**EXPLANATORY STATEMENT**

***Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015***

**Summary**

The *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the new Determination) is made by the Minister for Social Services under subsection 49(3) of the *A New Tax System (Family Assistance) Act 1999*(the Family Assistance Act). The new Determination revokes the *A New Tax System (Family Assistance) (Child Care Benefit – Children in respect of whom no-one is eligible) Determination 2006* (the revoked Determination), under subsection 33(3) of the *Acts Interpretation Act 1901*.

The new Determination maintains the rule in the revoked Determination that if a session of care is provided by a family day care (FDC) carer or in-home carer to their own child or their partner’s child, the child is in the class of children in respect of whom no-one is eligible for child care benefit (CCB).

The new Determination inserts a new provision specifying another class of children in respect of whom no-one is eligible for CCB. This class (the specified class) applies to a Family Tax Benefit (FTB) child or regular care child of an FDC carer or the partner of an FDC carer, who is enrolled for care at an approved FDC service and is provided care by another FDC carer, where a session of care is given on a day on which the FDC carer is providing care to another child on behalf of an approved FDC. The new Determination also specifies four circumstances in which a child would not be included in the specified class. In any of these circumstances, an eligible individual may claim CCB for the care provided to their own child by an approved FDC service through another FDC carer on a day that the individual or their partner is providing care as an FDC carer. The four specified circumstances are:

1. A child is an *eligible disability child* or an *eligible ISS child*. This applies if either the child has been diagnosed within the last 24 months as having one of the disabilities listed in Schedules 1 or 2 of the new Determination, and documentary evidence of this has been provided to the approved FDC service providing care to the child, or if the child is being provided sessions of care by an approved family day care service receiving payment of an amount of Inclusion Support Subsidy for that child because the child is undergoing continuous assessment of disability, as provided for in the Inclusion and Professional Support Program Guidelines for 2013-2016.
2. A child is a *remote area child*. This applies if the child resides in ‘remote Australia’ or ‘very remote Australia’ in accordance with the *Australian* *Statistical Geography Standard (ASGC) Volume 5 – Remoteness Structure*, July 2011 (cat. no. 1270.0.55.005), and documentary evidence of the child’s residence has been provided to the approved FDC service providing care to the child.
3. An FDC carer is required to work for at least 2 hours on the care day in paid work which is not for an approved FDC service. Documentary evidence must be provided to the approved FDC service providing care to the child.
4. An FDC carer is enrolled in a programme or course of education or training towards a recognised qualification (at Certificate III level or above) provided by a Registered Training Organisation (RTO), or is engaged in activities for the purposes of the programme or course on the care day. Documentary evidence of their enrolment and/or engagement in the programme or course must be provided to the FDC service.

The purpose of the new specified class is to ensure that FDC is being delivered in line with its original intent, that is, flexible home-based care that can give parents the opportunity to care for their own children at home, while also being remunerated for caring for other people’s children. The policy intent was not that FDC carers should be paid CCB for their own child(ren) to be cared for by an approved FDC service (in another FDC carer’s home) on a day when the FDC carer is providing care on behalf of an approved FDC service by which they are employed, contracted or otherwise engaged.

Definitions have been included to define the terms used in the new Determination. They are: ‘*eligible disability child’*, *‘eligible ISS child’*, ‘*FDC carer’*, ‘*IHC carer’, ’Inclusion and Professional Support Program Guidelines for 2013-2016’,* ‘*Inclusion Support Subsidy’*, ‘*remote area child’* and ‘*RTO*’. These are described in full in the Explanation of Provisions.

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

**Background**

In December 2014 four new eligibility rules affecting all new and approved FDC services were added to the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Eligibility Determination). One of these eligibility rules required all new and approved FDC services to ensure that their FDC carers did not obtain sessions of care for their own child on the same day the FDC carer was working as an FDC carer. This rule was to take effect for already approved FDC services on 3 February 2015. However, following concerns raised by Family Day Care Australia and individual FDC carers, as well as representations from some Members of Parliament, this rule was omitted from the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015* *(No.1*), which commenced on 3 February 2015.

The amendments in the new Determination have been made to help ensure that, unless one or more of the specified circumstances applies, CCB will not be payable for a session(s) of care obtained by an FDC carer or his or her partner for the carer’s or the partner’s own child from an approved FDC service (through another FDC carer) on a day when the FDC carer is providing care to other children on behalf of an approved FDC service.

The new Determination applies to all new or existing approved FDC services and takes effect from the new Determination’s commencement date, which is 12 October 2015.

The new specified class in the new Determinationrelates to other instruments which are intended to be registered at the same time – the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)* (the Eligibility Determination 2015) and *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping Amendment Rules 2015 (No.1)* (the Record Keeping Rules 2015).

The following terms in the family assistance law may assist in understanding the background to the new Determination:

*Approved child care service*

An ‘approved child care service’ includes a ‘family day care service’ and an ‘in-home care service’ (as defined in subsection 3(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act)).

*Family day care service*

An approved FDC service is a service that predominantly provides care to an individual’s child, or children, in the residence of the carer (the FDC carer) during the normal business days of the working week. This type of service may also operate within flexible hours to provide care to children of, for example, parents who work shift work hours.

*In-home care service*

An in-home care service is another kind of approved child care service. In-home care is a form of child care where care is provided to a child in the child’s home by an in-home carer. The operator of the in-home care service supports and administers a network of in-home carers, and individual carers may be employed, contracted or otherwise engaged by the operator of the service.

*Eligibility for care provided to own child*

Division 4 of Part 3 of the Family Assistance Act sets out the provisions relating to an individual’s eligibility for CCB. An individual is eligible for CCB in respect of a session of care provided by an approved child care service if, amongst other things, the child is an FTB child or a regular care child of the individual or the individual’s partner (paragraphs 42(1)(a) and 44(1)(a) of the Family Assistance Act refer).

‘*FTB child’* and ‘*regular care child’*; are defined in subsection 3(1) of the Family Assistance Act.

*Limitations on eligibility for child care benefit*

Subsection 49(3) of the Family Assistance Act (*Exempt class of children*) provides that the Minister may determine that children included in a specified class are children in respect of whom no-one is eligible for CCB under Division 4, Part 3 of the Family Assistance Act.

**Consultation**

The FDC sector was advised in February 2015 that further consultation would be undertaken before introducing any new rules to replace the rule revoked in the Eligibility Determination on 2 February 2015.

Possible amendments to the Eligibility Determination were discussed with key stakeholders in the child care sector during February and March 2015 and at a meeting held on 26 March 2015 with FDC peak bodies representing the FDC sector. There was a broad level of support to preserve the reputation of the FDC sector by addressing ‘sharp practices’, but at the same time the FDC sector wanted to avoid unintended consequences for individual children and carers. They requested consideration of legitimate circumstances which would allow CCB to be claimed for sessions of care obtained for their own child by FDC carers on any day when they are working as an FDC carer on behalf of an approved service. These specified circumstances are now set out in subsection 8(2) of the new Determination.

FDC services will be informed by email of the changes when the new Determination is registered and they will be asked to inform all their FDC carers of the changes. A fact sheet explaining the changes will also be posted on the Department of Social Services’ website.

A review of the efficacy of the new Determination, including seeking the views of stakeholders, will be undertaken prior to 1 July 2016.

**Regulation**

A consequence of making changes in the new Determination is that amendments are required to be made to two other disallowable instruments. The requirement on FDC services to request information, record it in the register, update the register and provide the register to the Secretary of the Department of Social Services when requested is contained in the amendments made by the Eligibility Determination 2015 to the Eligibility Determination. The register and supporting documentation are records to be kept as specified in the amendments made by the Record Keeping Rules 2015 to the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Rules 2006*.

A minor regulatory burden will be imposed on FDC services through this new Determination as, under the Eligibility Determination (as amended), services will be required to seek additional information and documents from the relevant individual and enter the details in a register if the individual informs the FDC service that any one of the four specified circumstances specified in subsection 8(2) of the new Determination applies.

Another minor regulatory burden will be imposed on FDC services through this new Determination where a service has not previously applied for funding under the Inclusion Support Subsidy on behalf of an FDC carer with a child undergoing assessment of disability. A small number of FDC services may now decide to apply for the Inclusion Support Subsidy so a child, or children being provided sessions of care by the service, are not included within the specified class.

The regulatory burden of the new measures to be implemented by the new Determination, the Eligibility Determination 2015 and the Record Keeping Rules 2015 was costed across all three instruments as there are interlinking requirements for information to be obtained and records to be created and kept. The anticipated total cost of regulation requirements imposed under all three legislative instruments is around $5,000 per annum, potentially involving up to six FDC services which may now submit an application for the Inclusion Support Subsidy and up to 300 FDC carers for whom FDC services will have to complete the register, where applicable.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the new Determination as the amendments are effectively amendments of a minor nature and do not substantially alter existing arrangements (OBPR ID 19117, dated 5 May 2015).

**Explanation of Provisions**

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

**Section 1** sets out the name of the new Determination, the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015.* **Section 2** provides that the new Determination commences on 12 October 2015. **Section 3** provides that the new Determination revokes the *A New Tax System (Family Assistance) (Child Care Benefit – Children in respect of whom no-one is eligible) Determination 2006*.

**Section 4** sets out the definitions of the new Determination:

* *eligible disability child*, which means a child who has been diagnosed by a qualified medical practitioner as suffering from one or more of the conditions listed in Schedule 1, or by a registered psychologist as suffering from one or more of the conditions listed in Schedule 2, and documentary evidence of the diagnosis has been provided to the approved family day care service providing care to the child and the diagnosis was made within a period of 24 months before the documentary evidence is given to the service.
* *eligible ISS child*, which means a child who is being provided sessions of care by an approved family day care service receiving payment of an amount of Inclusion Support Subsidy for that child because the child is undergoing continuous assessment of disability, as provided for in the Inclusion and Professional Support Program Guidelines for 2013-2016. This does not apply if the service is receiving an amount of Inclusion Support Subsidy because the child comes from a refugee or humanitarian intervention background. It also does not apply if the child has been diagnosed as having a disability, as any such child is an ‘eligible disability child’ (see previous definition).
* *FDC carer,* which means an individual who is employed, contracted or otherwise engaged to provide session/s of care to a child on behalf of an approved FDC service (noting that the term ‘educator’ is generally used by the sector rather than ‘carer’).
* *IHC carer*, which means an individual who is employed, contracted or otherwise engaged to provide session/s of care to a child on behalf of the approved IHC service.
* *Inclusion and Professional Support Program Guidelines for 2013-2016* which means the guidelines of that name made for the Inclusion and Professional Support Program administered by the Department of Social Services.
* *Inclusion Support Subsidy* which means the subsidy of that name provided under the Inclusion and Professional Support Program administered by the Department of Social Services.
* *remote area child,* which means a child who is an FTB child or regular child of an individual, where the child resides in an area designated as ‘remote Australia’ or ‘very remote Australia’ as determined in accordance with the *Australian* *Statistical Geography Standard (ASGC) Volume 5 – Remoteness Structure*, July 2011 (cat. no. 1270.0.55.005), and documentary evidence of the child’s residence has been provided to the approved FDC service providing care to the child.
* *RTO* (or ‘Registered Training Organisation’), which has the same meaning as in the *National Vocational Education and Training Regulator Act 2011*.

**Section 5** provides that, for the purposes of subsection 49(3) of the Family Assistance Act, the children included in the classes of children specified in sections 6, 7 or 8, are children in respect of whom no-one is eligible for CCB under Division 4 of Part 3 of the Family Assistance Act.

**Section 6** provides that no-one is eligible for CCB in respect of a session of care provided to a child if the session of care is provided by an FDC carer, and the child is an FTB child or regular care child of the FDC carer or the partner of the FDC carer. For example, in a situation where a child is an FTB child of a resident mother and non-resident father, and the mother provides care to the child in her capacity as an FDC carer, section 6 means that

no-one, including both the mother and the father, is eligible for CCB for sessions of care provided by the mother.

**Section 7** provides that no-one is eligible for CCB in respect of a session of care provided to a child if the session of care is provided by an IHC carer and the child is an FTB child or regular care child of the IHC carer or the partner of the carer.

**Section 8** provides that no-one is eligible for CCB in respect of a session of care provided to a child who is in the class specified by the section. The class is specified as explained below.

Subsection 8(1) provides that a child is included in the specified class if, in relation to a specific session of care:

* the child is an FTB child or regular care child of an FDC carer or the FDC carer’s partner; and
* the session of care is provided by an approved family day care service (other than through the FDC carer) on a day on which the FDC carer provides care to other children on behalf of an approved FDC service;

*unless* one (or more) of the four circumstances set out in subsection 8(2) applies.

The four circumstances set out in subsection 8(2) are:

* the child is an eligible disability child or an eligible ISS child;
* the child is a remote area child;
* the FDC carer is required to work for at least 2 hours on the care day in paid work which is not for an approved FDC service, and documentary evidence that the FDC carer usually works at the time the session of care is provided has been provided to the FDC service; or
* the FDC carer is enrolled in a programme or course of education or training towards a recognised qualification (at Certificate III level or above) provided by a Registered Training Organisation and is engaged in activities for the course or programme on the care day, and documentary evidence that the FDC carer usually studies at the time the session of care is provided has been provided to the FDC service.

For a child to be an eligible disability child or an eligible ISS child (with the result that the child is not included in the class of children in respect of whom no one is eligible specified in section 8), the approved family day care service must have been given documentary evidence of the child’s diagnosis, and the diagnosis must have been obtained within a period of 24 months prior to the provision of the documentary evidence (for an eligible disability child – see the definition of eligible disability child in section 3), or the approved family day care service must have documentary evidence that an amount of Inclusion Support Subsidy is being paid to the service in respect of the child (for an eligible ISS child – see paragraph 10A(3)(b) of *the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* as amended by the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No. 2)*).

For any of the other three specified circumstances to apply (with the result that the child is not included in the class of children in respect of whom no one is eligible specified in section 8), it is necessary that documentary evidence of the circumstance has been provided to the service that is providing care to the child (see the definition of remote area child in section 3 and subparagraphs 8(2)(c)(ii) and 8(2)(d)(iii)).

**Schedule 1** lists the conditions that may be diagnosed by a qualified medical practitioner for the purposes of paragraph (a) of the definition of ‘eligible disability child’ in section 3.

**Schedule 2** lists the conditions that may be diagnosed by a registered psychologist for the purposes of paragraph (b) of the definition of ‘eligible disability child’ in section 3.

**Statement of Compatibility with Human Rights**

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

***Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015***

The *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* 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 (Children in respect of whom no-one is eligible) Determination 2015* (the new Determination)revokes, under subsection 33(3) of the *Acts Interpretation Act 1901,* the *A New Tax System (Family Assistance)* (*Child Care Benefit – Children in respect of whom no-one is eligible) Determination 2006* (the revoked Determination). The revoked Determination specifies the classes of children in respect of whom no-one is eligible for child care benefit (CCB) for care provided to a child by a child care service that is approved for the purposes of family assistance law.

The new Determination is made by the Minister for Social Services under subsection 49(3) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act)*.*

The new Determination continues the specified classes in the revoked Determination which have the effect that, if a session of care is provided by an FDC carer or in-home carer to their own child or their partner’s child, the child is in the class of children in respect of whom no-one is eligible for CCB.

The new Determination also specifies an additional class of children in respect of whom no-one is eligible for CCB. This provision (section 8) provides that an FTB child or regular care child of an FDC carer or that carer’s partner, who is enrolled for care at an approved FDC service and is provided care by that service (through another FDC carer), is a child in respect of whom no-one is eligible for CCB for care, if the session of care is provided on a day that the FDC carer is providing any care on behalf of an approved FDC (subsection 8(1)), unless one of four circumstances apply (subsection 8(2)).

Children who are not included in this class of children may be eligible to receive CCB – for example, this includes sessions of care provided by an approved family day care (FDC) service to the Family Tax Benefit (FTB) child or regular care child of an FDC carer or that carer’s partner:

* on a day on which the FDC carer does not provide any sessions of care and sessions of care; or
* on a day on which the FDC carer does provide any session of care, if one (or more) of the four circumstances set out in subsection 8(2) applies.

Four circumstances in subsection 8(2) are:

* if the child is an ***eligible disability child*** or an ***eligible ISS child*** – these apply if either the child has been diagnosed as having one of the disabilities listed in Schedules 1 or 2 of the new Determination, and documentary evidence of this has been provided to the approved FDC service providing care to the child, or if the child is being provided sessions of care by an approved family day care service receiving payment of an amount of Inclusion Support Subsidy for that child because the child is undergoing continuous assessment of disability, as provided for in the Inclusion and Professional Support Program Guidelines for 2013 -2016;
* if the child is a ***remote area child*** – this applies if the child resides in ‘remote Australia’ or ‘very remote Australia’ in accordance with the *Australian* *Statistical Geography Standard (ASGC) Volume 5 – Remoteness Structure*, July 2011 (cat. no. 1270.0.55.005), and documentary evidence of the child’s residence has been provided to the approved FDC service providing care to the child;
* if the FDC carer is required to work for at least 2 hours on the care day in paid work which is not for an approved FDC service. The FDC carer must provide documentary evidence that they usually work at the time that the session is provided to the approved FDC service providing care to the child;
* if the FDC carer is enrolled in a programme or course of education or training towards a recognised qualification (at Certificate III level or above) provided by a Registered Training Organisation, and is engaged in activities for the purposes of the programme or course on the care day. The FDC carer must provide documentary evidence of their enrolment and/or engagement in the programme or course to the FDC service, including evidence that the FDC carer usually studies at the time the session of care is provided.

The purpose of inserting the additional specified class set out in section 8 is to ensure that FDC is being delivered in line with the policy intent for this type of care. FDC is intended to be 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 policy intent is not that FDC carers or their partner should be able to claim CCB to care for their child in their own home, or for the child to be cared for by another FDC carer, except in specified circumstances on a day when they are providing care to other people’s children.

**Human rights implications**

Together with two related instruments, the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)* (the Eligibility Determination 2015) and *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping Amendment Rules 2015 (No.1)* (the Record Keeping Rules 2015), the new 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)
* Right to work under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

*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 State 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 new Determination is one of three disallowable instruments that establish new requirements with which FDC services must comply to be approved or continue to be approved for the purposes of family assistance law. The purpose of these eligibility rules is to ensure that FDC is being delivered in line with the policy intent for this type of care, that is, flexible home-based care that can give parents the opportunity to care for their own children at home, while being remunerated for caring for other people’s children. The policy intent was not that FDC carers should be paid CCB for their own child or children to be cared for by an approved FDC service (in another FDC carer’s home) on a day when the FDC carer is providing care on behalf of an approved FDC service by which they are employed, contracted or otherwise engaged.

These new requirements do not engage the rights of the child as FDC carers (or their partner) will still be able to access FDC care for their child, even if the child is in the class of children set out in section 8 of the new Determination. However, they will not be eligible for CCB for this care unless they are able to provide documentary evidence of specified circumstances when their child is enrolled with a FDC service, or when updating the register held by that service.

FDC carers (or their partner) can obtain sessions of care from an approved child care service through another FDC carer and receive CCB for care of their own child on days when they are not working as a carer on behalf of a FDC service. They can also obtain sessions of care in another care type, such as long day care, occasional care or outside school hours care (whether or not they are working as an FDC carer on any particular day) and receive CCB for this care.

Taking into account the other options available to FDC carers (or their partner) and the specified circumstances that apply to children who are not in the class of children set out in the new Determination, the new requirements are 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 new Determination specifies circumstances in which an FTB child who is considered not to be in the class of children in respect of whom no-one is eligible which (under the related requirements imposed by the Eligibility Determination 2015) requires personal information to be provided by an eligible individual to an FDC service when enrolling their child. The amendments in the Eligibility Determination 2015 specifies that the FDC service will request that an individual who provides information or documents to the service will authorise the service in writing to disclose the information and documents to the Secretary of the Department of Social Services.

To the extent that the right to privacy is limited and there is informed consent for disclosure (if required), the limitation is reasonable and proportionate and the new Determination is compatible with the right to privacy.

*Right to work*

Article 6 of the ICESCR requires that a person has a right to work, which includes the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses or accepts, and appropriate steps are taken to safeguard this right.

The Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. Some FDC carers and services (claiming on their carers’ behalf) may experience some loss of income as a result of FDC carers or their partners no longer being able to receive CCB for their own children to be provided care by an approved FDC service on a day when they are providing care to other children on behalf of an approved service. However, the measures being implemented do not remove the right of an FDC carer, or their partner, to work or to access FDC for their own child.

**Conclusion**

The new Determinationis compatible with human rights, particularly the rights of the child and the right to work. To the extent that it places a limitation on the right to privacy, that limitation is reasonable and proportionate.