

## EXPLANATORY STATEMENT

### ***Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)***

#### **Summary**

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)* (the 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 Amending Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. It amends the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (Principal Determination).

The Amending Determination adds new requirements to the Principal Determination with which family day care (FDC) services must comply for approval of their services and continued approval of their services. These new requirements have been added to require FDC services to, among other things, collect certain information to help ensure that the Secretary will have the necessary information to determine whether FDC carers (or their partners) are entitled to child care benefit (CCB) for a session(s) of care obtained for the carer's (or partner's) own child from an approved FDC service (provided through another FDC carer) on a day when the FDC carer is providing care to other children on behalf of an approved FDC service. FDC carers or their partners are not entitled to CCB for these sessions of care unless specified circumstances apply. These specified circumstances are set out in subsection 8(2) of the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the No-one is Eligible Determination 2015).

The new requirements are that:

1. An approved FDC service will ensure that for each of its FDC carers that has a Department of Human Services' Customer Reference Number (CRN), the CRN is entered into the registered software as soon as the registered software the service uses allows the service to do so.
2. An approved FDC service must, within 7 days of the care date (i.e. the enrolment date for future child enrolments, or the date the No-one is Eligible Determination 2015 commences), ask if each individual who is determined by the Secretary to be conditionally eligible for CCB by fee reduction for the child (the eligible individual), or the eligible individual's partner, is employed, contracted or otherwise engaged to provide sessions of care on behalf of any approved FDC service as an FDC carer.

Services must also ask each eligible individual to inform the service if, in the future, the individual or the individual's partner becomes an FDC carer.

3. If the eligible individual or their partner is an FDC carer and states that the eligible individual or their partner is an FDC carer, or if the service becomes aware of this through other means, and if the eligible individual informs the service that specified circumstances apply (i.e. that the child in question is an eligible disability child or a remote area child or the FDC carer has a work or study obligation of the kind set out in paragraphs 8(2) (c) or (d) of the No-one is Eligible Determination 2015), the service must, within 7 days of becoming aware, request information and documents relating to the specified circumstance(s). The information and documents are:
  - a. the name of the eligible individual and his or her partner (if any)
  - b. the name and CRN (if any) of the FDC carer
  - c. if the eligible individual is not the FDC carer, the CRN (if any) of the eligible individual
  - d. the CRN of the child
  - e. the name of the approved FDC service where the FDC carer works
  - f. the days and times of sessions of care that the FDC carer ordinarily provides on behalf of an approved FDC service
  - g. documentary evidence of the specified circumstance(s).
4. The approved FDC service is required to ask the eligible individual to inform the service if their situation changes that would result in the provision of different information or documents. The FDC service must request that this be provided within 7 days of the change in circumstances.
5. The approved FDC service is required to record any information, as described above, that is provided in response to the request for information and documents relating to specified circumstance(s) in a register in a form approved by the Secretary of the Department of Social Services. The approved FDC service must also record the day on which the service enters the information in the register, and the day on which the service is given or sees documentary evidence. The service is required to update the information in the register as required and provide it to the Secretary, if requested.
6. The approved FDC service must keep any document provided in response to the request for documents relating to specified circumstance(s).
7. Similar arrangements apply if the service is aware that the eligible individual or their partner is an FDC carer and states that the eligible individual or their partner is an FDC carer and the child is an eligible ISS child (that is, the service receives payment of an Inclusion Support Subsidy in relation to the child and the basis for that payment is that the child is undergoing continuous assessment of disability). In this case, the service must have the documentary evidence that it is receiving payment of Inclusion Support Subsidy in relation to the child. It must record that information and the information mentioned in paragraphs 3 a. to 3 f. above in the register mentioned in

paragraph 6, above. The service must also update that information if any of it changes.

The Amending Determination commences upon commencement of the No-one is Eligible Determination 2015, which commences on 12 October 2015.

## **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.

In December 2014 four new eligibility rules affecting all new and approved FDC services were added to the Principal 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 they were working as a carer. This was to discourage FDC carers from being paid CCB (or CCR) for the care of their own child by an approved FDC service (acting through another FDC carer) on any day when the FDC carer was working as an FDC carer. This rule was to commence 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 Principal Determination by 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 Amending Determination introduce new eligibility rules relating to care of an FDC carer's child by another FDC carer on behalf of an approved FDC service, to strengthen the Australian Government's policy intent around FDC carers not being paid CCB (or CCR) for the care of their own children by an approved FDC service. The purpose of these new eligibility rules 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.

The measures being implemented by the Amending Determination relate to measures being implemented in the No-one is Eligible Determination 2015 and the A New Tax System (Family Assistance) (Administration) (*Child Care Benefit – Record Keeping*) Amendment Rules 2015 (No.1) (the Record Keeping Rules 2015). It is intended that all three legislative instruments will be registered on the same day.

## **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 *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)* on 2 February 2015.

Possible amendments 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.

FDC services will be informed by email of the changes when the Amending 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 Amending Determination, including seeking the views of stakeholders, will be undertaken prior to 1 July 2016.

## **Regulation**

The regulatory burden of the new measures to be implemented by the Amending Determination, the No-one is Eligible 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 Amending Determination as the amendments are effectively amendments of a minor nature and do not substantially alter existing arrangements (OBPR ID 19116, dated 5 May 2015).

## Explanation of Provisions

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

**Section 1** sets out the name of the Amending Determination, the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)*. **Section 2** provides that the Amending Determination commences on the day the No-one is Eligible Determination 2015 commences (which is 12 October 2015). **Section 3** provides that the Schedule to the Amending Determination amends the Principal Determination.

## Schedule

**Items [1] and [2]** amend section 3 of the Principal Determination by omitting the definitions after the definition of 'registered software' and inserting a number of new definitions. These new definitions are:

- *care date*, which is the later of the date the No-one is Eligible Determination 2015 commences and the date that a child is enrolled for care by the service;
- *CRN*, which is the active Customer Reference Number issued by the Department of Human Services to parents and children;
- *eligible disability child* which has the same meaning as in the No-one is Eligible Determination 2015. This applies to a child who has been diagnosed as suffering from one or more of the conditions listed in Schedule 1 of the No-one is Eligible Determination 2015, by a qualified medical practitioner, or from one or more of the conditions listed in Schedule 2 of the No-one is Eligible Determination 2015, by a registered psychologist, 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 has the same meaning as in the No-one is Eligible Determination 2015, which is 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;
- *eligible individual*, which means an individual whom the Secretary has determined to be conditionally eligible for CCB by fee reduction under section 50F of the Family Assistance Administration Act;
- *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 (it is noted that the term 'educator' is generally used by the sector rather than 'carer'; but these terms are intended to mean the same thing);
- *FDC child*, which means a child who is enrolled for care to be provided by a FDC service and who is the FTB child or regular care child of an FDC carer or the partner of an FDC carer;
- *Inclusion Support Subsidy*, this definition refers to the definition in the No-one is Eligible Determination 2015 – the subsidy is a payment made under the Inclusion and Professional Support Program administered by the Department of Social Services;
- *Regulatory Authority*, which has the same meaning as in the Education and Care Services National Law;
- *remote area child*, which has the same meaning as in the No-one is Eligible Determination 2015, which is a FTB child or regular care child where there is documentary evidence of the child's residence in an area designated as 'remote Australia' or 'very remote Australia' as determined in accordance with the Australian Statistical Geographical Standard (ASGS);
- *service approval*, which has the same meaning as in the Education and Care Services National Law; and
- *Service Provider Personnel ID*, which means a unique alphanumeric identifier in registered software identifying an individual – this is referred to in paragraph 10(1A)(g) of the Principal Determination.

**Item [3]** omits all the subsections after subsection 10(1) and before subsection 10(1B) of the Principal Determination. The Item inserts paragraphs 10(1A)(a) to 10(1A)(h) into the Principal Determination. Paragraphs 10(1A)(a) to (g) consolidate the provisions in the current version of the Principal Determination.

New paragraph 10(1A)(h) requires that approved FDC services ensure that, for each of its FDC carers that have a CRN, the CRN is entered into the registered software used by the service, as soon as the registered software provides the service the capability to do so.

**Item [4]** inserts new section 10A. Subsection 10A(1) provides that approved FDC services are to ask an eligible individual (with the meaning as defined in section 3) within 7 days of the care date if the eligible individual or the individual's partner is employed, contracted or otherwise engaged to work as an FDC carer. Further, the eligible individual is asked to advise the service, if, in the future, the eligible individual or the eligible individual's partner becomes an FDC carer. This is to assist in the determination of whether the enrolled child is included in a class of children in respect of whom no-one is eligible for CCB under Division 4 of Part 3 of the Family Assistance Act (see the No-one is Eligible Determination 2015); specifically, whether the child is in a class of children who are being cared for by an approved FDC service (in another FDC carer's home) on a day when the eligible individual or their partner is providing care for other people's children on behalf of an approved FDC service.

New subsection 10A(2) provides that where an FDC service becomes aware that an eligible individual (or his or her partner) is an FDC carer, the service will, within 7 days of becoming aware, request the information and documents set out in subsection 10A(4) if the eligible individual informs the approved FDC service that any of certain specified circumstances set out in the No-one is Eligible Determination 2015 applies in relation to one or more sessions of care the service has provided, is providing, or will provide.

These specified circumstances are:

- the FDC child meets the definition of eligible disability child, as defined in the No-one is Eligible Determination 2015;
- the FDC child meets the definition of remote area child, as defined in the No-one is Eligible Determination 2015;
- 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 is usually required to work at the time the session of care is provided has been provided to the FDC service (see paragraph 8(2)(c) of the No-one is Eligible Determination 2015); 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 (see paragraph 8(2)(d) of the No-one is Eligible Determination 2015).

New subsection 10A(3) provides that if an FDC service becomes aware that an eligible individual (or his or her partner) is an FDC carer and the child is an eligible ISS child (which the service will know because it receives payment of an amount of Inclusion Support Subsidy in relation to the child) because the child is undergoing continuous assessment for a disability (see the definition of 'eligible ISS child' in the No-one is Eligible Determination 2015)), the service must request the information in paragraphs 10A(4)(a) to (g) from the eligible individual and record this information in the register mentioned in subsection (6) and also record in the register documentary evidence that the child is an eligible ISS child.

New subsection 10A(4) details the information and documents an FDC service is required to request of eligible individuals where a specified circumstance(s) identified in subsection 10A(2) applies:

- (a) the name of the eligible individual and the eligible individual's partner (if any)
- (b) the name of the FDC carer
- (c) the CRN (if any) of the FDC carer
- (d) the CRN of the eligible individual (if the eligible individual has one) if the eligible individual is not an FDC carer
- (e) the CRN of the FDC child
- (f) the name of the approved FDC service where the FDC carer works i.e. the name of the approved FDC service for which the eligible individual (or the eligible individual's partner, whoever is an FDC carer) works. The approved FDC service may be the service at which the eligible individual has enrolled the child, or another approved FDC service
- (g) the days and times of the sessions of care that the FDC carer (who is either the eligible individual or the eligible individual's partner) ordinarily provides at the approved FDC service where the FDC carer works. The approved FDC service may be the service the eligible individual has enrolled the child in, or another approved FDC service.

A reader's note is provided stating that documentary evidence for the purposes of subparagraph 10A(4)(j)(i) could include a copy of an enrolment form. Documentary evidence for the purposes of subparagraph 10A(4)(j)(ii) could include an employment contract or a payslip.

New subsection 10A(5) provides that, in addition to requesting that eligible individual to provide the information and documents required in subsection 10A(2) or paragraph 10A(3)(a), the service will also request that the eligible individual inform the service of any changes in circumstances that would result in different information or documents being provided to the service, and to request the individual to, within 7 days of the change occurring, provide the service with the different information or documents.



New subsection 10A(6) provides that an approved FDC service is required to record in a register (in a form approved by the Secretary) the details required under subsection 10A(2), paragraph 10A(3)(a) or subsection 10(5) in addition to recording the day the service has entered the information on the register and the day the service has been given or has seen the documentary evidence that is required under subsections 10A(2) or 10A(5).

New subsection 10A(7) provides that an approved FDC service must within 7 days of being notified that Inclusion Support Subsidy is no longer being paid in relation to an eligible disability child, record that fact and any other relevant information in the register.

New subsection 10A(8) requires that the approved FDC service keep the documents provided in response to a request under subsection 10A(2), paragraph 10A(3)(a) or required to be provided under subsection 10A(5). If applicable, the service will keep a copy of any of the documentary evidence mentioned in paragraph 10A(3)(b) or any notification of the kind mentioned in subsection (7).

New subsection 10A(9) requires the approved FDC service to request an individual providing the information and/or documents to provide written authorisation that the service may disclose the information/documents to the Secretary (when requested).

**Item [5]** provides that paragraph 16A(2)(b) of the Primary Determination is to be substituted with a new paragraph 16A(2)(b) to provide that approved FDC services must, in order to continue to be approved for the purposes of the family assistance law, comply with all undertakings in subsection 10(1A) and section 10(A) whether or not the operator has given the undertakings.

## 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) Amending Determination 2015 (No.2)***

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amending Determination 2015 (No.2)* (Amending Determination) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Legislative Instrument**

The 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 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 Amending Determination adds new requirements to the Principal Determination with which family day care (FDC) services must comply for approval of their services and continued approval of their services under family assistance law. These new requirements have been added to require FDC services to, among other things, collect certain information to help ensure that the Commonwealth will have the necessary information to determine whether FDC carers (or their partners) are entitled to child care benefit (CCB) for a session(s) of care obtained for the carer's (or partner's) own child from another approved FDC service on a day when the carer (or partner) is providing care to other children on behalf of an approved FDC service. FDC carers or their partners are not entitled to CCB for these sessions of care unless specified circumstances apply.

The specified circumstances are set out subsection 8(2) of the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the No-one is Eligible Determination 2015) and are:

- the eligible individual's child is an eligible disability child or eligible ISS child (as these terms are defined in that instrument);
- the eligible individual's child is a remote area child (as defined in that instrument);

- 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 is usually required to work 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.

The new requirements are that:

1. An approved FDC service will ensure that for each of its FDC carers that has a Department of Human Services' Customer Reference Number (CRN), the CRN is entered into the registered software as soon as the registered software the service uses allows the service to do so.
2. An approved FDC service must, within 7 days of the care date (i.e. the enrolment date for future child enrolments, or the date the No-one is Eligible Determination 2015 commences), ask if each individual who is determined by the Secretary to be conditionally eligible for CCB by fee reduction for the child (the eligible individual), or the eligible individual's partner, is employed, contracted or otherwise engaged to provide sessions of care on behalf of any approved FDC service as an FDC carer. Services must also ask each eligible individual to inform the service if, in the future, the individual or the individual's partner becomes an FDC carer.
3. If the eligible individual or their partner is an FDC carer and states that the eligible individual or their partner is an FDC carer, or if the service becomes aware of this through other means, and if the eligible individual informs the service that specified circumstances apply (i.e. that the child in question is an eligible disability child or a remote area child or the FDC carer has a work or study obligation of the kind set out in paragraphs 8(2) (c) or (d) of the No-one is Eligible Determination 2015), the service must, within 7 days of becoming aware, request information and documents relating to the specified circumstance(s). The information and documents are:
  - a. the name of the eligible individual and his or her partner (if any)
  - b. the name and CRN (if any) of the FDC carer
  - c. if the eligible individual is not the FDC carer, the CRN (if any) of the eligible individual
  - d. the CRN of the child
  - e. the name of the approved FDC service where the FDC carer works
  - f. the days and times of sessions of care that the FDC carer ordinarily provides on behalf of an approved FDC service
  - g. documentary evidence of the specified circumstance(s).

4. The approved FDC service is required to ask the eligible individual to inform the service if their situation changes that would result in the provision of different information or documents. The FDC service must request that this be provided within 7 days of the change in circumstances.
5. The approved FDC service is required to record any information, as described above, that is provided in response to the request for information and documents relating to specified circumstance(s) in a register in a form approved by the Secretary of the Department of Social Services. The approved FDC service must also record the day on which the service enters the information in the register, and the day on which the service is given or sees documentary evidence. The service is required to update the information in the register as required and provide it to the Secretary, if requested.
6. The approved FDC service must keep any document provided in response to the request for documents relating to specified circumstance(s).
7. Similar arrangements apply if the service is aware that the eligible individual or their partner is an FDC carer and states that the eligible individual or their partner is an FDC carer and the child is an eligible ISS child (that is, the service receives payment of an Inclusion Support Subsidy in relation to the child and the basis for that payment is that the child is undergoing continuous assessment of disability). In this case, the service must have the documentary evidence that it is receiving payment of Inclusion Support Subsidy in relation to the child. It must record that information and the information mentioned in paragraphs 3 a. to 3 f. above in the register mentioned in paragraph 6, above. The service must also update that information if any of it changes.

The Amending Determination commences upon commencement of the No-one is Eligible Determination 2015, which commences on 12 October 2015.

## **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)
- 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 Amending Determination establishes new eligibility rules with which FDC services must comply to be approved or continue to be approved for the purposes of the 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, 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 eligibility rules 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 the No-one Eligible Determination 2015. However, they will not be eligible for CCB for this care.

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 circumstances in subsection 8(2) of the No-one Eligible Determination which provide that a child is not within the class of children in respect of whom no-one is eligible in subsection 8(1), 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 requirement in the Amending Determination for FDC services to request and record information about individuals working as carers in approved FDC services who have a child who satisfies paragraphs 8(2)(a) or (b) of the No-one is Eligible Determination 2015, or who themselves satisfy paragraphs 8(2)(c) or (d) of the No-one is Eligible Determination 2015, and for services to report this information to the Department constitutes the use, collection, storage and sharing of personal information, and accordingly, engages the right to privacy. However, the Amending Determination 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.

The purpose of this eligibility rule in the Amending Determination is to allow for the monitoring of, and assurance that, care is being accurately reported to the Department of Social Services, and that calculations by the Department of amounts of CCB that should be paid for care based on this information, can be done accurately. The rule in the 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 in the Amending Determination. This includes that the *Privacy Act 1988* applies in relation to the management by the service of information collected by the service for the purposes of the eligibility rule. Any information collected by the service under section 10A and provided by the service to the Secretary will, once it is obtained and recorded by the Commonwealth, be subject to the confidentiality provisions in sections 161 to 168 of the Family Assistance Administration Act.

To the extent that the right to privacy is limited, the limitation is reasonable and proportionate and the Amending 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 Amending Determination is 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.