (Amending Instrument) amends the *Aged Care (Subsidy, Fees and Payments) Determination 2014* and the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* to increase the dollar amount of particular supplements payable to approved providers of aged care services in line with the changes to the Australian consumer price index (CPI) over the 6 months to the end of the March 2023 quarter, in addition to increasing the value of the annual and lifetime caps and income and asset thresholds in line with the changes to the age pension rates.

The Amending Instrument also amends the *Aged Care (Transitional Provisions) Principles 2014* to update the specified amount of maximum accommodation charge for a post-2008 reform resident as a result of routine indexation. Section 44-5C of the *Aged Care (Transitional Provisions) Act 1997* provides that a person is a post-2008 reform resident if they are being provided with care through a residential care service and the person is not a pre-2008 reform resident (as defined in section 44-5D of the *Aged Care (Transitional Provisions) Act 1997*).

In addition, the Amending Instrument amends the *Subsidy Principles 2014* and the *Aged Care (Transitional Provisions) Principles 2014* to allow nurse practitioners, in addition to medical practitioners, to certify that a care recipient has a continual need for the provision of oxygen for the purposes of eligibility for the residential care and home care oxygen supplements. .

Human Rights Implications

The Amending Instrument engages the following human rights contained in Articles 11(1) and 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Articles 25 and 28 of the *Convention of the Rights of Persons with Disabilities* (CRPD):

- the right to an adequate standard of living, including with respect to food, clothing and housing, and the right to the continuous improvement of living conditions (Article 11(1) of ICESCR and Article 28 of CPRD); and
- the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12(1) of ICESCR and Article 25 of the CPRD)

Indexation of aged care subsidies and payments increases the amount of subsidy payable to approved providers for the provision of care and services to people living in aged care facilities or otherwise receiving care who require assistance to achieve and maintain the highest standard of physical and mental health. It also increases the dollar amount of additional payments in the form of supplements that are payable to approved providers to assist with the costs of caring

for people who are financially disadvantaged. Indexation of aged care fees increases the thresholds and caps that are taken into account in determining how much people who can afford to contribute to the cost of their care can be asked to pay.

These changes are designed to ensure the payments and contributions keep pace with increases in the CPI. This helps ensure that aged care providers continue to receive sufficient funds in order to provide care recipients with a high standard of living and care.

The changes in relation to allowing nurse practitioners to certify that care recipients have a continual need for the provision of oxygen make it easier to satisfy eligibility requirements for residential care and home care oxygen supplements. For example, these changes assist older Australians in rural and remote areas where access to medical practitioners can be limited.

The Amending Instrument positively engages the rights set out in Articles 11(1) and 12(1) 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 for persons receiving aged care.

Conclusion

This legislative instrument is compatible with human rights because it promotes the right an adequate standard of living and the highest attainable standard of physical and mental health.

The Hon Anika Wells MP
Minister for Aged Care