EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

*Health Insurance Act 1973*

*Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Revocation Determination 2018*

**Authority**

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 general medical 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 4(1) of the Act.

**Purpose**

The purpose of the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Revocation Determination 2018* (the Determination) is to revoke the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Determination 2017.*

Currently, there are two items for the surgical reversal of bariatric surgery. Item 31584, in its current form, can be claimed when bariatric reversal surgery is performed as a standalone procedure. Item 31591 was introduced in the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Determination 2017* to cover circumstances where a bariatric reversal is performed on the same occasion as another bariatric surgical procedure. It allowed the item to be co-claimed with bariatric surgery items 31569 to 31581 where appropriate.

As only one item is needed for the reversal of a bariatric procedure, the Table will be amended to enable bariatric services under item 31584 to be co-claimed in association with an additional bariatric service under items 31569 to 31581, or as an independent reversal procedure. This will be implemented by the *Health Insurance (General Medical Services Table) Regulations 2018* from 1 July 2018.

This Determination will revoke the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Determination 2017*, which is the legal basis for item 31591*.* This item will be redundant upon commencement of *Health Insurance (General Medical Services Table) Regulations 2018*.

**Consultation**

The Obesity Surgery Society of Australia and New Zealand were previously consulted on appropriate co-claiming practices in relation to bariatric surgery.

**Commencement**

The Determination commences immediately after the commencement of the *Health Insurance (General Medical Services Table) Regulations 2018*.

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

**Reliance on subsection 33(3) of the *Acts Interpretation Act 1901***

Under subsection 33(3) of the *Acts Interpretation Act 1901* (the AI Act), 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. The power to revoke the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Determination 2017* relies on subsection 33(3) of the AI Act.

Details of the Determination are set out in the Attachment.

ATTACHMENT

Details of the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Revocation Determination 2018*

Section 1 – Name of Determination

# Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Revocation Determination 2018.*

Section 2 – Commencement

Section 2 provides that the Determination commences immediately after the commencement of the *Health Insurance (General Medical Services Table) Regulations 2018*.

Section 3 – Authority

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

Section 4 – Revocation

Section 4 provides that the Determination revokes the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Determination 2017*.

**Statement of Compatibility with Human Rights**

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

***Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Revocation Determination 2018***

This Determination 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 General Medical Services – Additional item for reversal of a bariatric procedure) Revocation Determination 2018* (the Determination) is to revoke the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Determination 2017.*

Currently, there are two items for the surgical reversal of bariatric surgery. Item 31584, in its current form, can be claimed when bariatric reversal surgery is performed as a standalone procedure. Item 31591 was introduced in the *Health Insurance (Section 3C General Medical Services – Additional item for reversal of a bariatric procedure) Determination 2017* to cover circumstances where a bariatric reversal is performed on the same occasion as another bariatric surgical procedure. It allowed the item to be co-claimed with bariatric surgery items 31569 to 31581 where appropriate.

As only one item is needed for the reversal of a bariatric procedure, the General Medical Services Table will be amended to enable bariatric services under item 31584 to be co-claimed in association with an additional bariatric service under items 31569 to 31581, or as an independent reversal procedure. This will be implemented by the *Health Insurance (General Medical Services Table) Regulations 2018* from 1 July 2018.

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**Human rights implications**

This Determination 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.

Analysis

This Determination will maintain rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective.

**Conclusion**

This Determination is compatible with human rights, in particular, the rights to health and social security.

**Natasha Ryan**

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**MBS Policy and Specialist Services Branch**

**Medical Benefits Division**

**Department of Health**