

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Repeal Determination 2025*

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 pathology 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 section 4A of the Act. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulations 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 Pathology Services – Respiratory Pathogen Testing) Repeal Determination 2025* (the Repeal Determination) is to repeal the *Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Determination 2024* (the Principal Determination) from 1 March 2025. The Principal Determination lists Medicare Benefits Schedule (MBS) items 69421 or 69422 for the detection of respiratory pathogen nucleic acid from a nasal swab, throat swab, nasopharyngeal aspirate and/or lower respiratory tract sample.

From 1 March 2025, MBS items 69421 and 69422 will be incorporated into the Table by the *Health Insurance Legislation Amendment (Hospital-Only Services and Other Measures) Regulations 2025*.

This change is administrative in nature and patients will continue to have access to the pathology services under MBS items 69421 and 69422.

### **Consultation**

Consultation was not undertaken for this instrument as the repeal of the Principal Determination is administrative in nature. There is no change to the practical arrangements for services provided under item 69421 or 69422 for patients and health professionals and Medicare will continue to subsidise these services.

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

The Repeal Determination commences on 1 March 2025.

Details of the Repeal Determination are set out in the [Attachment](#).

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

## ATTACHMENT

**Details of the *Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Repeal Determination 2025***Section 1 – Name

Section 1 provides for the instrument to be referred to as the *Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Repeal Determination 2025* (Repeal Determination).

Section 2 – Commencement

Section 2 provides for the Repeal Determination to commence on 1 March 2025.

Section 3 – Authority

Section 3 provides that the Repeal 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 Repeal 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 Repeal Determination has effect according to its terms.

Schedule 1 – Repeals

Schedule 1 repeals the whole of the *Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Determination 2024*.

## Statement of Compatibility with Human Rights

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

*Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Repeal Determination 2025*

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

The purpose of the *Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Repeal Determination 2025* (the Repeal Determination) is to repeal the *Health Insurance (Section 3C Pathology Services – Respiratory Pathogen Testing) Determination 2024* (the Principal Determination) from 1 March 2025. The Principal Determination lists Medicare Benefits Schedule (MBS) items 69421 or 69422 for the detection of respiratory pathogen nucleic acid from a nasal swab, throat swab, nasopharyngeal aspirate and/or lower respiratory tract sample.

From 1 March 2025, MBS items 69421 and 69422 will be incorporated into the pathology services table (the Table) by the *Health Insurance Legislation Amendment (Hospital-Only Services and Other Measures) Regulations 2025*.

This change is administrative in nature and patients will continue to have access to the pathology services under MBS items 69421 and 69422.

### 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 does not affect the rights to health and social security and the right of equality and non-discrimination. Patients and medical practitioners will continue to be able to receive or render (respectively) pathology services to which MBS items 69421 or 69422 apply as these will be prescribed in the Table from 1 March 2025.

**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.

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