

EXPLANATORY STATEMENT

Child Care Benefit (Session of Care) Amendment Determination 2017

Summary

The *Child Care Benefit (Session of Care) Amendment Determination 2017* (the Amendment Determination) is made by the Minister for Education and Training under section 9 of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act).

The Amendment Determination amends the *Child Care Benefit (Session of Care) Determination 2016* (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.

Section 9 of the Family Assistance Act is a power to define the term “session of care”, which are periods of child care in respect of which child care payments are able to be made. The Amendment Determination limits the kinds of care that can be taken to be a “session of care”. The amendments state that care provided by an approved Family Day Care (FDC) service cannot constitute a “session of care” where reported fees involve amounts which have not incurred a genuine fee liability and where the rate of child care benefit (CCB) that would otherwise be payable would be the special grandparent (GCCB) rate or the special rate applicable where a child is at risk or an individual is in hardship (SCCB). The Amendment Determination states that care, in these circumstances, is not a “session of care” where the hourly fee for that care exceeds what the Secretary considers to have incurred a genuine liability with an individual, or exceeds a prescribed “maximum amount” (\$12.67 per hour from commencement and \$12.84 from 1 July 2017). An exception applies if the Secretary considers that, despite exceeding the maximum amount, the fees reflect a genuine legal liability with the individual and the fee is the usual fee of the service.

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

Background

An individual (or, in limited circumstances, a service) is only eligible for CCB, which is a payment to contribute towards actual fees incurred for child care, in respect of the provision of a “session of care” by an approved child care service (see sections 43, 44 and 47 of the Family Assistance Act). Section 9 of the Family Assistance Act requires the Minister to determine what constitutes a “session of care” through a legislative instrument. The Amendment Determination sets out the meaning of a “session of care” for this purpose.

The Amendment Determination will address a number of what the Australian Government perceives as “sharp practices” undertaken by some FDC services: in particular, the reporting of GCCB and SCCB sessions of care at inflated fees to attract higher rates of Commonwealth child care payments. These practices are inconsistent with the intent of the family assistance law and the policy intent of child care fee assistance to only subsidise genuine, commercial child care fees that have been incurred by individuals.

The Amendment Determination includes new provisions that prescribe when care that has been provided by an FDC service is not a session of care for which GCCB and SCCB would otherwise be payable. A session of care is not a session of care for the purposes of the family assistance law where the hourly fees reported in relation to GCCB or SCCB exceed what the Secretary considers to have incurred a genuine liability with an individual, or exceed the maximum amount of \$12.67 per hour (indexed to \$12.84 on 1 July 2017). An exception is provided where the Secretary considers that, despite exceeding the maximum amount, the fee is not more than the fee the service would charge if the GCCB or SCCB rate did not apply and the fees have incurred a genuine legal liability with the individual.

The Amendment Determination reinforces, for FDC services, the existing requirement that the fees charged by all approved child care services for sessions of care that attract GCCB and SCCB rates must be no more than the service’s usual fee. It also clarifies that fee assistance is only payable where a person has incurred a genuine legal liability for the care.

The Amendment Determination is consistent with subsections 43(1) and 44(1) of the Family Assistance Act which provides that, amongst other things, for an individual to be eligible for CCB, the individual, or the individual’s partner must have incurred a liability to pay for the session of care. A liability to pay that fee must already have been incurred irrespective of whether any child care payment is subsequently made by the Australian Government to reduce some or all of that liability. That is, the arrangement between the service and the individual must be one that is commercial in nature, and requires the payment of fees in return for child care.

Section 219BB of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) already provides that a service providing care to a child for whom an individual is eligible for GCCB must ensure that the fees set for the session of care do not exceed the amount of the fees that the service would charge for the same session of care for the same child if that rate did not apply. Section 219BC of the Family Assistance Administration Act places the same obligation on services in respect of SCCB.

Consultation

Consultations were held on 24 November 2016 including with FDC peak bodies and other stakeholders from the broader child care sector. Further detailed consultations were held during January 2017 with FDC peaks bodies. There was broad agreement that changes were necessary to address practices that are inconsistent with the policy intent of child care fee assistance. The consultations with FDC peaks resulted in the instruments being refined.

Regulation

The regulatory impact of implementing these changes is negligible. The instrument reinforces the existing obligations imposed on services to ensure that fees reported are accurate and are those that an individual genuinely incurs a liability for, and in no event should the fees exceed the usual fee the service would charge if that rate were not applicable. That is, FDC services which are already complying with existing provisions of the family assistance law will not have to change their business practices to ensure their periods of child care continue to be “sessions of care” as defined for child care payments purposes.

These measures will only adversely affect those child care operators that inflate hourly rates to attract Commonwealth fee assistance, which is inconsistent with family assistance law and the established policy intent of child care fee assistance.

Where an FDC service genuinely charges a fee that is higher than the maximum amount in respect of the GCCB and SCCB rates, services will need to demonstrate that this higher amount is no more than the service would charge if the GCCB or SCCB rate did not apply and that a genuine legal liability on the part of an individual for this reported fee has been incurred, by making an application to the Secretary of the Department containing supporting documentation. If the service can demonstrate this to the satisfaction of the Secretary, the reported session will be a “session of care” for child care payments purposes.

In 2015-16, approximately 18 percent of FDC services reported charging on average above the maximum amount for sessions that attracted GCCB, and approximately 19 per cent on average reported charging above the maximum amount for sessions that attracted SCCB. The vast majority of these services reported charging a usual fee for sessions that did not attract GCCB or SCCB below the maximum amount. These services would be unlikely to qualify for a higher maximum amount approved by the Secretary. This is because such services would not, on balance, be able to demonstrate compliance with the obligation not to charge fees exceeding the amount of the fees the service would charge for the same session for the same child if that rate did not apply. The care provided by those services, for which the GCCB or SCCB rates may otherwise be applicable, will, as a result of these amendments, not be a session of care for the purposes of the family assistance law and therefore no Commonwealth child care fee assistance will be payable. In addition, apart from the effect on the eligibility of an individual (or the service, in limited cases), the service may also face compliance action if the Secretary is satisfied the service has not been complying with obligations under the family assistance law, due to obtaining incorrect amounts of child care payments that cannot be passed on as fee reductions or inflating fees to attract Commonwealth fee assistance.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Determination as any amendments to the Current Determination are effectively of a minor nature and do not substantially alter existing arrangements (OBPR ID 21442, dated 27 October 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 family assistance law establishes the Commonwealth child care payments scheme, consisting of Child Care Benefit (CCB) and Child Care Rebate (CCR), which are payments towards a family's child care costs. These payments are only made where a "session of care" has been provided to a child by an approved child care service. Section 9 of the Family Assistance Act requires the Minister to determine what constitutes a "session of care" for this purpose. The Amendment Determination sets out what is and what is not a "session of care" for the purposes of the family assistance law and the special rates of Grandparent Child Care Benefit (GCCB) and Special Child Care Benefit (SCCB), by giving meaning to the need for a "fee to be charged" in respect of the care, and reminding services of their obligations to only report fees that genuinely arise, are not in excess of usual fees charged, and are not inflated purely for the purposes of attracting a higher rate of Commonwealth subsidy.

Subsection 43(1) of the Family Assistance Act states that an individual is eligible for CCB by fee reduction 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. The Amendment Determination reinforces this requirement by stating that a session of care only occurs where an approved child care service imposes a liability on the individual by charging a fee and that this is irrespective of any potential payment the Government may make to reduce that fee in whole or in part.

Some approved Family Day Care (FDC) services report high fees for care with the objective of having these wholly subsidised by the Commonwealth. However, these reporting practices are inconsistent with the family assistance law which requires that FDC services charge rates for GCCB and SCCB that do not exceed the amount that the service would charge for the same session for the same child if that additional subsidised rate did not apply. New provisions in the Amendment Determination clarify certain care circumstances that are not "sessions of care" for which Commonwealth fee assistance is available by emphasising the need for a genuine liability to have been incurred, on the part of an individual, in respect of the fee, and setting out a maximum amount which constitutes the upper limit of what, based on current market rates, an individual would normally agree to pay for child care provided by FDC services.

Notwithstanding the new prescribed “maximum amount”, FDC services which can demonstrate that their fees are genuine and do not exceed “usual fees” that would usually be charged for child care can still report such fees for “sessions of care” if the Secretary agrees that the reported fees reflect a genuine liability.

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An individual or child care service is only eligible for Commonwealth child care payments under the family assistance law in respect of a session of care. The purpose of the Amendment Determination is to set out the meaning of a “session of care” for the purposes of the special GCCB and SCCB rates of 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), particularly Article 6.

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 what does not constitute a session of care for the purposes of payment of the special rates of GCCB and SCCB by the Commonwealth under the Family Assistance Act.

The amendments aim to ensure that Commonwealth child care payments are only paid in respect of true cases of fee liability for child care and, as such, are consistent with the overall objectives of the child care payments system and with the best interests of children. The amendments are aimed to only affect services that are not providing sessions of care consistent with these objectives.

Right to work

Article 6 of the ICESCR requires that a person has a right to work, which includes the right of everyone to have 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 Australian Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care and these amendments are aimed at ensuring that Commonwealth expenditure on child care remains targeted at real instances of child care, and ensures that child care fee assistance is available for working families.

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

Section 1 of the Amendment Determination states the name of the instrument. **Section 2** states Schedule 1 of the Amendment Determination commences on 13 March 2017 and Schedule 2 of the Amendment Determination commences on 1 July 2017. **Section 3** sets out the Minister's authority to make the instrument. **Section 4** sets out application provisions to clarify that the Amendment Determination only applies to sessions of care that occur on and from commencement (and ensures that no part of the Amendment Determination takes effect retrospectively). **Section 5** sets out that the *Child Care Benefit (Session of Care) Determination 2016* (the Current Determination) is amended by Schedules 1 and 2 to the Amendment Determination.

Schedule 1

Item 1 amends subsection 11(2) of the Current Determination to insert a reference to the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Eligibility Determination). This amendment is necessary as the Eligibility Determination contains important provisions relating to the provision of in-home care. These provisions are relevant to considering whether subsection 11(2) has been satisfied, for the purposes of determining whether care provided in the circumstances outlined at current paragraph 11(1)(b) is a session of care or not.

Item 2 inserts new sections 12 and 13, which apply only to approved FDC services. New section 12 defines what is not a session of care for GCCB purposes, when the care is provided by an approved FDC service. Where an individual would otherwise be eligible for the special grandparent rate (GCCB) under the family assistance law, fees reported for care provided by a service in that circumstance must not exceed the fees an individual incurs a genuine legal liability for under an arrangement, irrespective of any Commonwealth fee subsidy that may be payable, as set out in section 6 of the Current Determination. The other requirement is that the fee must not exceed the maximum amount, specified in subsection 12(3). Where, however, fees exceed the maximum amount, the Secretary may still agree that the care involves a "session of care" where the higher fee does not exceed the fee the service would charge for the same session for the same child if the GCCB rate did not apply (the "usual fee"), and where the Secretary considers that the fee is one which an individual has incurred a genuine legal liability for.

New section 13 deals with care provided by an approved FDC service that is not a session of care for special child care benefit rate (SCCB) purposes. Similar to the effect of section 12, this provision ensures fees reported for care provided by an approved FDC service do not exceed what the individual has incurred a genuine legal liability for, or exceed the maximum amount set out in subsection 13(3). As is the case for GCCB, the Secretary may still agree that the care involves a "session of care" where the higher fee does not exceed the fee the service would charge for the same session for the same child if the SCCB rate did not apply (the "usual fee"), and where the Secretary considers that the fee is one which an individual has incurred a genuine legal liability for.

Schedule 2

Items 1 and 2, from 1 July 2017, will amend the “maximum amounts” referred to in new sections 12 and 13, changing them from \$12.67 to \$12.84 to take account of movements in the Consumer Price Index.