

EXPLANATORY STATEMENT

Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2011 (No.1)

Authority

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2011 (No.1)* (this Determination) is made under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act), which forms part of the family assistance law.

Subsection 205(1) gives the Minister power to determine, by legislative instrument, rules relating to the eligibility of child care services to become approved for the purposes of the family assistance law; and rules relating to the eligibility of those services to continue to be so approved.

This Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Purpose of this Determination

This Determination makes amendments to the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Eligibility Determination) to remove the Secretary's power of delegation in section 4 and to specify the decisions that are reviewable under section 108 of the Family Assistance Administration Act. These amendments are made as a consequence of the amendments to the Family Assistance Administration Act made by Schedule 3 to the *Family Assistance and Other Legislation Amendment (Child Care and Other Measures) Act 2011* (the Child Care and Other Measures Act). Schedule 3 effectively commences on 22 August 2011.

The amendments made by Schedule 3 to the Child Care and Other Measures Act amend, among other things, the definition of *family assistance law* in sub-section 3(1) of the Family Assistance Administration Act to include any instrument (including regulations) made under the Family Assistance Administration Act or the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act).

The amendment to the definition of *family assistance law* affects the operation of subsection 221(1) of the Family Assistance Administration Act. Subsection 221(1) contains the Secretary's power of delegation. It provides that the Secretary may delegate to an officer all or any of the powers of the Secretary under the *family assistance law*. Prior to the amendments made by the Child Care and Other Measures Act, the definition of *family assistance law* did not include a reference to instruments and therefore the Secretary's delegation power in subsection 221(1) did not extend to delegating the Secretary's powers under instruments. However, as a result of the amendments to the definition of *family assistance law*, from the commencement day of Schedule 3 to the Child Care and Other Measures Act, the Secretary's power of delegation in subsection 221(1) extends to powers which are exercised by the

Secretary under instruments (including regulations) under the Family Assistance Administration Act or the Family Assistance Act.

Currently, section 4 of the Eligibility Determination contains an express delegation provision which enables the delegation of all or any of the Secretary's powers under that Determination to an officer of the agency. However, as a result of the amendments made by the Child Care and Other Measures Act and on the commencement day of Schedule 3 to that Act, the authority for delegation of powers under the Eligibility Determination is in subsection 221(1) of the Family Assistance Administration Act. Section 4 of the Eligibility Determination is therefore a redundant provision. This Determination removes this section.

Schedule 3 to the Child Care and Other Measures Act also makes amendments to the Family Assistance Administration Act, which affect the review of decisions made under instruments. As a result of these amendments, a decision under an instrument is not reviewable under section 108 of the Family Assistance Administration Act (internal review on application), and therefore not reviewable by the Social Security Appeals Tribunal (SSAT) and the Administrative Appeals Tribunal (AAT), unless the instrument specifies that the decision is reviewable (paragraph 108(2)(h) and subsection 108(2A) of the Family Assistance Administration Act, inserted by Items 2 and 3 of Schedule 3 to the Child Care and Other Measures Act refer). These amendments enable the instrument-maker to specify – at the time the instrument is made - which decisions are reviewable and to leave outside that review those decisions, which, by their nature, are not suitable for merits review. All decisions may be reviewed by the Secretary (delegate) on own initiative, under section 105 of the Family Assistance Administration Act.

This Determination specifies the decisions in the Eligibility Determination which are reviewable for the purposes of section 108 of the Family Assistance Administration Act.

Consultation Statement

The proposed amendment to section 4 (delegation) was not consulted. This amendment was considered unnecessary to consult as the amendment to the delegation provision is minor and machinery in nature. The amendment simply reflects the changes to the source of the Secretary's delegation power as a consequence of the amendments made by the Child Care and Other Measures Act; it does not have any impact on the nature or exercise of that power.

The amendment to section 5 (review provision) was also not consulted. It was considered unnecessary to consult the amendment to make certain decisions under the Eligibility Determination reviewable, as these decisions are of the kind that would be reviewable, as a matter of merits review policy, if the powers for making these decisions were included in the primary legislation. Further, leaving the three decision-making powers (subsection 12(3), section 21 and section 21A) outside merits review (other than on the Secretary's own initiative) was also considered unnecessary or inappropriate to consult. These decisions are procedural or preliminary decisions, which are considered unsuitable for merits review (the

explanation relating to **Item 2 of Schedule 1** refers). Similar decisions, made under the primary legislation, are also not reviewable.

Regulation Impact Statement

Office of Best Practice Regulation was consulted in the preparation of this Determination and assessed that no Regulation Impact Statement was required in relation to the amendments included in this Determination.

Explanation of Provisions

Sections 1, 2 and 3 of this Determination are functional provisions.

Section 1 sets out the name of this Determination.

Section 2 specifies that this Determination commences on the day on which of Schedule 3 to the *Family Assistance and Other Legislation Amendment (Child Care and Other Measures) Act 2011* commences. Schedule 3 commences on the 28th day after that Act is given Royal Assent. Royal Assent was given on 25 July 2011.

Section 3 states that Schedule 1 amends the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000*.

Section 4 of this Determination is an application provision. It states that an amendment made by item 2 of Schedule 1 (to enable review of decisions under the Eligibility Determination) applies to a decision made under the Eligibility Determination on or after the day on which Schedule 3 to the Child Care and Other Measures Act commences.

Schedule 1 - Amendments

Section 4 - Delegation

Section 4 of the Eligibility Determination provides for delegation of the Secretary's powers in that Determination. As a result of the amendments made by the Child Care and Other Measures Act, from the commencement of Schedule 3 to that Act, the power to delegate the Secretary's powers under the Eligibility Determination is in subsection 221(1) of the Family Assistance Administration Act. Therefore, **Item 1 of Schedule 1** omits the Secretary's power of delegation in section 4, which, from that date, is a redundant provision.

Section 5 – Review of decision

Section 5 of the Eligibility Determination provides that, for Part 5 of the Family Assistance Administration Act (Review of decisions), a decision of an officer under the Eligibility Determination is taken to be a decision of an officer under the family assistance law. Section 5 will become ineffective from the commencement day of Schedule 3 to the Child Care and Other Measures Act (22 August 2011).

To make a decision in the Eligibility Determination reviewable under section 108 of the Family Assistance Administration Act (and therefore reviewable by SSAT and AAT), the Eligibility Determination has to specify that the decision is so reviewable (as provided for by subsection 108(2A) of the Family Assistance Administration Act).

Item 2 of Schedule 1 therefore replaces section 5 with new section 5, which makes reviewable under section 108 of the Family Assistance Administration Act any decision under the Eligibility Determination, except for decisions made under subsection 12(3), section 21 or section 21A.

Under subsection 12(3) the Secretary may request a person (an applicant for approval of a child care service for the purpose of the family assistance law) to provide a copy of any relevant insurance policy and certificate of currency for that insurance. Having relevant insurance is a condition of approval and continued approval of a child care service. Requesting a copy of the insurance documents is not a decision that is suitable for merits review as it is a preliminary decision, which facilitates the making of the substantive decision to approve a child care service, or to decide whether an approved child care service should be sanctioned (under section 200 of the Family Assistance Administration Act) for breach of the insurance condition. A decision not to approve a service, or to sanction a service, is reviewable under the merits review provisions of the Family Assistance Administration Act.

Section 21 provides that the Secretary may request an approved child care service to provide information for census or survey purposes, or information regarding the operation of the service. Section 21A enables the Secretary to approve the form, manner or way of requesting or giving information under section 21. These are procedural decisions, which are not suitable for merits review.

While a failure to comply with a request for information or a failure to provide information to the Secretary in the form, manner or way which the Secretary requests, could lead to a sanction (under section 200 of the Family Assistance Administration Act) being imposed on the service, the reasonableness of the Secretary's request for provision of information, in the particular form, could be scrutinised as part of the merits review of a decision to sanction the service. The decision to request information and the decision to approve a particular form, manner or way, in which to provide that information are not decisions, which affect the substantive rights of an approved child care service. Enabling review of such decisions could mean that the administrative decision-making processes under the Eligibility Determination could be unnecessarily frustrated or delayed.

Leaving decisions under subsection 12(3), section 21 and section 21A outside of merits review (except review by the Secretary on own initiative) aligns the review treatment of those decisions with the treatment of similar decisions under the Family Assistance Administration Act (see subsection 111(2)).

This amendment does not affect the reviewability of decisions made under the Eligibility Determination before 22 August 2011.