

EXPLANATORY STATEMENT

A New Tax System (Family Assistance) (Administration) (Child Care Benefit - Record Keeping) Amendment Rules 2015 (No. 1)

Summary

The *A New Tax System (Family Assistance) (Administration) (Child Care Benefit - Record Keeping) Amendment Rules 2015 (No. 1)* (Record Keeping Rules 2015) is made by the Secretary of the Department of Social Services under subsection 219F(3) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) and pursuant to subsection 33(3) of the *Acts Interpretation Act 1901*. The Record Keeping Rules 2015 is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and amends the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Rules 2006* (Record Keeping Rules 2006).

The Record Keeping Rules 2015 adds a new record keeping requirement for approved family day care (FDC) services. The Record Keeping Rules 2015 commences upon commencement of the *Child Care Benefit (Children in respect of whom No-one is eligible) Determination 2015* (No-one is Eligible Determination 2015). That instrument commences on 12 October 2015.

Background

An ‘approved child care service’ is a service approved under subsection 195(1) of the Family Assistance Administration Act. An applicant seeking approval must specify which one of the five kinds of child care service they wish to operate, and there are five kinds, namely: long day care, in home care, outside school hours care, occasional care and FDC.

Under the family assistance law, an individual may be eligible for child care benefit (CCB) in relation to care provided by an ‘approved child care service’ to a child. An individual who is eligible may be entitled under the family assistance law to payments in the form of CCB, which is means tested, and/or the child care rebate (CCR), which is not means tested. In most cases, payments of CCB are made to the approved service providing care to the child and the service is required, under the family assistance law, to pass on the amount of CCB paid to the service to the individual within a specified time.

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) by the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.1)*. 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 an FDC 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 *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)* (the Eligibility Determination 2015) will 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 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.

The measures being implemented by the Eligibility Determination 2015 and by the Record Keeping Rules 2015 relate to a new measure being implemented in the No-one is Eligible Determination 2015. It is intended that all three legislative instruments will be registered on the same day.

Changes to the Record Keeping Rules

As a part of the Australian Government's broader policy of ensuring Commonwealth assistance is appropriately targeted, and to support amendments made to the Eligibility Determination by the Eligibility Determination 2015, the Record Keeping Rules 2015 substitutes section 7 of the Record Keeping Rules 2006.

The new subsection 7(1) is identical to subsection 7(1) in the current Record Keeping Rules 2006. It requires approved FDC services to keep current records of the name, address and telephone number of each carer employed, contracted or otherwise engaged by the service, and the address and telephone number of the premises where the care is not provided in the carer's residence.

The new subsection 7(2) is a new provision and requires approved FDC services to keep any records provided to or created by the service for the purposes of section 10A of the Eligibility Determination. Such records are required if subsection 8(2) of the No-one is Eligible Determination 2015 applies in respect of an individual and a child.

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 Eligibility Determination 2015 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 Record Keeping Rules 2015, including seeking the views of stakeholders, will be undertaken prior to 1 July 2016.

Regulation

The changes made to the Rules involve a minor regulatory burden.

The regulatory burden of the new measures to be implemented by the Record Keeping Rules 2015, the No-one is Eligible Determination 2015 and the Eligibility Determination 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 Record Keeping Rules 2015 as they are amendments of a minor nature and do not substantially alter existing arrangements (OBPR ID 19118, dated 5 May 2015).

Explanation of Provisions

Name of Rules

Section 1 states the name of the Record Keeping Rules 2015, the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Amendment Rules 2015 (No. 1)*.

Commencement

Section 2 provides that the Record Keeping Rules 2015 commences upon the commencement of the No-one is Eligible Determination 2015.

Amendment of the Record Keeping Rules 2006

Section 3 provides that the Schedule amends the Record Keeping Rules 2006.

Schedule

The Schedule substitutes section 7 of the Record Keeping Rules 2006.

Subsection 7(1) is identical to the current subsection 7(1) in the Record Keeping Rules 2006.

Subsection 7(2) is a new provision that requires an approved family day care service to keep any records provided to or created by the approved family day care service for the purposes of section 10A of the Eligibility Determination.

Statement of Compatibility with Human Rights

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

A New Tax System (Family Assistance) (Administration) (Child Care Benefit - Record Keeping) Amendment Rules 2015 (No. 1)

The *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Amendment Rules 2015 (No. 1)* (the Record Keeping Rules 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 Record Keeping Rules 2015 is made by the Secretary of the Department of Social Services under subsection 219F(3) of the *A New Tax System (Family Assistance) (Administration) Act 1999* and pursuant to subsection 33(3) of the *Acts Interpretation Act 1901*.

The Record Keeping Rules 2015 amends the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Rules 2006* (Record Keeping Rules 2006) by inserting a new subsection 7(2). This is done by substituting the whole of section 7.

Subsection 7(1) of the substituted section 7 is identical to subsection 7(1) of the current Record Keeping Rules 2006.

Subsection 7(2) of the substituted section 7 is a new provision. It requires approved family day care (FDC) services to keep any records provided to or created by the service for the purposes of new section 10A being inserted into the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (Eligibility Determination) by the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)*. These records include, but are not limited to: documentary evidence of a medical or psychological diagnosis that the child is suffering from a condition listed in Schedules 1 or 2 of the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (No-one is Eligible Determination); documentary evidence the service has that it is receiving payments of Inclusion Support Subsidy in relation to a child undergoing diagnosis for a disability; or documentary evidence of a child's residential address and remote area status; or documentary evidence of an FDC carer's other work, study or training commitments on any days when they are also providing care on behalf of an FDC service. The service must request this information, if it applies, from the FDC carer (or partner). This documentary

evidence will only apply in situations where an approved FDC service provides care to a child of an FDC carer or the FDC carer's partner on a day when the FDC carer provides child care on behalf of an approved child care service and one of the circumstances in subsection 8(2) of the No-one is Eligible Determination applies.

Human rights implications

Together with the Eligibility Determination 2015 and the No-one is Eligible Determination 2015, the Record Keeping Rules 2015 engage 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 Record Keeping Rules 2015 add new requirements to the Record Keeping Rules 2006 with which approved FDC services must comply for approval and continued approval of their services under 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 they are in the class of children set out in the No-one is 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 an FDC 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 is 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 new subsection 7(2) of the Record Keeping Rules 2006 that approved FDC services must keep certain records about FDC carers or their partners and their child (who is being provided care by another FDC carer while they are providing care to other children on behalf of an approved FDC service) relates to new provisions in new section 10A in the Eligibility Determination 2015 and in section 8 of the No-one is Eligible Determination 2015. These requirements engage the right to privacy. However, new section 10A in the Eligibility Determination 2015 provides that approved FDC services will request that an individual who provides information or documents to the service for the purposes of section 10A authorise in writing the service to disclose the information and documents to the Secretary of the Department of Social Services.

The purpose of the related obligation in new section 10A in the Eligibility Determination 2015 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 amounts of CCB that should be paid for care based on this information, can be done accurately. New section 10A in the Eligibility Determination 2015 permissibly limits the right in Article 17 of the ICCPR because it is an appropriate and measured response to 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 by the service under section 10A of the Eligibility Determination 2015. 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 section 10A. 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 under the Eligibility Determination 2015 and the limitation is reasonable and proportionate, the amendment to the Record Keeping Rules 2006 is considered 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 by the Record Keeping Rules 2015 and the related Eligibility Determination 2015 and the No-one is Eligible Determination 2015 do not remove the right of an FDC carer, or their partner, to work or to access FDC for their own child.

Conclusion

The Record Keeping Rules 2015 are compatible with human rights. To the extent that the amendment places a limitation on the right to privacy, that limitation is reasonable and proportionate.