

EXPLANATORY STATEMENT

Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2011 (No. 2)

Authority

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2011 (No. 2)* (Amendment Determination) is made by the Minister for Employment Participation and Childcare under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Administration Act).

Subsection 205(1) of the Administration Act provides for the Minister to determine by legislative instrument:

- (a) rules relating to the eligibility of child care services to become approved for the purposes of the family assistance law; and
- (b) rules relating to the eligibility of those services to continue to be so approved.

The current rules under subsection 205(1) are the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Principal Determination).

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

Purpose of the Amendment Determination

Under the family assistance law, an individual (e.g. a parent or guardian) may be eligible for child care benefit (CCB) and child care rebate in respect of care provided to a child by a child care service approved for the purposes of the family assistance law. An approved child care service is entitled to be paid CCB fee reduction amounts by the Commonwealth, for the benefit of the individuals who are eligible for CCB by fee reduction. The service must pass these amounts on to the eligible individual, usually in the form of reduced child care fees.

Division 1 of Part 8 of the Administration Act provides for the approval of child care services by the Secretary. That Division imposes certain conditions relating to the eligibility of child care services for approval, and for continued approval. Further, section 205 of the Administration Act authorises the Minister to determine rules relating to the eligibility of child care services to be approved and to continue to be approved. The Principal Determination contains those rules. Failure of an approved child care service to comply with those rules may lead to sanctions being imposed on

the service under section 200 of the Administration Act, which include, among others, suspension or cancellation of the service's approval.

The Amendment Determination makes changes to the Principal Determination to:

- (1) clarify the matters that the Secretary may have regard to in deciding whether or not to approve a child care service, or continue its approval, under the Administration Act for the purposes of the family assistance law; and
- (2) make amendments consequential to the introduction from 1 January 2012 of the Education and Care Services National Law and National Quality Framework and the cessation of operation by the National Childcare Accreditation Council (NCAC), principally to remove provisions concerning quality assurance requirements based on the systems administered by the NCAC.

The Amendment Determination also makes minor changes to the Principal Determination to clarify or reinforce existing eligibility requirements for approval and continued approval.

Consultation

*Amendments relating to introduction of the Education and Care Services National Law and the cessation of operation by the NCAC (amendments made by **items 1, 2, 5, 7 and 11**)*

As the Amendment Determination removes conditions of approval, and continued approval, of child care services for the family assistance law purposes, with which the services in the specified class could not otherwise comply due to the cessation of the NCAC operation from 1 January 2012, consultation in relation to these amendments was considered unnecessary. Neither was it considered appropriate to consult in relation to the non-substantive amendment bringing to the reader's attention the inclusion in the child care laws, with which child care services must comply as a condition of the services' approval and continued approval, the new Education and Care Services National Law or a law based on that law applying in the States and Territories.

Extensive consultations have been conducted during the development of the National Quality Framework that, from 1 January 2012, will replace the NCAC quality assurance systems.

Regulation Impact Statement consultations on the National Quality Framework were undertaken from July to September 2009, including: consultation documents, open public forums in all capital cities and a number of regional centres, a call for written submissions and focus group discussions. The "*Regulation Impact Statement for Early Childhood Education and Care Quality Reforms, COAG Decision RIS, December 2009*" based on this consultation process was released publicly in December 2009.

Public information forums were also conducted in April and May 2010 in metropolitan and some regional locations across Australia. Additional information and consultation forums that focused on the processes for quality assessment and ratings of services and the Education and Care Services National Law were held in November and December 2010. Further forums and a public submission process were held in the first half of 2011 to consult on the exposure draft of the Education and Care Services National Regulations made under the Education and Care Services National Law.

A Stakeholder Reference Group of the Early Childhood Development Working Group (established under the Ministerial Council for Education, Early Childhood Development and Youth Affairs) is a key consultation mechanism that helps to inform implementation of the National Quality Framework.

The NCAC, and peak bodies representing child care services affected by the uniform national child care law, have been part of these consultations.

*Amendments clarifying the matters that the Secretary may have regard to in deciding whether or not to approve a child care service (amendments made by **items 3, 4, 8 and 9**).*

These amendments have been consulted – comments on the consultations are made within the Regulation Impact Statement (RIS) included in this Explanatory Statement (please see the heading ‘Consultation’ in the RIS).

*Minor amendments (amendments made by **items 6 and 10**)*

As the amendment removes the notification requirement in section 19 of the Principal Determination relating to cessation of operation (made by **item 10**), as a consequence of the earlier enactment of section 219M of the Administration Act imposing a new and different requirement relating to notification of cessation of operation, it was considered unnecessary to consult this consequential, housekeeping amendment.

Consultations on the minor amendments to section 12 of the Principal Determination relating to insurance requirements were undertaken in November 2010 with national child care peak bodies and Early Childhood Australia’s national Children’s Services Forum. No comments were made regarding the changes to section 12.

Regulation Impact Statement

Office of Best Practice Regulation was consulted in the preparation of the Amendment Determination and assessed that no Regulation Impact Statement was required in relation to amendments required as a result of the cessation of operation by the NCAC and the introduction of the National Quality Framework (amendments made by **items 1, 2, 5, 7 and 11**) as these amendments are consequential to the implementation of the National Quality Framework, for which the “*Regulation Impact Statement for Early Childhood Education and Care Quality Reforms, COAG Decision RIS, December 2009*” was published in December 2009. The Amendment Determination removes the conditions of approval of child care services for the family assistance law purposes, and the conditions of continued approval, relating to the quality assurance systems, which will become obsolete as a result of the cessation of the NCAC operation.

The Regulation Impact Statement included in this Explanatory Statement, relates to the amendments concerning eligibility for approval for the purposes of the family assistance law (amendments made by **items 3, 4, 8 and 9**).

Regulation Impact Statement

1. Introduction

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Eligibility Determination) specifies rules a child care service must satisfy in order to become approved and remain approved for the purposes of family assistance law. An approved service can receive Child Care Benefit (CCB) to pass on to families as fee reductions and Child Care Rebate (CCR) to assist eligible families using the service with the cost of child care.

The Eligibility Determination is made under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). It allows the Secretary of the Department of Education, Employment and Workplace Relations (the Department) and/or a delegate to make an assessment regarding the suitability of the operator who applies for approval of the service for CCB purposes and to monitor and review the service's conditions for continued approval.

To become approved for CCB purposes, an operator must apply for approval of the service. The operator applying for approval of a child care service must meet the 'suitability of applicant' criteria:

- when the applicant is an individual, the applicant must be a suitable person to operate a child care service
- when the applicant is not an individual, and is not a state/territory or local government, the applicant's key personnel must be suitable people to operate a child care service.

In making a decision on suitability, the following criteria must be assessed:

- the applicant's expertise and experience in providing child care
- the applicant's ability to meet and provide the appropriate quality of child care
- if the applicant has been a provider of child care:
 - the applicant's record of financial management relating to the provision of child care
 - the applicant's conduct as a provider of child care
 - the applicant's compliance with the responsibilities as a provider of child care and obligations arising from the receipt of payments from the Australian Government; and
 - whether the applicant has maintained the confidentiality of personal information about people who were liable to pay child care fees, and their families

- any relevant criminal charges against the applicant pending before a court and any relevant convictions or findings of guilt against the applicant for an offence.

Services must also meet other requirements, such as:

- the staff must be suitable persons and the applicant must undertake that the service will ensure that they are suitable persons
- the service must meet the provision of care requirements, which detail the minimum amount of care for each type of child care service
- the service must be licensed to operate, where applicable in their State or Territory
- the service must meet quality standards applicable to the type of service; and
- the service must hold the required insurance.

State and Territory Governments have prime responsibility for family support, child welfare and the regulation of child care services. These regulatory responsibilities include licensing in all states and territories for centre-based Long Day Care and Occasional Child Care and in some states and territories for Family Day Care and Outside School Hours Care. These arrangements cover aspects of a service's operation such as the number of children in care, the size of rooms and playgrounds, the number of staff and their qualifications, and health and safety requirements. State and Territory licensing arrangements complement, rather than duplicate, Commonwealth regulation.

From 1 January 2012, current licensing arrangements for Long Day Care, Family Day Care and Outside School Hours care will be replaced by the National Quality Framework, established under the Education and Care Services National Law and accompanying National Regulations. This Act was enacted in Victoria in October 2010 and is scheduled to commence in Victoria, NSW and ACT from 1 January 2012. As agreed by the COAG National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care (December 2009), the other jurisdictions are moving to enact the National Law or corresponding legislation.

Under the National Quality Framework, State and Territory regulatory authorities will be responsible for assessing these services against the National Quality Standard, with the aim of improving the quality of education and care provided while reducing the regulatory burden on services. The National Quality Framework will be overseen by the Australian Children's Education and Care Quality Authority to ensure there is national consistency across all jurisdictions.

Background

The Australian Government's agenda for early childhood education and child care focuses on providing Australian families with high-quality, accessible and affordable child care. The agenda has a strong emphasis on connecting with schools to ensure all Australian children are fully prepared for learning and life. Investing in the health, education, development and care of our children benefits children and their families,

our communities and the economy, and is critical to lifting workforce participation and delivering the Government's productivity agenda.

The Australian Government makes CCB and CCR payments to families to assist with the cost of child care. CCB is a means tested payment based on a family's income so that it is targeted to people most in need of financial assistance. Most CCB payments are made to families in the form of fee reductions passed on by their child care service following the service's submission of child care attendance records through the Child Care Management System (CCMS). Other families receive CCB as a lump sum at the end of an income year. CCR is an additional payment to assist families with up to 50 per cent of out-of-pocket costs up to an annual cap and is not income-tested. Families using approved child care who are eligible for CCB (at zero rate or more) and meet the work, training and study test are eligible for CCR. Families can receive their CCR payments as an annual lump sum; by quarterly instalments; as fortnightly payment; or as a fortnightly fee reduction to their child care service.

Operators of child care services must apply to the Department for approval of the service under family assistance law to administer CCB on behalf of the Australian Government.

Over the years, the child care sector in Australia has rapidly developed from community based child care services to a diverse sector that incorporates various business models, including not-for-profit, employer sponsored and private for-profit services.

Australian Government spending on CCB and CCR is substantial. Over the next four years, \$16.4 billion will be provided to help 800,000 Australian families annually with the cost of child care, through CCB and CCR. This includes \$9.2 billion over four years to 2014–15 to reduce child care fees for low and middle-income earners by means of CCB payments and \$7.2 billion to assist working families with out-of-pocket child care expenses in the form of CCR payments.

Because of the significant outlays, it is important that an appropriate assessment of the suitability of an applicant is undertaken before a child care service is approved for the purposes of CCB.

2. Assessing the problem

Family Assistance legislation, including the Eligibility Determination, came into effect in 2000 to ensure that child care services and operators met certain standards in order to administer Commonwealth Government funds.

In the ensuing period, the child care sector has evolved from relatively simple operations that run one or two child care services to, in some cases, complex company structures that operate a large number of child care services.

Due to the changes in the child care sector, the current rules in the Eligibility Determination are not sufficient to mitigate the risk of unsuitable persons obtaining approval of a child care service for CCB purposes.

The current Eligibility Determination does not allow the Department to assess the suitability of all persons involved in the management of a service. Furthermore, an

applicant's history of financial management, including bankruptcy, insolvency or external administration, may not be considered unless the applicant has previously been a provider of child care. The Eligibility Determination also often does not allow for the consideration of any debts an applicant has outstanding to the Commonwealth in relation to the operation of child care services.

The collapse of ABC Learning was the most significant example of the need to amend the Eligibility Determination, but there have been other instances where the Eligibility Determination has been insufficient to protect Commonwealth investment and families' losses. Under the current rules, a failed operator could establish a new company and seek approval under the new structure. The limitation with the current rules is that an applicant's history of financial management, including bankruptcy, insolvency or administration, cannot be considered unless the applicant has previously been a provider of child care.

Additionally, under the current rules management companies are not currently included in the definition of 'key personnel' and cannot be considered through the approval processes or held accountable for the manner in which a service is operated. By way of example, a company that went into administration in 2009 was operating seven services when it became insolvent. The operator then became the management company under a new company name, on behalf of the administrator, for those services that it had previously operated. The management company then became insolvent, compounding the financial debts to the Department and other Commonwealth agencies, as well as putting the child care arrangements of a number of working families at risk.

Since the collapse of ABC Learning, a number of large organisations have entered or continued to expand in the child care sector. The Department's concerns are not confined to large organisations alone. Small players, with only one or two centres, must also meet suitability standards which demonstrate their ability and suitability to administer Commonwealth funds and protect working families from the unanticipated loss of child care. Small players may still be able to accrue a substantial debt to the Commonwealth over a period of time. The Department sees several applications for CCB approval each year where a small provider goes into administration, leaving debts to the Commonwealth, only to recreate themselves under a new company name and re-enter the child care market – sometimes at the same child care service. Because of the change of company name, the current Eligibility Determination does not allow the Department to adequately assess the new company's suitability.

The potential for the financial circumstances of a child care operator to impact on the child care sector has demonstrated that the powers of the Secretary to scrutinise the suitability and continuing suitability of applicants and their associated entities need to be strengthened.

The use of corporate structures by some operators to evade proper scrutiny of their financial affairs by the Department has contributed to the need for change. This is evident in the case previously cited, where an operator with a history of non-compliance or poor financial management took on a new corporate identity which allowed them to re-enter the child care market, leaving outstanding debts to the Commonwealth from operations as a previous entity. Under the current rules, the past

financial practices of the applicant can only be considered if the applicant is the same entity and management companies are not scrutinised.

3. Objectives of government action

The objective is to protect the Commonwealth's investment in child care and work towards achieving and maintaining higher quality child care and to ensure the responsible use of payments made under the family assistance law.

4. Options that may achieve the objectives

Status Quo

The Government has an obligation to the Australian taxpayer to appropriately manage child care assistance paid to Australian families. It is committed to providing stability for working families in the child care sector.

The current Eligibility Determination only allows the Department to make a limited assessment of the suitability of the key personnel of an applicant to administer CCB on behalf of the Commonwealth and the definition of key personnel does not capture all parties that are directly involved in the decisions affecting the operation of a service. These limitations impair the ability of the Department to adequately protect the Government's significant investment in child care assistance and, as a consequence, to ensure that Australian families have access to high quality child care.

The collapse of ABC Learning and other instances, where the current Eligibility Determination has not allowed the Department to consider or deal with unsuitable applicants, has highlighted the need to amend the Eligibility Determination, in keeping with the Government's role and responsibilities.

Amendment to the Eligibility Determination

The Eligibility Determination provides the parameters within which the Department can assess the suitability of child care operators applying for approval of child care services for CCB purposes. Amending the Eligibility Determination is the most appropriate avenue for meeting the Government's objectives as it is the existing basis for regulating the child care industry for CCB approval purposes.

In light of the continually evolving child care sector in Australia, the Department has been reviewing the rules to enhance the Eligibility Determination to reflect contemporary company structures.

The proposed amendments to the Eligibility Determination will equip the Department with the appropriate legal mechanisms to more thoroughly assess the suitability of applicants.

Key changes

There are two key changes to the Eligibility Determination. The first is to expand the definition of 'Key Personnel'. The second is to apply a stronger suitability assessment to the applicant, including through the assessment of their 'Key Personnel' (under the expanded definition) and other persons connected with the applicant's operation.

Changes to the definition of 'Key Personnel' and the range of persons relevant to the suitability of an applicant

The proposed changes will enable the Department to assess the suitability of the applicant through the assessment of the applicant's key personnel (under the amended definition) and, where relevant, the assessment of the entities connected with the operation of the child care service - when assessing an application for CCB approval. Where, for example, 'key personnel' change, the Department may assess their suitability at that time.

Currently 'Key Personnel' in relation to an applicant, who is not an individual, means:

- a member of the group of people who is responsible for the executive decisions of the applicant; and
- any other person who is concerned in, or who takes part in, the management of the applicant.

It is proposed to expand the definition of 'key personnel' to include:

- an officer (within the meaning given by section 9 of the *Corporations Act 2001*) of the applicant or operator
- a member of the group of people that is responsible for the executive decisions of the applicant or operator
- any other person who is concerned in, or who takes part in, the management of the applicant or operator; and
- any person who, under an arrangement with the applicant or operator, manages or supervises the child care service.

Suitability of applicant

Enhancements are proposed to improve the test for the assessment of the suitability of the applicant, including through the assessment of their key personnel (under the expanded definition) and other persons connected with the applicant's operation (i.e. the persons connected with the applicant or applicant's key personnel, who affect or are likely to affect the operation of the service by the applicant). It is proposed that the following additional factors **may** be taken into consideration in relation to the applicant, its key personnel and the persons connected with the applicant's operation:

- governance arrangements, including any arrangements with other persons for the management or supervision of the child care service
- record of financial management, including any instances of bankruptcy, insolvency or external administration
- debts that relate to child care due to the Commonwealth.

5. Impact analysis – costs, benefits and risks

Affected Stakeholders

The most significant impact on the Australian Government will be improved ability to monitor the expenditure of Commonwealth funds. There are also potential savings through making these changes, although these are unquantifiable. The cost of implementing changes to the assessment process will be absorbed by the Department as part of its normal review processes.

The most significant effect of the changes will be on new applicants for CCB approval. Services already approved for the purposes of CCB will have certain additional conditions for continued approval. There will be minor benefits for families as a result of the changes.

Impact on New Applicants

Currently, all child care service operators who apply for approval of a service for CCB purposes must submit an application form to the Department along with supporting documentation.

The Department provides all prospective applicants with a ‘CCB Application Package’, which contains detailed information regarding the legislative requirements that a service must meet in order to be approved for the purposes of CCB.

The ‘CCB Application Package’ also advises applicants of documents that must be submitted with the application form. No additional documents will be required under the proposed changes to the Eligibility Determination. The additional information will be limited to that collected in the application form itself. Note: It is anticipated that an online application form will be available to prospective applicants from 1 January 2012.

The existing application form for CCB approval requires the applicant, if the applicant is not an individual, to declare details of any child care services its key personnel had an interest in over the past five years or whether they currently operate a child care service. The changes will broaden the range of persons that could be assessed in relation to the suitability of the applicant so that this existing question will also apply to key personnel of an applicant who is an individual, including the key personnel of a management company.

The new application form will define the ‘key personnel’ (and the relevant persons connected with the applicant’s operation) that the applicant needs to nominate in the application form. The existing questions relating to past and current interest in or operation of child care services relate to those nominated persons.

The existing application form also asks whether the applicant’s key personnel have been subject to administration, receivership, liquidation, bankruptcy or debt recovery proceedings at any time in the past five years, if they were previously a provider of child care. The amendments to the Eligibility Determination mean that this existing question will apply to all applicants irrespective of whether they were previously a provider of child care.

Under the new arrangements, where, for example, one of the key personnel has been subject to administration, receivership, liquidation or debt recovery proceedings or has any criminal charges pending before a court or any convictions or findings of guilt for an offence, the application form will require the applicant to list those key personnel and nominate each person's name, date of birth and position. The date of birth will not be a mandatory field in the online application form.

The applicant will be required to declare in the new application form that the information provided is complete and correct. There will be no further verification needed unless there is sufficient doubt about the veracity of the information provided. These questions apply to all key personnel and connected persons. In most cases, the only additional information collected will be the actual details of the persons who have a connection with other child care services. The questions relating to history of financial management are relevant for both the current and amended versions of the Eligibility Determination. The inclusion of a broadened definition of key personnel will make it clearer for the applicant, to whom these questions relate, and therefore assist them to complete the application form with correct information.

Approximately four per cent of applicants are individuals/sole traders. Given the vast majority of applicants are organisations rather than individuals, and are therefore already required to provide information in respect of their key personnel, the only additional information required from these applicants will be for them to provide details in the application form against the broadened definition of key personnel (and if applicable other persons connected with the operation). It is expected that the additional time needed to provide the name, date of birth and position within the organisation of the key personnel (or details of connected persons) will be in the order of five to ten minutes, where applicable, given that other information in relation to the key personnel is already collected, i.e. interest in other child care services, history of financial management and criminal history.

Where an entity operates a large number of child care services or has a large number of key personnel, they are likely to be an organisation rather than an individual. Therefore, the requirement to provide information in respect of key personnel already exists. The additional time relates to nominating other key personnel and relevant connect persons not captured under the current Eligibility Determination and providing further details where this applies. It is anticipated that a company that is expanding its interest in the child care industry will have most of this information stored electronically to be re-used. While the initial exercise of providing information about those persons as part of the application process may take some time (it is expected this could take a couple of hours), the provision of this information for later applications by the same applicant will require a review of the persons applicable to each subsequent application and an update of related details. The question of whether, for example a key personnel has become a bankrupt or has criminal proceedings pending before a court, is expected to be known outside of the application for CCB approval process, and therefore be readily available at such time.

Where an applicant is an individual, they will need to nominate their key personnel and other persons relevant to the operations, where questions relating to those persons' current interest, and past involvement, in child care, history of financial management or criminal history are relevant. This brings individual applicants in line with organisational applicants. The additional time taken to provide this information

is directly dependent, for example, on the number of key personnel and their unique histories. In any case, it is expected that an individual operator of a child care service would have detailed knowledge of those persons, including their respective criminal and financial history and experience in child care, given the relevance of these issues to their responsible operation of a child care service. Where the applicant did not already have this information, it is expected that those persons could easily and promptly provide this information to the applicant via email.

The application form will be altered to gather this information, using design principles that make it easy for the applicant to provide the required information. Where an applicant cannot provide all supporting documentation at the time of the lodgement of the application form, the applicant has a further 28 days in which to provide the outstanding documents to the Department.

Additionally, to provide more flexibility to a service, there is provision in the family assistance law for CCB approval to be backdated for up to six months. This provision comes into effect if an operator of a service does not seek approval until after they commence operations, or if they do not provide the necessary documents with their application, such as licence or insurance documentation, possibly due to matters beyond their control.

A decision to approve a service cannot be made until all the conditions for approval are satisfied. Once the Department is satisfied (or has evidence, as the case may be) that all conditions have been met, the service may be approved and the approval may be backdated for a retrospective period of up to six months (even if some or all the conditions were not met during the retrospective period).

The ability to backdate approval for six months or to the date of commencement of operation of the service if that date is earlier than six months ensures that families are entitled to CCB for the care provided from that date.

Although the Eligibility Determination provides the rules for the assessment of an applicant's suitability, it is subsection 195(5) of the Family Assistance Administration Act that allows the Secretary (or delegate) to refuse approval. Subsection 195(5) makes it clear that the Secretary must refuse to approve a child care service if not satisfied of matters specified in subsection 195(1), including that the service satisfies the eligibility rules. The Act provides that where the Secretary refuses to approve a child care service, the Secretary must give the applicant notice of:

- a) the refusal; and
- b) the reasons for the refusal; and
- c) the applicant's rights under the Family Assistance Administration Act to seek a review of the refusal decision.

Where, for example, a member of the applicant's key personnel is assessed as affecting the applicant's suitability, the applicant would have the option to sever the relationship with that person in respect of the provision of child care. The applicant could then resubmit the application for reassessment.

Where an applicant (operator) is found not to be a suitable person and is refused approval, it is anticipated there will generally be alternative applicants of a more suitable calibre ready to apply for CCB approval of the service where demand exists.

Impact on Individuals (Key Personnel)

Individuals working for, or associated with, an applicant, who fit the definition of key personnel, may be required to provide information to the applicant pertaining to their past involvement in child care and financial and criminal history. It is expected that the applicant would already have this information in most instances owing to the relevance and importance of it to the responsible operation of a service.

Where the applicant does not have the information and an individual is required to provide it, the nature of the information suggests this would typically be readily available and easily provided.

Impact on Child Care Services Approved for the Purposes of CCB

The proposed changes to the Eligibility Determination enhance rules that are already in place and add conditions to the Eligibility Determination that were previously administrative requirements.

Currently, to remain approved for the purposes of CCB, a service must perform certain administrative functions as set out in the *Child Care Service Handbook* and satisfy the rules contained in the Eligibility Determination. If a service breaches the requirements set out in the Eligibility Determination, it may be subject to sanctions, including withdrawal of CCB approval, because these rules also apply to continuing approval for CCB.

The vast majority of existing child care services approved for the purposes of CCB are meeting their obligations and conditions for their continued approval and will not be impacted by the proposed amendments. It is anticipated that there will be a very small number of approved child care services that will not satisfy the amended conditions for continued approval. Only where a service commits a serious breach of the conditions for continued approval will the Department consider applying sanctions. These range from imposing additional conditions for continued approval through to the possible suspension or cancellation of a service's approval for CCB purposes. In all instances, the Department is required to give notice to the operator of its intention to impose a sanction and the operator will be given an opportunity to present a case as to why the sanction should not be imposed. The sanction process can be avoided should the operator choose to rectify the non-compliance issue. The suitability of new personnel may also be assessed by the Department when the key personnel of a service change.

There will be no additional administrative burden on services that already operate in accordance with family assistance law and administrative requirements.

The Department supports the reduction of the administrative burden on businesses wherever practicable, as demonstrated by the removal of the requirement to provide 'other appropriate insurance', which is an unnecessary obligation.

Services are supported in understanding their obligations through the *Child Care Service Handbook*, Instruction Sheets, emails and updates on changes as well as the

CCMS Helpdesk - a call centre which exists specifically to assist services with any concerns they may have.

Risks

The insolvency of ABC Learning highlighted the need for greater scrutiny of the suitability of applicants and their associated entities to operate child care services that are approved for the purposes of CCB.

The risk to the Commonwealth if the proposed changes are not made to the Eligibility Determination is that the Department will not be in a position to more fully assess the suitability of child care operators and the child care sector will be at risk of another collapse similar to ABC Learning. The Government's quick and decisive action at the time of the ABC collapse meant that 90 per cent of ABC Learning centres continue to operate for Australian families today. Initially, the Government provided a \$24 million support package to keep ABC centres open while the receiver, McGrathNicol, assessed their operations. A further \$34 million was provided to keep 262 unviable services (known as the ABC 2 Group) operating while the Court Appointed Receiver, PPB, conducted an Expression of Interest process for their sale. This process resulted in the successful sale of 236 of these centres. The Government also provided assistance to support the employee entitlements of some of the ABC workforce.

Had the Government's support not been provided, almost 100,000 families would have had to find alternative care arrangements with little or no notice.

The proposed changes also put in place measures to mitigate any risk to Government outlays due to the mismanagement of child care assistance by unsuitable operators.

There have been no risks identified for child care services.

6. Consultation

Consultation was undertaken in November 2010 with the national child care peak bodies that represent approved child care services in Australia. The peak bodies consulted with their key members before providing feedback to the Department.

The overall feedback received was positive. *Australian Children's Community Services* and *Early Childhood Australia* responded with their full support for the proposals to strengthen eligibility requirements for services. The Department responded to all issues raised through the consultation process (discussed below) and no further issues have been raised by the peak bodies.

The National Childcare Services Forum which met on 16 November 2010 was attended by national child care peak bodies representing the child care sector. The Department addressed the forum and discussed the proposed changes to the Eligibility Determination. Members indicated they had received the Department's responses to their feedback and were satisfied with those responses. No further questions were raised and all comments were positive.

Outlined below is the feedback received through the consultation process and the Department's response:

1. The Childcare Association of Western Australia was of the view that the financial viability of a business (i.e. a child care service) should not be scrutinised as CCB is paid to a service on behalf of families. They suggested that the business agreement is between the service and the family.
 - The examination of the applicant's record of financial management is a requirement in the current Eligibility Determination, where an applicant has a history of providing child care. The insolvency of ABC Learning highlighted the need for the Department to extend this scrutiny to an applicant's financial viability. Changes have been made to the A New Tax System (Family Assistance) (Administration) Act 1999 that will allow financial viability assessments of large Long Day Care child care service providers.
2. The National Association of Multicultural and Ethnic Children's Services asked what provisions are being put in place to ensure that information provided will be able to be understood by families and carers for whom English is not their first language or who do not speak English.
 - The Department is considering ways to better assist operators and families requiring assistance with translation of forms into other languages.

7. Conclusion and recommended options

The proposed changes to the Eligibility Determination will enable the Department to assess the suitability of all entities connected with the operation of a child care service.

The changes to the Eligibility Determination will clarify matters that the Department may take into consideration when assessing the suitability of the applicant and associated entities. This is not only of benefit to the Department, but to operators and potential operators who are, or will be, required to satisfy the conditions for approval and continued approval of the child care service.

These proposed amendments will help protect the Australian Government's significant investment in child care of \$16.4 billion over four years to 2014–15, which will directly assist families with the cost of child care; and provide a more secure environment for Australian children in care.

The changes will not adversely impact on operators or potential operators who are required to satisfy the conditions for approval and continued approval of the child care service.

It is recommended that the Eligibility Determination be amended to incorporate the changes proposed, as outlined above at section 4.

8. Implementation and review

It is proposed that the changes be implemented by the Australian Government through amendments to the Eligibility Determination.

These changes will have a date of effect to coincide with the start of the National Quality Framework.

The Department will implement a communication strategy that will engage all stakeholders, including operators that run child care services approved for the purposes of CCB, immediately following the disallowance period.

All associated resources such as the 'CCB Application Package' for new applicants, the *Child Care Services Handbook*, information on the MyChild website and associated forms will be revised to reflect the changes.

All new applications for approval for the purposes of CCB will be subject to the changes. Child care services currently approved for CCB purposes are regularly monitored by Departmental compliance officers and, where breaches are found, will be subject to the new provisions.

The Department's officers are in frequent contact with child care service providers. Any information they receive from those providers, and any change of frequency and/or type of compliance issues found, will be given consideration in the context of the review of the Eligibility Determination.

Apart from requirements relating to all legislative instruments (e.g. under the *Legislative Instruments Act 2003*), no statutory preconditions needed to be satisfied prior to the making of this instrument.

Explanation of provisions

Sections 1 to 3 of the Amendment Determination are formal provisions. **Section 1** sets out the name of the Amendment Determination. **Section 2** provides that the Amendment Determination commences on 1 January 2012. **Section 3** provides that Schedule 1 amends the Principal Determination.

Section 4 provides that applications for approval of a child care service under Part 8 of the Administration Act that were made before commencement of the Amendment Determination are processed under the provisions of the Principal Determination in force before commencement of the amendments.

Section 5 provides that, despite section 4, amendments made to section 12 of the Principal Determination (insurance requirements) by item 6 of Schedule 1 apply to the applications for approval of a child care service under Part 8 of the Administration Act that were made before commencement of the Amendment Determination but were not determined by the commencement. The amendments make the insurance requirements less onerous.

Schedule 1

The amendments to the Principal Determination are contained in Schedule 1 to the Amendment Determination. The amendments are of three kinds:

- (1) amendments that clarify matters that the Secretary may take into account in deciding whether or not to approve a child care service, and that then become factors relevant to the ongoing eligibility of child care services for approval; and
- (2) amendments consequential to the introduction from 1 January 2012 of the Education and Care Services National Law and National Quality Framework and the cessation of operation by the National Childcare Accreditation Council; and
- (3) minor amendments.

Matters relevant to eligibility for approval of child care services for the purposes of the family assistance law

The need for the Secretary to have the capacity to undertake comprehensive assessment of the suitability of child care operators is emphasised by the growing commercialisation of the child care industry, the increased complexity of child care operators' arrangements to manage the provision of services, the larger amounts of taxpayer money being channelled into child care services, and the increasing number of members of the public for whom child care services are essential. These amendments are part of a suite of actions being taken by the Government to enhance stability in the child care sector, and increase the transparency of arrangements and accountability for key actors in the industry, for the benefit of the Australian community.

Item 3 of Schedule 1 to the Amendment Determination repeals and replaces the definition of *key personnel*. This definition is used in the provisions setting out the matters that the Secretary may take into account in deciding whether an applicant for approval of a child care service, or an operator of an approved child care service, is a suitable person to operate the service.

Paragraphs (b) and (c) of the new definition are materially the same as paragraphs (a) and (b) of the old definition. New paragraph (a) explicitly states that a person who is an officer (as defined in section 9 of the *Corporations Act 2001*) of an applicant or operator is a member of the applicant's or operator's key personnel. While paragraphs (b) and (c) already capture many of the people who are 'officers' as defined, the new paragraph (a) will ensure that passive directors, people outside the organisation with whose instructions the directors of the organisation are accustomed to act in accordance with, and receivers, administrators and liquidators are also regarded as 'key personnel'.

New paragraph (d) of the definition of *key personnel* is intended to capture people with management and supervision of child care services. Some child care operators subcontract the day-to-day management and supervision of their services to other people or companies. It is essential that the Secretary, in assessing the suitability of a child care service operator, is able to have regard to the suitability of the management entity that is actually running the service on a daily basis. Consequently, these management entities are regarded as part of the 'key personnel' of the operator.

Item 4 repeals and replaces the current section 7 of the Principal Determination, which is about the suitability of an applicant for approval of a child care service. Section 7 mandates that an applicant must be a suitable person to operate a child care service, and enumerates the matters that the Secretary must have regard to in determining whether the applicant is suitable. The purpose of the new section 7 is to clarify the matters relevant to suitability of an applicant and to expand the class of people the Secretary can consider when having regard to those matters when assessing the suitability of the applicant.

New subsection 7(1) provides that the applicant for approval of a child care service must be a suitable person to operate a child care service. The subsection does not draw a distinction between applicants who are individuals and applicants that are organisations. Currently, only the key personnel of a non-individual applicant needed to be suitable persons (current subsection 7(2)), with the result that it was difficult for the Secretary to assess organisational health of a non-individual applicant, for example, issues to do with governance or organisational compliance with relevant laws.

New subsection 7(2) sets out the matters that the Secretary can consider when assessing whether an applicant is a suitable person to operate a child care service. The Secretary is not obliged to consider all of these matters in relation to all applicants, but is authorised to consider any of these matters where they are relevant to the applicant's circumstances (e.g. an applicant's record of compliance with child care laws may not be relevant where the applicant has had no prior involvement in the child care industry). Importantly, new subsection 7(2) makes it clear that issues

around an applicant's governance arrangements and record of financial management (paragraphs (c) and (e)) are directly relevant to the question of the applicant's suitability to be an operator of a child care service.

The most significant change to section 7 is the expansion of the class of people that the Secretary might examine in determining whether an applicant is a suitable person to operate a child care service. New subsection 7(3) provides that, in assessing the suitability of an applicant, the matters mentioned in new subsection 7(2) can also be assessed in relation to persons connected with the applicant, where that assessment is relevant to determining the suitability of the applicant. Essentially, where a person (individual or organisation) has a relationship with an applicant that is likely to affect whether and how the applicant will operate a child care service, then the Secretary can examine the matters outlined in new subsection 7(2) in connection with that person. New subsection 7(4) clarifies that the 'person' referred to in subsection (3) includes a partnership or an incorporated body.

Some examples of how new subsection 7(3) operates are set out under the subsection.

Item 8 repeals and replaces subsection 16(1) and (2) of the Principal Determination. New subsection 16(1) provides that an operator of an approved child care service must be a suitable person to operate the service. This is an ongoing condition for eligibility for the service's approval, and so the operator must be suitable at all times for the service to remain approved, or the service may be sanctioned under the family assistance law. In determining whether an approved operator is suitable, the Secretary may consider the matters mentioned in new subsection 7(2) of the Determination – including those matters as applied to people with connections to the applicant mentioned in new subsection 7(3).

Item 9 amends subsections 17(2) and (3) of the Principal Determination to similar effect to **item 8**, although in relation to child care services that have never been approved by the Secretary under Part 8 of the Administration Act, but which are taken to be approved under transitional arrangements made under the *A New Tax System (Family Assistance and Related Measures) Act 2000*.

Amendments relating to the introduction of the Education and Care Services National Law and the National Quality Framework

Sections 14, 14A and 14B of the Principal Determination make it a condition for approval for a centre based long day care service, a family day care service and an outside school hours care service, respectively, that the service be registered with the NCAC as a participant in the child care quality assurance system relevant to the kind of service. The NCAC administers the Quality Improvement and Accreditation System (for centre based long day care services), the Family Day Care Quality Assurance system and the Outside School Hours Care Quality Assurance system. If a service does not satisfy this condition, it cannot be approved for the purposes of the family assistance law.

Once a service is approved for the purposes of the family assistance law, sections 23, 23A and 24A of the Principal Determination make it a condition for continued

approval of the service to participate in the child care quality system for that kind of service. The NCAC assesses approved child care services' progress against the relevant child care quality systems. Sanctions under the family assistance law, including cancellation of the service's approval apply for failure to comply with these conditions.

In December 2009, the Council of Australian Governments agreed to a *National Quality Agenda for Early Childhood Education and Care* that involved the introduction of a new, national quality framework for education and care services replacing the existing Commonwealth, State and Territory child care quality arrangements from 1 January 2012.

The Education and Care Services National Law enacted in Victoria (the law set out in the Schedule to the *Education and Care Services National Law Act 2010* of Victoria), commencing on 1 January 2012, establishes the National Quality Framework and a new statutory authority to oversee its administration (the Australian Children's Education and Care Quality Authority). Other States and Territories will either apply the Education and Care Services National Law as their own law or will enact their own law substantially corresponding to the provisions of the Education and Care Services National Law. The National Quality Framework and its quality standards will replace the quality assurance systems operating for the purposes of the family assistance law administered by the NCAC. The NCAC will cease to operate from that date. Therefore, quality assurance requirements under the family assistance law are no longer needed.

Consequently, **item 7** removes sections 14, 14A and 14B from the Principal Determination, and **item 11** removes sections 23, 23A, 23B, 24A and 24B. **Item 2** make consequential amendments to subsection 3(1) to remove associated definitions.

Under section 11 of the Principal Determination, a service's compliance with 'child care laws', that is with legal requirements of the Commonwealth and the State and Territory governments where the service operates, is the service's condition of approval for the purposes of the family assistance law. The same in substance but slightly differently worded requirement, in subsection 196(3) of the Administration Act, is the condition of the service's continued approval. The relevant legal requirements are those concerning the operation of the service, including the construction of the service's premises and the service's equipment.

Section 11 makes a specific reference to licensing requirements as part of the relevant legal requirements. With the introduction of the Education and Care Services National Law and its application, directly or otherwise, in the States and Territories, the relevant legal requirements for the purposes of section 11 will also include those laws.

Item 5 replaces current section 11 with a new section 11 to align the wording of the 'child care laws' condition of approval with the corresponding condition of continued approval in subsection 196(3) of the Administration Act. The amendment does not result in a substantive change of the condition.

Item 5 also adds a note at the end of section 11 to inform the reader that the law of the State or Territory referred to in that section includes the licensing laws, the Education

and Care Services National Law, the State and Territory law that applies the Education and Care Services National Law as their own law and the State or Territory law that substantially corresponds to the provisions of the Education and Care Services National Law. The note does not provide an exhaustive list of the laws that may be applicable to a service.

Item 1 amends subsection 3(1) of the Principal Determination to insert a definition of the Education and Care Services National Law for the purposes of the note, to mean the Education and Care Services National Law set out in the Schedule to the *Education and Care Services National Law Act 2010* of Victoria.

Minor amendments

Item 6 repeals and replaces subsection 12(1) of the Principal Determination, which mandates that an applicant for approval of a child care service has to have certain insurance. The current subsection 12(1) has two problems: it requires the applicant to have the insurance (even if the insurance was better held by another person, for example, the management company that managed the day-to-day operation of the service); and it requires the applicant to hold ‘other appropriate insurance’ without specifying what was meant by that phrase nor what risk that insurance was supposed to address.

The new subsection 12(1) provides that the applicant must *ensure that the child care service* is covered by the requisite insurance – so the insurance could be held by another person. It also no longer requires the applicant to hold ‘other appropriate insurance’. Nevertheless, the Secretary can still have regard to an applicant’s insurance arrangements in deciding whether or not to approve the service, for example, in considering the applicant’s governance arrangements (new paragraph 7(2)(c)) or ‘any other matter relevant to the suitability of the applicant’ (new paragraph 7(2)(h)). However, the Secretary can do so on a case-by-case basis, where there is some particular risk that the Secretary considers should be insured against.

Item 10 makes amendments to section 19 of the Principal Determination, which obliges operators of approved child care services to notify the Secretary of certain matters. This item repeals paragraphs 19(1)(c) and (d), which provided that the operator of a service needed to notify the Secretary, at least 30 days before, of the change of address of the service given in the application for approval and of the intended cessation of the operation of the service. Paragraph 19(1)(c) has been replaced by the new paragraph 19(1)(c) which provides that any change of address of the service is notified. Paragraph 19(1)(d) is redundant with the enactment of subsection 219M(1) of the Administration Act, dealing with the notification requirements relating to the cessation of operation of an approved child care service.