

Explanatory Statement

Child Care Benefit (Australian Resident) Guidelines 2017

Summary

The *Child Care Benefit (Australian Resident) Guidelines 2017* (the Guidelines) are made by the Minister for Education and Training under subsection 8(4) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act). The Guidelines provide guidance to the Secretary in making determinations that a person who is not an Australian resident is taken to be an Australian resident for the purposes of eligibility for child care benefit. It continues the operation of the *Child Care Benefit (Australian Resident) Guidelines 2000*, which is repealed under Part 4 of the *Legislation Act 2003* (Sunsetting of legislative instruments), on 1 October 2017.

Background

Division 4 of Part 3 of the Family Assistance Act includes provisions relevant to the eligibility requirements for child care benefit. A person must be eligible for child care benefit, before they may be determined, under Division 4 of Part 3 of the *A New Tax System (Family Assistance) (Administration) Act 1999*, to be entitled to be paid child care benefit.

Child care benefit is a means-tested payment which assists individuals with child care costs. One of the eligibility requirements specified in the Family Assistance Act is that an individual, or the individual's partner, must be an Australian resident. Section 8 of the Family Assistance Act enables the Secretary to make a determination that an individual is to be treated as an Australian resident. In making this determination the Secretary must comply with guidelines made by the Minister under subsection 8(4) of the Act.

Subsection 8(4) of the Family Assistance Act authorises the Minister to make guidelines relating to the Secretary's determinations on Australian residence.

The Guidelines provide that the Secretary must consider whether an individual would suffer hardship and take into account whether the individual has experienced an unexpected event which has reduced his or her ability to pay child care fees. The Secretary must also take into account how long ago the event occurred, and the continuing effect of the event.

The Guidelines replicate the operation of the *Child Care Benefit (Australian Resident) Guidelines 2000* (2000 Guidelines). The 2000 Guidelines are repealed on 1 October 2017, under Part 4 of the *Legislation Act 2003* (Sunsetting of legislative instruments). The new Guidelines will operate from 1 October 2017 until 2 July 2018, when they will be superseded.

The *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (the Amendment Act) was enacted on 4 April 2017. This Amendment Act gives effect to the legislative elements of the Government's new child care system, including the Child Care Subsidy and Additional Child Care Subsidy from 2 July 2018. The Amendment Act includes provisions to make subordinate legislation, known as Minister's and Secretary's Rules (the Rules). The Rules will replace many of the existing family assistance law subordinate legislative instruments.

In particular, the Amendment Act amends section 8 of the Family Assistance Act, and enables the making of Minister's Rules prescribing matters to which the Secretary must have regard in making a determination that an individual who is not an Australian resident is taken to be one for the purposes of eligibility for Child Care Subsidy.

Consequently, the sole purpose of the Guidelines is to allow the operation of the current arrangements for Secretary's determinations of Australian residency to continue between the sunsetting of the 2000 Guidelines on 1 October 2017 and the commencement of the new Minister's Rules on 2 July 2018.

Consultation

Prior to this instrument being made, targeted consultation was undertaken with child care stakeholders notifying them of the remaking of the instrument and inviting their comments. Targeted consultation was deemed appropriate as the remaking of the instrument was machinery in nature to continue the operation of the *Child Care Benefit (Australian Resident) Guidelines 2000* until 2 July 2018. The instrument does not substantially alter existing arrangements.

Regulatory Impact Statement

The Guidelines do not require a Regulatory Impact Statement or a Business Cost Calculator Figure. The Guidelines remake the 2000 Guidelines for a short period, and are machinery in nature and will not have more than minor regulatory impact. The Office of Best Practice Regulation (OBPR) agrees with this regulatory impact assessment (OBPR ID 22536).

Authority

The *Child Care Benefit (Australian Resident) Guidelines 2017* are made under subsection 8(4) of the *A New Tax System (Family Assistance) Act 1999*.

Explanation of Provisions

Section 1 sets out that the name of the instrument is the *Child Care Benefit (Australian Resident) Guidelines 2017*.

Section 2 provides that the instrument commences on 1 October 2017 and is repealed immediately after the commencement of Schedule 1 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (i.e. on 2 July 2018).

Section 3 sets out that the authority for the instrument is the *A New Tax System (Family Assistance) Act 1999*.

Section 4 specifies the matters to be considered by the Secretary in making a determination under subsection 8(1) of the Family Assistance Act that an individual is taken to be an Australian resident are:

- a) whether the individual has, since arriving in Australia, experienced an event that was not reasonably foreseeable, and that has substantially reduced the individual's capacity to pay child care fees; and
- b) if so, how long ago the event occurred, and the continuing effect of the event in causing hardship if the individual were not treated as an Australian resident.

Subsection 4(2) of the instrument provides that the Secretary must not take into account the following events for the purposes of making a determination under subsection 8(1) of the Family Assistance Act:

- a) currency fluctuations;
- b) increases in child care fees;
- c) a reduction in the individual's available income due to routine or non-essential expenditure.

Section 4 of the Guidelines replicates section 5 of the 2000 Guidelines.

Statement of Compatibility with Human Rights

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

Child Care Benefit (Australian Resident) Guidelines 2017

This 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*.

Overview of the Legislative Instrument

The *Child Care Benefit (Australian Resident) Guidelines 2017* (the Guidelines) provide guidance to the Secretary in making determinations that a person who is not an Australian resident is taken to be an Australian resident for the purposes of eligibility for child care benefit. It continues the operation of the *Child Care Benefit (Australian Resident) Guidelines 2000*, which is repealed under Part 4 of the *Legislation Act 2003* (Sunsetting of legislative instruments), on 1 October 2017.

Division 4 of Part 3 of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act) includes provisions relevant to the eligibility requirements for child care benefit. A person must be eligible for child care benefit, before they may be determined, under Division 4 of Part 3 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act), to be entitled to be paid child care benefit.

Child care benefit is a means tested payment which assists individuals with child care costs. One of the eligibility requirements specified in the Family Assistance Act is that an individual, or the individual's partner, must be an Australian resident. Section 8 of the Family Assistance Act enables the Secretary to make a determination that an individual is to be treated as an Australian resident. In making this determination the Secretary must consider whether an individual would suffer hardship and take into account whether the individual has experienced an unexpected event which has reduced his or her ability to pay child care fees. The Secretary must also take into account how long ago the event occurred, and the continuing effect of the event.

Subsection 8(4) of the Family Assistance Act authorises the Minister to make guidelines relating to the Secretary's determinations on Australian residence.

The Guidelines replicate the operation of the *Child Care Benefit (Australian Resident) Guidelines 2000* (2000 Guidelines). The 2000 Guidelines are repealed on 1 October 2017, under Part 4 of the *Legislation Act 2003* (Sunsetting of legislative instruments). The new Guidelines will operate from 1 October 2017 until 2 July 2018, when they will be superseded.

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In particular, the Amendment Act amends section 8 of the Family Assistance Act, and enables the making of Minister's Rules prescribing matters to which the Secretary must have regard in making a determination that an individual who is not an Australian resident is taken to be one for the purposes of eligibility for Child Care Subsidy.

Consequently, the sole purpose of the Guidelines is to enable the operation of the current arrangements for Secretary's determinations of Australian residency to continue between the

sunsetting of the 2000 Guidelines on 1 October 2017 and the commencement of the new Minister's Rules on 2 July 2018.

Human Rights Implications

The making of the Guidelines is machinery in nature to enable current legislative requirements set out in the 2000 Guidelines to continue until 2 July 2018. The Guidelines do not substantially alter existing arrangements and will not have more than minor regulatory impact or change any human rights implications under the current instrument.

The Guidelines engage the following rights:

The rights of the child – Article 3 of the Convention of the Rights of the Child (CRC) and Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR)

Rights of equality and non-discrimination – Articles (2), (16) and (26) of the ICCPR.

The right to social security – Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The rights of the child

Article 3 of the CRC recognises that in all actions concerning children, the best interests of the child shall be a primary consideration. In fulfilment of the broader principle of the best interests of the child, the UN Committee encourages States parties to monitor the availability of and access to quality services that contribute to young children's development, including through ensuring that all children have an equal opportunity to benefit from available services.

This instrument promotes this right by providing for the residency limitations for receiving child care benefit to be extended to include an individual who is not an Australian resident due to events which will substantially reduce the individual's capacity to pay child care fees.

The right to be free from discrimination

Article 26 of the ICCPR and Article 2 of the CRC requires that persons are equal before the law and that the law shall provide equal and effective protection against discrimination on any grounds. The Family Assistance Act sets out a range of eligibility criteria for child care benefits in relation to age of the child, residency requirements, immunisation status of children and for grandparents.

Using residency requirements as a criterion to determine eligibility is a reasonable and proportionate limitation on the right to be free from discrimination, because it is important for the Secretary to reconcile payments against residents' tax assessment information.

The right to social security

Article 9 of the ICESCR recognises the right of everyone to social security.

This instrument, by providing for the residency limitations for receiving child care benefit to be extended to include an individual who is not an Australian resident due to events which will substantially reduce the individual's capacity to pay child care fees, promotes the above right.

Conclusion

The Guidelines are compatible with human rights because they promote the protection of human rights, particularly the rights of parents and children, the right to be free from discrimination and the right to social security.

Simon Birmingham
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