

## EXPLANATORY STATEMENT

### ***Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)***

#### **Summary**

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)* (the 2015 Amending Determination) is made by the Minister for Social Services under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act) and subsection 33(3) of the *Acts Interpretation Act 1901*.

The 2015 Amending Determination amends the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (Principal Determination) and revokes the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2014 (No.1)* (the 2014 Amending Instrument).

The policy effect of the 2015 Amending Determination is to remove one of the four new eligibility rules for family day care services added to the Principal Determination by the 2014 Amending Instrument. Family day care services must comply with all applicable eligibility rules for approval of their services and for continued approval of their services. These new eligibility rules have been added for the purpose of helping to ensure that approved family day care services continue to provide quality care for children and families and for the better monitoring of approved family day care services.

The three eligibility rules added by the 2015 Amending Determination (which continue three of the four rules added by the now revoked 2014 Amending Instrument) are that:

1. Approved family day care services will only provide care in the state or territory in which the service has its service approval under the Education and Care Services National Law (the National Law), with exemptions available for special circumstances. The purpose of this requirement is to support the monitoring of service operations and carers more efficiently so that children and families continue to receive quality care and education.
2. Any conditions that are imposed on the service's approval by the National Law are conditions that the service must also comply with under the family assistance law. The purpose of this requirement is to ensure a consistent approach to approval conditions where these are imposed by a state or territory Regulatory Authority and

to assist Regulatory Authorities and the Secretary in monitoring services' compliance with the imposed conditions.

3. Family day care services must attribute all sessions of care to a specific carer by using the Service Provider Personnel ID assigned to that particular carer in the service's registered software product in all reports of sessions of care. The purpose of this requirement is to allow for monitoring of the accuracy of information provided by approved family day care services in regard to the carer who has provided the care.

The new eligibility rule added by the 2014 Amending Instrument, but which is revoked on commencement of the 2015 Amending Determination, is that:

Carers do not obtain sessions of care for their own children by other carers of a family day care service. The purpose of this requirement is to ensure that family day care is being delivered in line with its original intent, which is flexible home-based care that can give parents the opportunity to care for their own children at home, while also caring for other people's children.

The 2015 Amending Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

## **Background**

Division 1 of Part 8 of the Administration Act provides for the approval, for the purposes of the family assistance law, of child care services by the Secretary. Under subsection 205(1) of the Administration Act, the Minister may determine (by legislative instrument) rules relating to the eligibility of child care services to become approved (paragraph 205(1)(a)) and to continue to be so approved (paragraph 205(1)(b)). It is a condition for the approval of a child care service that the service satisfies any eligibility rules relating to the eligibility of the service to become approved (paragraph 195(1)(c)) and a condition for the continued approval of a child care service that the service satisfies any eligibility rules relating to the eligibility of the service to continue to be approved (subsection 196(1)). The Principal Determination contains both kinds of eligibility rules. A failure of an approved child care service to comply with the rules relating to the service's eligibility to continue to be approved may lead to the Secretary imposing one or more sanctions on the service under section 200 of the Administration Act. These sanctions include, among others, suspension or cancellation of the service's approval.

The amendments in the 2015 Amending Determination relate to approved family day care services, which are services that predominantly provide care to an individual's child, or children, in the residence of the carer during the normal business days of the working week.

These services may also operate within flexible hours to provide care to children of, for example, parents who work shift work hours.

The amendments are being made to: help ensure that family day care service operators provide appropriate supervision of carers in their state or territory and that services remain compliant with the requirements of the National Law and the family assistance law; assist the monitoring of care that is attributed to a particular carer who actually provided the session(s) of care in reports submitted on sessions of care; and better enable the state and territory Regulatory Authorities and the Secretary to monitor the compliance activities of family day care services.

The 2014 Amending Instrument, registered on 3 December 2014, included a requirement that 'services ensure their carers do not obtain a session of care for their children from a carer in any family day care service on a day on which the family day care carer provides any session of care to a child'. The Government has determined that this requirement should be removed from the Principal Determination at this time to allow for further consultation with the Family Day Care sector on the implications of this requirement.

## **Consultation**

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the 2015 Amending Determination as the amendments are effectively amendments of a minor nature and do not substantially alter existing arrangements (OBPR ID) 17765, dated 30 January 2015.

The 2014 Amending Instrument, registered on 3 December 2014, included a requirement that 'services ensure their carers do not obtain a session of care for their children from a carer in any family day care service on a day on which the family day care carer provides any session of care to a child'. The Government has determined that this requirement should be removed from the Principal Determination at this time to allow for further consultation with the Family Day Care sector on the implications of this requirement.

## **Regulation**

The 2015 Amending Determination inserts three new eligibility rules into the Principal Determination. These three new rules set out in the Summary section of this Explanatory Statement are additional eligibility rules that will apply to family day care services:

1. A requirement that services only operate in the same state or territory where approval has been granted by the state or territory Regulatory Authority;
2. A requirement to comply with conditions on a service's approval imposed under the National Law; and
3. A requirement that session(s) of care be attributed to an educator's Service Provider Personnel ID.

The above three rules will apply as eligibility rules for the continued approval of all family day care services from the commencement of the 2015 Amending Determination. These three rules will also be eligibility rules for a service to become approved for all applications for approval under the family assistance law made by persons who operate, or propose to operate, a family day care service on and after the 2015 Amending Determination commences. These rules continue the corresponding rules inserted by the 2014 Amending Instrument and in effect from 4 December 2014 until the day the 2015 Amending Determination commences.

The majority of family day care services that already comply with these new requirements will not experience an increased regulatory burden as a result of these changes.

## Explanation of Provisions

**Sections 1 to 3** of the 2015 Amending Determination are formal provisions.

**Section 1** sets out the name of the 2015 Amending Determination, the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)*. **Section 2** provides that the 2015 Amending Determination commences on the day after it is registered. **Section 3** provides that the Schedule to the 2015 Amending Determination amends the Principal Determination.

**Section 4** revokes the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2014 (No.1)*

**Section 5** provides that any family day care service that was approved on 4 December 2014 and had been approved before that day has until 3 June 2015 to comply with the new eligibility rule in paragraph 10(1A)(e) of the Principal Determination as amended. This continues the transitional arrangement for this provision in subsection 4(2) of the 2014 Amending Instrument.

This transitional arrangement allows approved family day care services which currently have carers providing care in a state or territory other than the state or territory for which they have service approval for the service under the National Law six months to make arrangements to comply with the new rule.

### Schedule

**Item [1]** inserts three new definitions into section 3 of the Principal Determination.

These new definitions are:

- *Regulatory Authority*, which has the same meaning as in the National Law. This is the relevant agency in each state or territory jurisdiction that issues provider approvals and service approvals to applicants under the National Law;
- *service approval*, which has the same meaning as in the National Law. This is the approval that is issued by the relevant Regulatory Authority under the National Law to an approved provider and which authorises the approved provider to operate the service;
- *Service Provider Personnel ID*, which is a unique alphanumeric identifier in the registered software identifying an individual.

**Item [2]** is a technical amendment. It omits the word 'and' from the end of paragraph 10(1A)(c). This is needed as Item 4 adds three new paragraphs after paragraph 10(1A)(d).

**Item [3]** inserts three new paragraphs after 10(1A)(d) and also inserts a new subsection 10(1AA).

New subsection 10(1AA) provides that the term ‘FDC carer’ as used in subsection 10(1A) means any individual employed or contracted by a family day care service to provide care on the service’s behalf.

The three new paragraphs 10(1A)(e) to (g) are as follows.

New paragraph 10(1A)(e) requires an applicant for approval of a family day care service to undertake that the service’s family day care carers will only to provide sessions of care within the State or Territory in which the service has a current service approval. The note to this paragraph indicates that the Secretary may determine an exemption to this rule (under paragraph 205(3)(a) of the Administration Act), for example, where a family day care service is operating in a border town.

New paragraph 10(1A)(f) requires an applicant for approval of a family day care service to undertake that the service will comply with any conditions in the service approval granted by the Regulatory Authority.

New paragraph 10(1A)(g) requires an applicant for approval of a family day care service to undertake that, as soon as the registered software the service uses allows for this, the services will:

- ensure each FDC carer is listed in the ‘service personnel’ field of the registered software and is assigned a Service Provider Personnel ID in the registered software; and
- ensure the Service Provider Personnel ID is included in each section 219N report of a session of care the FDC carer provides for the service.

**Item [4]** substitutes a new section 16A into the Principal Determination.

Section 16A requires approved child care services to comply with certain undertakings as an eligibility rule an approved child care service must comply with to continue to be approved for the purposes of the family assistance law.

Subsection 16A(1) continues to require approved child care services to comply with the undertakings the operator of the service gave under subsections 8(2), 9(2) and 13(1) of the Principal Determination.

Paragraphs 16A(2)(a), (c) and (d) also continue to require approved child care services to comply with the undertakings of the operator of an approved centre based long day care service, an occasional care service or an outside school service gave under subsections 10(1), 10(2) and 10(3) of the Principal Determination, respectively.

The above requirements are not changed by the 2015 Amending Determination.

Paragraph 16A(2)(b), however, requires operators of approved family day care services to comply with all the undertakings in subsection 10(1A) of the Principal Determination, regardless of whether the operator gave the undertaking (that is, at the time the operator applied for approval of its child care service). That is, the new requirements in paragraphs 10(1A)(e) to (g) apply to all approved family day care services on and from the day the Amending Determination commences, subject to the transitional arrangements for paragraph 10(1A)(e) in section 5 of the 2015 Amending Determination.

## Statement of Compatibility with Human Rights

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

### ***Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)***

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)* 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 Legislative Instrument**

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)* (the 2015 Amending Determination) amends the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000*, (the Principal Determination) which provides for rules that a proposed operator of a child care service must comply with in order to be approved, and continue to be approved for the purposes of family assistance law.

The 2015 Amending Determination is made by the Minister for Social Services under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act) and subsection 33(3) of the *Acts Interpretation Act 1901*.

The 2015 Amending Determination inserts three new eligibility rules for family day care services into the Principal Determination. These new requirements have been added for the purpose of helping to ensure that approved family day care services continue to provide quality care for children and families and for better monitoring of approved family day care services.

These rules are as follows:

- Approved family day care services will only provide care in the State or Territory in which the service has its service approval under the Education and Care Services National Law (the National Law), with exemptions available for special circumstances.
- Any conditions that are imposed on the service's approval by the National Law are conditions that the service must also comply with under the family assistance law.
- Family day care services must attribute all sessions of care to a specific carer by using the Service Provider Personnel ID assigned to that particular carer in the service's registered software product in all reports of sessions of care.



The above three rules will apply as eligibility rules for the continued approval of all family day care services from the commencement of the 2015 Amending Determination. These three rules will also be eligibility rules for a service to become approved for all applications for approval under the family assistance law made by persons who operate, or propose to operate, a family day care service on and after the 2015 Amending Determination commences. The majority of family day care services already comply with these new requirements.

## **Human rights implications**

The Determination engages the following rights:

- Rights of the child under the *Convention on the Rights of the Child* (CRC), particularly Article 18(2)
- Right to protection against arbitrary and unlawful interferences with privacy, family and home under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR)

### *Rights of the Child*

Article 3 of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration and Article 18(2) of the CRC requires States Parties to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and ensure the development of institutions, facilities and services for the care of children.

The Amending Determination establishes three new eligibility rules for family day care services to comply with. These new requirements engage the rights of the child and have been added for the purpose of helping to ensure that approved family day care services continue to provide quality care for children and families and to ensure better monitoring of approved family day care services; outcomes which are consistent with promoting the rights of the child.

In particular, the 2015 Amending Determination provides that approved family day care services may only provide care in the State or Territory in which the service has approval under the National Law (subject to certain exemptions in special circumstances). This measure is intended to ensure that service operations and carers can be appropriately monitored to ensure that children and their families receive an appropriate standard of care and education which is consistent with promoting the rights of the child.

Further, the 2015 Amending Determination provides that any conditions that are imposed on a service's approval by the National Law will be conditions that the service must also

comply with under the family assistance law. The purpose of this requirement is to ensure a consistent approach to approval conditions where these are imposed by State or Territory Regulatory Authorities and to assist Regulatory Authorities and the Secretary in monitoring services' compliance with the imposed conditions. The consistent approach to approval conditions and monitoring of services will ensure the quality and consistency of care across services, which is in the best interest of the children being cared for and therefore promotes the rights of the child.

In addition, family day care services will be required to attribute all sessions of care to a specific carer by using the Service Provider Personnel ID assigned to that particular carer in the service's registered software product in all reports of sessions of care. The purpose of this requirement is to allow for monitoring of the accuracy of information provided by approved family day care services in regard to the carer who has provided the care. To the extent that such a measure engages the rights of the child, it promotes that right by ensuring accountability and transparency where child care services supported by government, are provided to children.

The 2015 Amending Determination is compatible with the rights of the child.

#### *Right to privacy*

Article 17 in the ICCPR provides the right to protection against arbitrary and unlawful interferences with privacy, family and home. Australia interprets the term 'unlawful' as being taken to mean that no interference should occur except in cases envisaged by the law and the law itself must comply with the provisions, aims and objectives of the ICCPR. Interference provided for by law can be arbitrary if the law is not in accordance with the provisions, aims and objectives of the ICCPR and is not reasonable in the particular circumstances. The Australian Government has accepted that the term 'arbitrary' could encompass interferences which although lawful, would be 'unreasonable'. 'Reasonable interferences' with privacy are measures based on reasonable and objective criteria which are proportional to the purpose for which they are adopted.

The rule in the 2015 Amending Determination that requires family day care services to attribute all sessions of care to a specific carer by using the Service Provider Personnel ID assigned to that particular carer and to report this information to the Department constitutes the use, collection, storage and sharing of personal information, and accordingly, engages the right to privacy.

The purpose of this rule in the 2015 Amending Determination is to allow for the monitoring of, and assurance that, care is being accurately reported to the Department, and that calculations by the Department, of fee reduction payments for care based on this

information, can be done accurately. The rule in the 2015 Amending Determination permissibly limits the right in Article 17 of the ICCPR because it is an appropriate and measured response against this objective. This rule is precisely defined and suitably qualified to ensure that it carefully targets the issue that it seeks to address. Further, there are a number of safeguards in place in relation to the information that is collected under this new rule of the 2015 Amending Determination. The family assistance law imposes a secrecy regime on all information about a person collected by an officer for the purposes of the family assistance law and held in the records of the department or in the records of the Department of Human Services. This affords a considerably higher level of protection to such information than is imposed under the *Privacy Act 1988*. For example, the purposes for which such information may be disclosed are strictly regulated (sections 162, 167 and 168, *A New Tax System (Family Assistance)(Administration) Act 1999*) and unauthorised use or disclosure of 'protected information' is an offence (for example, see section 164 of the *A New Tax System (Family Assistance)(Administration) Act 1999*).

To the extent that the right to privacy is limited, the limitation is reasonable and proportionate and as such, the 2015 Amendment Determination is compatible with the right to privacy.

## **Conclusion**

The 2015 Amending Determination is compatible with human rights because it advances the protection of human rights, particularly the rights of the child and to the extent that it places a limitation on human rights (the right to privacy), that limitation is reasonable and proportionate.