

EXPLANATORY STATEMENT

Child Care Benefit (Children in respect of whom no-one is eligible) Amendment Determination 2016

Summary

The *Child Care Benefit (Children in respect of whom no-one is eligible) Amendment Determination 2016* (the Amendment Determination) is made by the Minister for Education and Training under subsection 49(3) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act).

The Amendment Determination amends the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the current Determination), under subsection 33(3) of the *Acts Interpretation Act 1901*. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The purpose of the Amendment Determination is to expand existing classes of children with respect to whom no-one is eligible for child care benefit (CCB) and therefore also child care rebate (CCR) by including children cared for by a sibling, or a parent (even in circumstances where the child is not the FTB child or regular care child of the carer or the partner of the carer).

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

Background

The Family Assistance Act sets out the criteria to determine an individual's eligibility for CCB, which is a payment towards a family's child care costs. Subdivision A of Part 3, Division 4 of the Family Assistance Act states that an individual is eligible for CCB for a session of care provided by an approved child care service to a child if, among other things, the individual or the individual's partner, has incurred a liability to pay for the session of care.

Subsection 49(3) of the Family Assistance Act provides that the Minister may, by legislative instrument, determine that children specified in a certain class are children in respect of whom no-one is eligible for CCB. Eligibility for CCB is part of an individual's eligibility for CCR and so the amendments also impact CCR.

The Amendment Determination makes two key amendments:

- clarifying that there is no individual eligible for CCB when the individual or the individual's partner provides care to their own child, irrespective of whether the child is the "FTB child" or the "regular care child", by broadening the definition of child in respect of whom no-one is eligible for CCB to include biological, adopted or foster care children, or a child whom the carer, or the carer's partner, has a legal responsibility towards;
- expanding the classes of children for whom no-one is eligible for CCB, to consist of children being cared for by a sibling (including step and half siblings).

The Amendment Determination would build on the existing provision in the current Determination that ensures that no-one is eligible for child care fee assistance where the child is the FTB or regular care child of the family day care (FDC)/ in-home care (IHC) educator or their partner. The amendment addresses an existing weakness whereby a child can become the FTB or regular care child of a person other than the parent, and Commonwealth fee assistance is subsequently administered for care provided by the parent to their own or their partner's child. The current Determination does not contemplate such a practice, although this is clearly contrary to the policy intent.

Consultation

Consultations were held on 23 August 2016 and 5 September 2016 including with FDC peak bodies and other stakeholders from the broader child care sector. Exposure drafts of proposed changes were presented and discussed. There was a broad level of support for the measure and agreement that changes were necessary to address practices that are inconsistent with the policy intent of child care fee assistance.

Regulation

The regulatory impact of implementing these changes is negligible. The vast majority of child care services and those who depend on them will not have to change their standard business practices in order to comply.

The intent of Commonwealth child care fee assistance is for the subsidised provision of formal care for children where there a genuine liability is incurred for that care. The nature of informal care is that it would occur with or without subsidisation. Care provided by a parent or sibling is not child care of the kind that CCB was established to subsidise.

These measures will only adversely affect those child care operators that have based their business model on providing informal, domestic type care, or other services, that are inconsistent with the established policy intent. The specific exclusion of FDC and IHC services administering CCB and other fee assistance for informal care will not affect the availability or quality of care provided to children.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Amendment Determination as the amendments are effectively amendments of a minor nature and do not substantially alter existing arrangements (OBPR ID 21198, dated 01 September 2016).

Statement of Compatibility with Human Rights

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

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This Legislative Instrument 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*.

Background

The *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) introduced Child Care Benefit (CCB), which is a payment towards a family's child care costs. Subdivision A of Part 3, Division 4 of the Family Assistance Act states that an individual is eligible for CCB for a session of care provided by an approved child care service to a child if, among other things, the individual or the individual's partner, has incurred a liability to pay for the session of care.

In situations where family day care (FDC) or in-home care (IHC) is claimed to be provided to a child by a parent or sibling of the child, there will be, other than in very rare circumstances, no liability incurred by the individual because of the informal and domestic nature of that care.

The clarification of ineligible classes of children for the purposes of CCB will more closely align Commonwealth fee assistance with genuine, formal child care arrangements as intended. Commonwealth fee assistance is not intended to be available for circumstances where informal child care arrangements are occurring, that is, the policy intent was not that FDC or IHC carers would be paid CCB for informal domestic care that would occur irrespective of a true fee liability, such as in where older siblings could naturally be expected to care for younger siblings.

Specific exclusion of informal domestic arrangements relating to care provided to a child by parents or siblings of the child is required to give effect to the requirement in the Family Assistance Act that an individual must have incurred a liability to pay for the session of care to be eligible for CCB by fee reduction.

Subsection 49(3) of the Family Assistance Act provides that the Minister may, by legislative instrument, determine that children specified in a certain class are children in respect of whom no-one is eligible for CCB.

Human rights implications

The Amendment 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 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 Amendment Determination clarifies and expands the existing classes of children in respect of whom no-one is eligible for CCB. The purpose of this expansion is to ensure that FDC and IHC are delivered in line with the policy intent for these types of care. The policy intent was not that FDC carers would be paid CCB for informal domestic care that would occur irrespective of a true fee liability, such as in circumstances where older siblings could naturally be expected to care for younger siblings. Similarly, no individual should be eligible for CCB where an IHC carer is providing care to their own child or sibling, or a child or sibling of their partner.

These amendments are compatible and reinforce the rights of the child as they are aimed at ensuring only genuine commercial child care is subject to Commonwealth fee assistance.

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. The amendments reinforce this commitment by ensuring child care fee assistance is only paid in circumstances of true liability for a genuine commercial fee.

Conclusion

The Amendment Determination is compatible with human rights, particularly the rights of the child and the right to work.

Senator the Hon Simon Birmingham, Minister for Education and Training

Explanation of the provisions

Sections 1 to 5 set out the name, commencement time, authority, and application provisions. Notably the application provision clarifies that the limitations on eligibility proposed by the changes only apply to sessions of care that occur from commencement onwards.

The Schedule

Item 1 inserts a new definition for “foster-care child” to refer to a definition in section 5B of the *Social Security Act 1991*. A new note quotes that definition. The term is used in the amendments to sections 6 and 7 of the current Determination.

Items 2 and 3 expand two existing classes of children with respect to whom no-one is eligible for CCB, relating to children who are cared for in family day care (FDC) services and in-home care (IHC) services.

Following these amendments, no one will be eligible for CCB for a child for a session of care where the child’s relationship to an FDC/IHC carer or the partner of the FDC/IHC carer is as one or more of the following:

- (i) an FTB child; or
- (ii) a regular care child; or
- (iii) a foster care child; or
- (iv) a biological or adopted child; or
- (v) a brother, sister, half-brother, half-sister, step-brother or step-sister; or
- (vi) a child for whom there is legal responsibility as referred to in paragraphs 22(5)(a) and (b) of the *A New Tax System (Family Assistance) Act 1999*.

Item 4 makes a minor typographic amendment to the heading in section 8.