

EXPLANATORY STATEMENT

Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2017

Summary

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2017* (Amendment Determination) is made by the Minister for Education and Training under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act).

The Amendment Determination amends the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (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.

Division 1 of Part 8 of the Family Assistance 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 Family Assistance Administration Act, the Minister may determine, by legislative instrument, rules relating to the eligibility of child care services to become approved and to continue to be approved.

The Amendment Determination adds new requirements to the current Determination with which operators of family day care (FDC) services must comply for approval and continued approval of their services. The *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (No-one Eligible Amendment Determination), which is being concurrently amended, will prescribe children who are attending secondary school or are 14 years of age or older as children in respect of whom no one is eligible for Child Care Benefit (CCB), unless exemptions (referred to below as “specified circumstances”) apply. The purpose of the Amendment Determination is to introduce requirements upon services to maintain a register relevant to those specified circumstances.

The Amendment Determination also clarifies the term ‘documentary evidence’ for the purposes of the child swapping integrity measure, introduced by amendments to the No-one Eligible Determination on 10 October 2015.

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

Background

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 Current 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 Family Assistance Administration Act. These sanctions include, amongst others, suspension or cancellation of the service's approval.

The *A New Tax System (Family Assistance) Act 1999* (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. 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 Child Care Rebate (CCR) and so the amendments also impact CCR.

The No-one Eligible Determination is concurrently amended to determine that, for care provided by FDC services only, children specified in a certain class are children in respect of whom no-one is eligible for CCB. The No-one Eligible Determination will prescribe a new class as children who are aged 14 years or older, or attend secondary school as being children specified in a class of children in respect of whom no-one is eligible for CCB, unless a specified circumstance exists.

The No-one Eligible Determination requires services to have evidence for all specified circumstances to demonstrate that, if not for the care, the child would be unreasonably left without the supervision of a responsible adult. For the specified circumstance relating to work, where the eligible individual has a partner who would otherwise care for the child the specified circumstance will only apply where it is met by both partners on the day on which the session of care is provided.

The Amendment Determination introduces the requirement for the service to keep a register of specified circumstances in a form approved by the Secretary of the Department of Education and Training, where care is provided to a child to whom subsection (9)(2) of the No-one Eligible Determination applies.

The Amendment Determination applies to all new or existing approved FDC services and takes effect with respect to eligibility for sessions of care that occur from 13 March 2017.

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 vast majority of child care services will not have to change any of their standard business practices in order to comply. The requirement on FDC services to record information about specified circumstances in a register and update the register is contained in the Amendment 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 Amendment Determination as services will be required to enter the details of specified circumstances in a register if the individual informs the FDC service that any one of the specified circumstances outlined in subsections 9(2) and 9(3) of the No-one Eligible Determination applies. A minor regulatory burden will also be placed on a conditionally eligible individual (and in some cases, a partner of that person if the child is the Family Tax Benefit (FTB) child or regular care child of the partner) where a specified circumstance applies, such as completing a statutory declaration or obtaining other formal evidence.

FDC for children aged 14 years or older, or who attend secondary school, is not child care of the kind that the Commonwealth child care payments scheme was established to subsidise. These particular measures will only adversely affect those child care operators that have based their business model on providing care or other services that are inconsistent with the established policy intent.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Amendment 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 and OBPR ID 21647, dated 16 December 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 *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2017* (the Amendment Determination) is made by the Minister for Education and Training under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act), which is a power to set out rules for approval and ongoing approval for family assistance law purposes. 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 Family Assistance Administration Act. These sanctions include, amongst others, suspension or cancellation of the service's approval.

The Amendment Determination adds new requirements to the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (Current Determination) with which operators of family day care (FDC) services must comply for approval and continued approval of their services. The *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (No-one Eligible Amendment Determination), which is being concurrently amended, will prescribe children who are 14 years of age or older or attend secondary school as children in respect of whom no one is eligible for Child Care Benefit (CCB), unless specified circumstances apply. The purpose of the Amendment Determination is to introduce a requirement for the service to keep a register of specified circumstances, in a form approved by the Secretary of the Department of Education and Training, where care is provided to a child to whom subsection 9(2) or 9(3) of the No-one Eligible Determination applies. The Amendment Determination also clarifies the term 'documentary evidence' for the purposes of the child swapping integrity measure, introduced on 10 October 2015.

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 protection against arbitrary and unlawful interferences with privacy, family and home under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- 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 establishes an obligation to document where a child may meet a specified circumstance under the No-one Eligible Determination. The purpose of these rules is to apply more rigorous criteria to improve the administration of Commonwealth funds and to ensure the safety and well-being of children.

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, and specifically that a child care service maintains accurate records when caring for older children to ensure relevant exemptions, related to disability, remoteness and work requirements of parents, are satisfied.

Right to privacy

Article 17 in the ICCPR provides the right to protection against arbitrary and unlawful interferences with privacy, family and home.

Although personal information will be disclosed to a service, and potentially further requested by a delegate of the Secretary of the Department, as part of the proposed amendments, disclosures will only be made where an individual (or a service, where applicable) seeks to rely on an exemption from the general rule that no-one is eligible for CCB where the child falls within the new class.

The purpose of the obligation in new section 10AB is to allow for the monitoring of, and assurance that, care is being accurately reported to the Secretary of the Department, and that calculations by the Secretary of the Department, of amounts of CCB that should be paid for care based on this information, can be done accurately. Further, there are a number of safeguards in place in relation to the information that is collected by the service. 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 10AB of the Eligibility Determination. In addition, any information collected by the service and provided by the service to the Secretary will, once it is obtained and recorded by the Secretary, 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 will strengthen the best interests of children in care.

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 or her living by work which he or 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. The amendments reinforce this commitment by ensuring child care fee assistance is only paid in circumstances where an eligible individual (and their partner) is required to work and the child cannot reasonably be left at home alone.

Conclusion

The Amendment 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.

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 the Amendment Determination commences on 13 March 2017. **Section 3** sets out the Minister's authority to make the instrument. **Section 4** sets out application provisions to clarify that the amendments made by the Amendment Determination only apply to eligibility for 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 (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* is amended by Schedule 1 to the Amendment Determination.

Item 1 amends the note underneath current subsection 10A(4) to reflect the documentary evidence requirements set out in the No-one Eligible Amendment Determination.

Item 2 inserts new section 10AB. Subsection 10AB(1) provides that there are additional ongoing eligibility requirements for approved FDC services. If an FDC service provides care to an older child who would otherwise be within the class of children for whom no-one is eligible, but for the existence of a specified circumstance as set out in new subsections (9)(2) and (9)(3) of the No-one Eligible Determination, the service must keep a register of certain information. The register must be kept in a form approved by the Secretary. The information or documents required to be kept are specified in subsection 10AB(2).

New subsection 10AB(2), details the information or documents an FDC service is required to record in the register where a specified circumstance applies. These include:

- all documentary evidence required to be provided to, or held by, the service under new section 9 of the No-one Eligible Determination;
- the name of the child;
- the Customer Reference Number (CRN) of the child;
- unless the service is eligible under section 47 of the Family Assistance Act:
 - the name of each individual for whom the child is an FTB child or regular care child;
 - the CRN (if any) of each individual for whom the child is an FTB child or regular care child;
- which of the exemptions are considered to apply;
- the day that the documentary evidence was provided or became held;
- the day on which the service enters the information in the register.

A reader's note states that documentary evidence for the purposes of subparagraph 10AB(2)(a) is defined in section 4 and section 9 of the No-one Eligible Determination.

A further reader's note states that the exemptions that may apply are those listed in subsections (9)(2) and (9)(3) of the No-one Eligible Determination.

Subsection 10AB(3) relates specifically to approved FDC services in receipt of funding under the Inclusion Support Programme (ISP). Where such a service is notified that ISP funding is no longer being paid in relation to an older child, the service must also record relevant information about this in the register.