Explanatory Statement

Child Care Subsidy Minister's Amendment Rules (No. 2) 2018

Summary

The *Child Care Subsidy Minister's Amendment Rules (No. 2) 2018* (the Rules) are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (the Assistance Act) and item 12 of Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (the Amendment Act).

The Rules amend the *Child Care Subsidy Minister's Rules 2017* (F2017L01464) (Principal Rules) and prescribe matters for the purposes of the Assistance Act and the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

The amendments to the Principal Rules also rely on subsection 33(3) of the *Acts Interpretation Act 1901* which states that, 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 Rules are made prior to the commencement of section 85GB of the Assistance Act as permitted by section 4 of the *Acts Interpretation Act 1901*. Section 85GB was inserted into the Assistance Act through Schedule 1 to the Amendment Act, which commences on 2 July 2018. The Rules will also commence on 2 July 2018, immediately following the commencement of the *Child Care Subsidy Minister's Amendment Rules (No. 1) 2018* (the Amendment Rules No. 1). In practice this means that on 2 July 2018, immediately following the Principal Rules and the Amendment Rules No. 1 coming into effect, these amendments will also be effective and added into the Principal Rules. A compilation will be produced shortly after 2 July 2018 to present the Principal Rules as amended in a single document and this will be available on the Federal Register of Legislation website.

In particular, the Rules deal with a range of matters including:

- provisions consequential upon the introduction of the "in home care service" type;
- conditions for continued approval of certain classes of approved providers;
- a new withholding percentage for CCS of 5%;
- circumstances during the transitional period where certain notices and reports are taken to have been given, even when they are late;
- other transitional matters, dealing with: old arrangements for child care which are not yet "complying written arrangements"; continuity of the immunisation grace period during transition; saving certain conditions for continued approval; and compliance processes underway during transition; and
- certain providers who are not required to meet State or Territory requirements.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Background

The Principal Rules made on 7 November 2017 help give effect to the legislative elements of the Australian Government's new child care package.

The Rules make a number of amendments to the Principal Rules that deal with transitional issues in particular that have been worked through, including through sector consultation, and identified since the Principal Rules were made.

The Rules also supplement the Amendment Rules No.1 by prescribing further matters in relation to in home care (IHC) services in accordance with the *In Home Care National Guidelines* published by the Department of Education and Training (the department).

In home care services

From 2 July 2018, the new IHC program will be delivered through a brokerage model with IHC Support Agencies servicing each State and Territory and assisting the department in administering the IHC program. The new arrangements will replace the existing IHC program and the ceasing Interim Home Based Carer ('Nanny Pilot') Programme, and to align with the new child care package. The refined IHC program is intended to assist parents and carers who are unable to access other approved forms of child care, such as those who work non-standard hours, are geographically isolated or have families with challenging and complex needs.

The Rules amend the Principal Rules to make a number of technical and consequential amendments to include reference to the new IHC service type. New provisions are added to ensure that approved providers of IHC services are subject to a range of important conditions of approval that are intended to ensure the quality and safety of IHC.

Transitional matters

Certain arrangements made between individuals and an approved child care service prior to commencement day may be taken to be a complying written arrangement for the purposes of paragraph 85BA(1)(b) of the Assistance Act, until 23 September 2018. This means that parents who had been receiving child care benefit (CCB) by fee reduction immediately before commencement day will be taken to have a "complying written arrangement" in place to be eligible for CCS. However, from 24 September 2018 they will need a "complying written arrangement" to remain eligible.

The Rules also allow, during a two year transitional period from 2 July 2018, for certain enrolment notices and attendance reports to be provided outside of the statutory timeframe and, if so, still taken to be legally given to enable CCS or ACCS payments to be made.

Any existing conditions for continued approval of an approved child care service, imposed by the Secretary, under subsection 199(2) of the Administration Act prior to commencement day, will continue to operate after commencement day in respect of the relevant approved provider.

Enrolment advances will continue to be recoverable by new savings provisions to clarify that offsetting of enrolment advances is to continue and, when approval is cancelled, to clarify that unrecovered enrolment advances are repayable as debts.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Consultation

The development of policy for the new IHC program took into account independent evaluations of the previous IHC program and ceasing Nanny Pilot Programme.

In developing the underlying policy for these Rules, the department has also consulted extensively with, and taken advice from, a wide range of stakeholders including service providers and relevant Government departments and agencies through targeted consultation on the In Home Care National Guidelines and exposure draft of the Rules.

Regulation Impact Statement

The Rules expand on the practical application of the policy objectives relating to particular provisions in the Assistance Act and Administration Act. It is also expected that the new, enhanced IT system will reduce regulatory burden currently experienced by families and the child care sector.

The Office of Best Practice Regulation (OBPR) advised an additional Regulation Impact Statement (RIS) for the Rules was not required, as the Rules are simply giving effect to the policy intent of the child care package (OBPR ID 22401).

Specific to the new IHC program, the OBPR determined that it was deemed to have minor regulatory impact on business, community organisations and individuals, and therefore a RIS was not required (OBPR ID 22882).

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Explanation of the provisions

Preliminary

Section 1 states the name of the instrument as the *Child Care Subsidy Minister's Amendment Rules (No. 2) 2018* (the Rules).

Section 2 states that all provisions of the Rules (except the amendment made by item 8) commence on 2 July 2018, immediately after the commencement of the Amendment Rules No.1, which commence on 2 July 2018.

Section 3 states that the Minister is authorised to make the Rules under subsection 85GB(1) of the Assistance Act and item 12 of Schedule 4 to the Amendment Act.

Section 4 contains a definition and is self-explanatory.

Section 5 provides that the detail of how the Principal Rules are amended is set out in the various items in the Schedule to the Rules (as described below).

Schedule – Amendments to Principal Rules

Item 1 replaces the definition of "educator" in section 4 of the Principal Rules, which has been extended to include reference to an in home care (IHC) educator.

Item 2 inserts the definitions for "IHC educator", "IHC service" and "IHC Support Agency" into section 4 of the Principal Rules to support the new IHC service type.

Item 3 inserts new paragraph (d) into section 7, which has the effect of ensuring that payments made to an "IHC Support Agency" under a funding agreement are prescribed as "child care service payments" against which debts may be able to be offset in cases where the Agency is also an approved provider that owes a debt under the family assistance law.

Item 4 clarifies that the prescribed circumstance under paragraph 8(1)(b), where there is no eligibility for CCS for a session of care provided in a domestic living arrangement on residential premises, does not apply to care provided by an IHC service.

Item 5 replaces paragraphs 8(1)(d), (e) and (f) with new paragraphs 8(1)(d), (da), (e), (ea), (f) and (g) to prescribe additional circumstances where there is no eligibility for CCS for a session of care in relation to care provided by an IHC service.

Paragraphs 8(1)(d) and (da) provide that there is no eligibility for a session of care provided by a family day care (FDC) service or an IHC service where care is provided to an "FTB child" or "regular care child" (as defined in subsection 3(1) of the Assistance Act) of an educator (or the educator's partner) who works on the same day as the care occurs as an FDC or IHC educator as applicable. Care provided in this circumstance is commonly referred to as "child swapping" and is a practice that the department has implemented a range of measures, since 2015, to stop.

Paragraph 8(1)(e) provides that there is no eligibility for a session of care provided at an FDC service by an FDC educator (or partner) to children, where the relationship between them is as set out in subsection 8(3) of the Rules.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Paragraph 8(1)(ea) provides that, subject to new subsection (4A), there is no eligibility for a session of care provided at an IHC service by an IHC educator (or partner) to children, where the relationship between them is one of the following:

- FTB child or regular care child (as defined in subsection 3(1) of the Assistance Act); or
- foster care child, biological or adopted child; or
- brother, sister, half-brother, half-sister, step-brother or step-sister; or
- grandchild or great-grandchild; or
- nephew, niece or cousin; or
- a child (not mentioned above) whom the IHC educator (or partner) has legal responsibility, as described in paragraph 22(5)(a) or (b) of the Assistance Act.

Paragraphs 22(5)(a) and (b) of the Assistance Act provide that legal responsibility arises in circumstances where:

- the adult is legally responsible (whether alone or jointly with someone else) for the day-to-day care, welfare and development of the individual; or
- under a family law order, registered parenting plan or parenting plan in force in relation to the individual, the adult is someone with whom the individual is supposed to live or spend time.

Paragraph 8(1)(f) provides that there is no eligibility during any part of a session where the child is attending school, or engaged in a formal schooling program (including a home schooling or distance education program).

Paragraph 8(1)(g) provides that there is no eligibility for a session of care that is provided in breach of the condition for continued approval in subsection 48A(6) of the Rules (about numbers of children who can be cared for by an IHC educator).

Item 6 inserts a new subsection 8(4A) to operate as an exception to the circumstance described in paragraph 8(1)(ea). Under paragraph 8(1)(ea), there is no eligibility for CCS (or ACCS) in relation to a session of care where certain family members provide care to children as the IHC educator. Subsection (4A) allows family members (for whom a child in care is a grandchild, great-grandchild, nephew, niece or cousin of the IHC educator their partner) to provide care in limited circumstances where: an IHC Support Agency has made a recommendation that this is appropriate; the care is provided in a very remote area of Australia (in accordance with the *Australian Statistical Geography Standard (ASGC) (Volume 5 Remoteness Structure 2016* (cat. No. 1270.0.55.005) as published by the Australian Bureau of Statistics); and where there is no other IHC educator reasonably available who is not a family member. Notwithstanding this provision, an individual will only be eligible for CCS where they have a genuine liability to pay child care fees to the service provider in respect of the care.

The *Australian Statistical Geography Standard (ASGC) (Volume 5 Remoteness Structure 2016* is readily and freely accessible online at http://www.abs.gov.au. The reference to this document is a reference to the 2016 volume as available at the time the Rules were made and is not a reference to the document as published from time to time.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Item 7 updates an outdated reference (to the 2011 publication) in the definition of "remote area child" to the 2016 publication, being the *Remoteness Structure* to the *Australian Statistical Geography Standard (ASGC) (Volume 5 Remoteness Structure 2016* as accessible online at http://www.abs.gov.au. The reference to this document is a reference to the 2016 volume as available at the time the Rules were made and is not intended as a reference to the document as published or updated from time to time.

Item 8 replaces paragraph 10(e) with an updated legislative reference for determining when a child is taken to be at risk in South Australia under new legislation set to commence in October 2018, the *Children and Young People (Safety) Act 2017* (SA). This item will not commence until 22 October 2018 when that legislation comes into force.

Item 9 is a technical amendment that replaces paragraph 11(2)(b) to clarify that provision is only relevant to determining whether a child is taken to be at risk for purposes of section 9 of the Principal Rules (circumstances in which a child is taken to be at risk under subsection 85CA(4) of the Assistance Act), but not section 10 of the Principal Rules (circumstances in which a child is taken to be at risk under State or Territory law). This is because the circumstances in section 10 are wholly determined by the terms of State or Territory legislation listed in that provision.

Item 10 omits the words "(unless entered into privately)" in paragraph 12(2)(d) to ensure that the child support arrangements referred to in that provision are not limited to those arising under statutory arrangements. This paragraph provides for one of the circumstances in which an individual is taken to be experiencing temporary financial hardship under section 12 of the Principal Rules, for purposes of determining an individual's eligibility for ACCS (temporary financial hardship) under section 85CG of the Assistance Act.

Item 11 replaces subparagraph 13(7)(c)(ii) with an updated reference to the version of the *Skill Shortage List*, as published on 28 March 2018. While this provision operates by making reference to an extrinsic document, it does not make the reference to that document as it exists from time. As such, the reference is consistent with section 14 of the *Legislation Act 2003*.

Item 12 clarifies, by replacing the Example, the policy position on kinds of volunteer work that could constitute "voluntary work for a school, preschool or a centre-based day care service, if the work directly supports the learning and development of the children at the school, preschool or service" for the purposes of paragraphs 21(1)(b) or (c) of the Principal Rules. The original Explanatory Statement to the Principal Rules suggested that involvement in a school parents and citizens committee would not constitute volunteer work for this purpose, however the new Example clarifies that volunteering in this capacity could be taken to be volunteer work for the purposes of section 21.

Item 13 inserts new Part 3A (Withholding Amount). New **section 40A** prescribes a new withholding percentage as 5% for the purposes of paragraph 67EB(3)(b) of the Administration Act. This means that, subject to the Secretary's determination in a specific case, the default amount withheld from weekly CCS payments to assist in end-of-financial-year debt management will be 5% rather than the 10% originally specified in section 67EB of the Administration Act. The new withholding percentage will ensure that parents have more of their CCS available from week to week to assist in covering their child care fees.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Item 14 replaces subsection 43(4) so that the requirement to carry out the national police check and working with children card check for educators applies to approved providers of both FDC services and IHC services.

Item 15 amends section 44 so that the additional prescribed matters for service eligibility apply to both FDC services and IHC services.

Items 16 and **17** amend section 45 to ensure that any applications for approval in respect of centre-based or outside school hours services can be made in respect of services that are not "education and care services" as defined under the Education and Care Services National Law, however the provision does require that the applicant provider complies with other applicable child care laws and maintains other applicable approvals or licences that may apply in the relevant State or Territory.

Item 18 inserts a new **section 48A** after section 48 for purposes of section 195E of the Administration Act, setting out the additional conditions for continued approval for approved providers of IHC services.

Subsection 48A(2) sets out a condition requiring the approved provider of an IHC service to satisfy the Secretary that the provider is equipped to provide high quality child care that is appropriate to the needs of families and the community. This requirement is to be determined by having regard to the approved provider's ability and commitment to a range of matters, including to provide a tailored education program for each child, to ensure that children are adequately supervised at all times and at least one IHC educator who is caring for children at the care premises holds a current first aid qualification. Paragraph (f) clarifies that as part of considering the compliance to this condition of commitment to high quality child care under section 195G of the Administration Act, the Secretary may have regard to other factors that are considered necessary or appropriate for the provision of high quality child care in addition to the specified factors for determining whether this condition has been met.

Subsection 48A(3) sets out a condition requiring the approved provider of an IHC service to implement appropriate arrangements to manage any serious incidents, including notifying the Secretary in writing within 24 hours of a serious incident occurring, or any circumstance that could have resulted in a serious incident. A serious incident for the purpose of this section is defined under subsection 48A(4).

Subsection 48A(5) sets out a condition requiring the approved provider of an IHC service to have insurance policies in place at all times, which includes workers compensation insurance as required by law, and a current policy of insurance providing adequate cover for the child care service against public liability with a minimum cover of $10 million.

Subsection 48A(6) sets out a condition requiring the provider of an IHC service to ensure that there is at least one IHC educator for each group of up to five children where, of those children, no more than four children are of preschool age or younger.

Subsection 48A(7) sets out a condition requiring the approved provider of an IHC service to nominate a child in accordance with any preference of the individual who would be eligible for CCS or ACCS in respect of that child. This requirement interacts with section 15A of the Principal Rules as inserted by the Amendment Rules No. 1, which sets out a mechanism for nominating children in respect of whom an individual is eligible for a session of care provided by an IHC service.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Subsection 48A(8) sets out a condition requiring the approved provider of an IHC service to undertake to operate in a manner consistent with the In Home Care National Guidelines as those Guidelines existed at the time these Rules were made (as available online at: https://docs.education.gov.au/node/47766). While this provision operates by making reference to an extrinsic document, it does not make the reference to that document as it exists from time. As such, the reference is consistent with section 14 of the *Legislation Act 2003*.

Subsection 48A(9) sets out a condition requiring the approved provider of IHC service to ensure that except in exceptional circumstances, child care is only provided at the residential premises of the individual who is eligible for CCS or ACCS in respect of that care.

Subsection 48A(10) sets out a condition requiring the approved provider of an IHC service to engage with an IHC Support Agency. This includes undertaking to only enrol a child for care after receiving a referral from an IHC Support Agency, informing the IHC Support Agency when a child ceases to be enrolled within seven days of the cessation and to provide reasonable assistance to and cooperate with IHC Support Agencies.

Item 19 replaces **section 50** with a new provision specifying certain providers that are not required to comply with requirements for purposes of section 199F of the Administration Act. The specified providers in this provision are not required to meet the requirement in paragraph 194C(a) of the Administration Act for the purposes of Commonwealth family assistance law approval, which is the requirement that the provider obtains any approvals or licences that are needed to operate a child care service under the law of the relevant State or Territory.

Subsections 50(1) and (2) are intended to ensure that any services formerly funded through the Budget Based Funding program (and which were not an "education and care service" by virtue of an exemption under the Education and Care Services National Law) are services that do not need to meet State or Territory requirements as a condition of their Commonwealth family assistance law approval.

Subsection 50(3) specifies a number of other providers in respect of certain child care services that operate in remote areas as services that do not need to meet State or Territory requirements as a condition of their Commonwealth family assistance law approval in view of the fact that the providers may face practical barriers in meeting State and Territory requirements.

Subsection 50(4) clarifies that, where there is a merger of one or more of the services captured by section 50, a provider in respect of the service formed by the amalgamation or merger is not required to meet the requirement in paragraph 194C(a) of the Administration Act (about meeting State or Territory requirements) for the purposes of Commonwealth family assistance law approval.

Item 20 inserts "IHC educator" wherever occurring after "FDC educator" in items 10, 11 and 12 in the table in section 55 to ensure a number of notifiable events relevant to FDC educators also apply in relation to IHC educators.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Item 21 makes a technical amendment to item 10 in the table in section 55, to ensure there are unique paragraphs for the provisions in column 1 and to clarify that a declaration must be made where the required checks have been carried out in accordance with section 43 of the Principal Rules, where the provider has ensured that the checks were carried out.

Item 22 makes an amendment to ensure that the calculation of business continuity payments in respect of IHC services is calculated on the basis of the Secretary's best estimate of the children for whom individuals could be eligible for the sessions of care in that week, having regard to section 15A of the Principal Rules (which sets out a nomination process to ensure that a parent is generally only eligible in respect of one child in a group of up to five children receiving IHC). This is intended to ensure that, in the event of an IHC service not being able to access the reporting ("CCSS") system, payments can be calculated that are roughly equivalent to the CCS that would have been payable.

Item 23 inserts new **section 62A** after section 62 relating to the continuity of an immunisation grace period during the transition from immunisation requirements under the pre-commencement family assistance law. The intention of this provision is to ensure where a 63-day grace period (for CCB purposes) is already underway on the commencement day (during which immunisation requirements are taken to have been met), the grace period remains in operation, and does not restart, following transition, allowing continued eligibility for CCS during the continued grace period.

Item 24 inserts new **section 67A** after section 67 relating to outstanding enrolment advances after commencement day.

Subsection 67A(1) clarifies the effect of item 10 of Schedule 4 to the Amendment Act in relation to debt that would have arisen under 71G(3) of the Administration Act (as it stood immediately prior to commencement day), resulting from an enrolment advance paid under section 219RA of the Administration Act (as it stood immediately prior to commencement day).

Subsection 71G(3) of the Administration Act raises a debt where a child care service's approval is suspended or cancelled and an amount of an enrolment advance that was paid to the service had not yet been recovered by set off.

Subsection 67A(1) modifies subsection 71G(3) of the Administration Act and provides that a debt arises where:

- an enrolment advance had been paid under section 219RA of the Administration Act (as it stood immediately prior to commencement day) in relation to an enrolment at a child care service; and
- after commencement day, the approval of a provider is cancelled or varied so that the provider is not approved in respect of that child care service; and
- at the time of cancellation or variation of the provider's approval, the amount of enrolment advance (the remaining amount) had not been fully set off under section 219RC of the Administration Act (as it stood immediately prior to commencement day).

The remaining amount is a debt due to the Commonwealth by the provider.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Subsection 67A(2) clarifies that a debt arising in these circumstances may be recovered under the Administration Act, using the recovery provisions as they stand from the commencement day.

Subsections 67A(3) and (4) clarify the effect of item 10 of Schedule 4 to the Amendment Act in relation to setting off enrolment advances under section 219RC of the Administration Act (when enrolment ceases or when a decision to cease operating the child care service is notified), as it stood immediately prior to commencement day. The intention of these provisions is to ensure that enrolment advances can continue to be set off notwithstanding the repeal of section 219RC of the Administration Act and, in particular, that recovery is triggered when enrolment of the relevant child ceases or when the relevant enrolment occurred four years ago.

Item 25 inserts new Divisions 4 to 11 into Part 7 (Transitional rules for the Amendment Act). These provisions are made as transitional rules under item 12 of Schedule 4 to the Amendment Act.

Division 4 relates to determining deemed claims for CCS.

Section 69 clarifies that if parents do not provide any information to the Secretary that may be required to assist granting their deemed claim (as taken to have been made under item 3 of Schedule 4 to the Amendment Act) the Secretary is able to refuse the claim on 24 September 2018. The parent will then need to make a new claim for CCS if they want to become eligible.

Division 5 relates to the backdating of applications for ACCS (grandparent).

Section 70 allows for applications for ACCS (grandparent) to be backdated to 2 July 2018 if made on or before 23 September 2018. This is only where the individual had, prior to commencement day, received the special grandparent rate of CCB in relation to the child in respect of whom the ACCS (grandparent) application is made.

Division 6 relates to arrangements and enrolments of children prior to commencement day.

Section 71 ensures that certain arrangements made between an individual and an operator of an approved child care service in relation to the enrolment of a child prior to commencement day may be taken to be a complying written arrangement for the purposes of paragraph 85BA(1)(b) of the Assistance Act until 23 September 2018. This means that parents who had been receiving CCB by fee reduction immediately before commencement day in relation to these enrolments will be taken to have a "complying written arrangement" in place, whether or not the old arrangement in fact meets all of the requirements for a complying written arrangement. This will ensure individuals can be eligible for CCS for sessions of care between 2 July 2018 and 23 September 2018. However, from 24 September 2018, all individuals must have a complying written arrangement within the meaning of subsection 200B(3) of the Administration Act, in place (including where the old arrangement was a complying written arrangement), to remain eligible for CCS for a session of care. Subsection 71(2) outlines a number of practical repercussions of this principle.

Division 7 relates to certain notices and reports that are taken to have been given.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Section 72 allows, during a two-year transitional period from 2 July 2018, for enrolment notices to be provided outside of the statutory timeframe and, if so, still taken to be legally given and to enable CCS or ACCS payments to be made.

Subsection 72(3) clarifies that the modification of the law for this purpose does not rectify a breach of section 200A of the Administration Act in relation to enrolment notices. An enrolment notice that is not given in accordance with section 200A of the Administration Act, and is not covered by subsection 72(1) of the Rules, may still lead to the enforcement of the offence or civil penalty under subsection 200A(5) or (6), or the imposition of a sanction under section 195H of the Administration Act.

Section 73 allows, during a two-year transitional period from 2 July 2018, for session reports to be provided outside of the statutory timeframe and, if so, still taken to be legally given and to enable CCS or ACCS payments to be made.

Subsection (3) clarifies that the modification of the law by this section does not rectify a breach of section 204B of the Administration Act. A session report that is not given in accordance with section 204B of the Administration Act, and is not covered by subsection 73(1) of the Rules, may still lead to the enforcement of the offence or civil penalty under subsection 204B(4) or (5), or the imposition of a sanction under section 195H of the Administration Act.

Division 8 relates to compliance processes after commencement day in respect of prior conduct.

Section 74 ensures that any notice issued under section 201 of the Administration Act (a notice of intention to impose a sanction) prior to commencement day is treated as still on foot after the commencement day. The provision achieves this by stating that it is to be treated as if it was issued under section 199A of the Administration Act (the new provision under which notices of intention to impose a sanction can be issued).

Subsection 74(1) provides that the Secretary may decide to impose a sanction on the approved provider in respect of the child care service under section 195H of the Administration Act in relation to a notice of intention to impose a sanction issued under section 201 of the Administration Act prior to commencement day, if no decision had been made under section 200 of the Administration Act (prior to commencement day).

Subsection 74(2) clarifies that the breach of conditions for continued approval referred to in the notice issued under section 201 of the Administration Act (before commencement day) is to be taken as a sufficient basis on which the Secretary may be satisfied in relation to the non-compliance referred to in section 195H of the Administration Act (after commencement day).

Section 75 clarifies that a sanction may be imposed on an approved provider after the commencement day in respect of breaches occurring prior to the commencement day including where subitem 10(1) of Schedule 4 to the Amendment Act saves conditions for continued approval that applied before commencement day that were contravened.

Division 9 relates to continuation of conditions for continued approval.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Section 76 provides for the transition of a condition for continued approval of an approved child care service imposed by the Secretary under subsection 199(2) of the Administration Act prior to commencement day.

Subsection 76(1) provides that a condition for continued approval of an approved child care service prior to commencement day is taken to apply as a condition for continued approval imposed under section 195F of the Administration Act of the approved provider in respect of that relevant service.

Example: A condition for continued approval was imposed on an approved child care service under subsection 199(2) of the Administration Act that the service must not engage more than 10 educators for six months from 10 May 2018. From the commencement day (2 July 2018), that condition for continued approval is taken to be imposed on the approved provider in respect of the child care service under section 195F of the Administration Act and the condition will stay in effect until 10 November 2018. The timeframe specified in the condition imposed under subsection 199(2) of the Administration Act continues to operate after commencement day, notwithstanding the condition is taken to apply as a condition imposed under section 195F of the Administration Act from 2 July 2018.

Division 10 relates to modifications to working with children card requirements under section 195D of the Administration Act.

Section 77 modifies section 195D of the Administration Act relating to the condition for continued approval in relation to working with children card that certain individuals are required to hold due to their involvement in providing child care.

Subsection 77(1) provides that from 2 July 2018 until 1 July 2020 (inclusive), details of working with children cards are only required to be given to the Secretary in respect of the following individuals:

- any individual who is a person with management and control of the approved provider (within the meaning of section 194F of the Administration Act); and
- an educator of an FDC service; and
- an educator of an IHC service.

This section addresses a limitation in the computer system for CCS and ACCS (including third party software) that is likely to apply within the transitional period that may restrict the ability to provide details of working with children cards.

Subsection 77(2) clarifies that any reference in the Principal Rules and the *Child Care Subsidy Secretary's Rules 2017* to the requirement in section 195D of the Administration Act is also modified by subsection 77(1) of the Rules.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Subsection 77(2) also clarifies that subsection 77(1) of the Rules does not alter any legal requirement to hold a working with children card under State or Territory legislation. The approved provider must comply with its obligations under the State or Territory legislation independently of its obligations under the family assistance law. Irrespective of subsection 77(1), an approved provider will be in breach of the condition for continued approval under subsection 195A(4) of the Administration Act, if an individual engaged to be involved in child care service, is required to, but does not hold, a working with children card under a State or Territory law.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Statement of Compatibility with Human Rights

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

Child Care Subsidy Minister's Amendment Rules (No. 2) 2018

The *Child Care Subsidy Minister's Amendment Rules (No. 2) 2018* (the Rules) 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 Rules are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (the Assistance Act) and item 12 of Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*.

The Rules amend the *Child Care Subsidy Minister's Rules 2017* (F2017L01464) (Principal Rules) and prescribe matters that are permitted as empowered by the Assistance Act and the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

In particular, the Rules deal with a range of matters including:

- provisions consequential upon the introduction of the "in home care service" type;
- conditions for continued approval of certain classes of approved providers;
- a new withholding percentage for CCS of five per cent;
- circumstances during the transitional period where certain notices and reports are taken to have been given, even when they are late;
- other transitional matters, dealing with: old arrangements for child care which are not yet "complying written arrangements"; continuity of the immunisation grace period during transition; and compliance processes underway during transition; and
- certain providers who are not required to meet State or Territory requirements.

Human rights implications

The amendments made by the Rules engage the following rights:

- the rights of the child under the *Convention on the Rights of the Child* (CRC), particularly Article 3, 18, 23 and 27;
- the right to work and the right to social security under Articles 6 and 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the right to equality and non-discrimination under Articles 1, 4, 7 and 28 of the *Convention on the Rights of Persons with Disabilities* (CRPD).

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Rights of the child

Article 3(1) of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 3(3) requires institutions and services responsible for the care of children to conform to standards established by competent authorities, particularly in the areas of safety and health.

Article 18(2) also requires States 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.

Article 18(3) requires States Parties to take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible.

Article 23 recognises the right of the disabled child to special care and ensure the extension of assistance, subject to available resources, to the child and those responsible for his or her care, for which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

Although primary responsibility for ensuring child care services and staff are appropriately qualified, and that care provided conforms to certain quality and safety standards rests with the relevant State and Territory authorities, the Commonwealth has also taken steps to supplement and complement those regimes. The Rules therefore reflect an increasing recognition of the importance of cooperation between the various levels of government. New section 48A, as inserted by the Rules, requires providers of in home care (IHC) services to meet additional conditions for ongoing approval that concern the quality of care provided, including ensuring that measures are in place to ensure an ongoing commitment to quality of care. In particular, section 48A(2) addresses quality child care, and subsections 48A(3) and (4) address arrangements to manage serious incidents that may occur while a child is being cared for as part of IHC. These conditions must not only be satisfied at the time of approval, but also on an ongoing basis.

Providers must also have in place any approvals or licences required to operate the service under the law of the State or Territory in which the service is situated. This generally requires the provider to be approved under the *Education and Care Services National Law* (the National Law) (as applied in State and Territory jurisdictions and which relates to the monitoring of the quality of child care services). This allows for consistency between the separate approval regimes that exist under State or Territory legislation (primarily the National Law) and the family assistance law. It also ensures that providers are only approved if they have also satisfied the relevant State or Territory authority of its ability to comply with quality and safety standards, and suitability to provide child care services. The ongoing National Law approval also forms a condition for continued approval so that a provider's approval under the family assistance law may be affected by any suspension or cancellation of National Law approval. Having a consistent approach supports the effective monitoring of services to ensure the quality and consistency of care across services, which is in the best interests of the children being cared for, and therefore promotes the rights of the child. Where an exception is granted in respect of services that are not required to hold National Law approval (see section 50), Part 4 of the Principal Rules also sets out quality and safety measures that must be complied with by the provider in respect of that service to remain

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

approved (see section 49 of the Principal Rules). These measures require demonstrating a commitment to high quality child care, notifying of serious incidents and managing work health and safety matters, amongst other things.

Right to an adequate standard of living

Article 27 of the CRC requires that States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 27(3) requires States Parties to take appropriate measures to assist parents and others responsible for the child to support the child's development.

Article 28 of the CRPD requires States Parties to recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including ensuring access to appropriate and affordable services and assistance for disability-related needs.

The Rules support this right through a number of provisions, in particular at item 8 in the Schedule to the Rules. This references new legislation enacted in South Australia which captures when a child is at serious abuse or neglect. This ensures that individuals with children who fall within this category can access a higher rate of subsidy to support their children, while other interventions are sought (see section 204K of the Administration Act). In addition, new sections 69 and 70 as inserted by the Rules ensure that individuals, including those seeking eligibility for Additional Child Care Subsidy (ACCS) (grandparent), are given an extended period to be assessed and transition to the Australian Government's new child care package (the package), to ensure that children attending care are not adversely affected because of an individual's inability to complete the required administrative processes by 2 July 2018. Further to this, new section 62A ensures that an individual's access to subsidised child care is not restricted during the transition. That is, where a child is within an immunisation grace period, that period will continue during the transition on 2 July 2018 (without this provision, the individual may not be eligible for Child Care Subsidy (CCS) during transition).

In relation to IHC, these Rules enable children with unique family circumstances to have access to care in their family home, where families do not have the ability to access other forms of approved child care.

Right to work and social security

Article 6 of the ICESCR requires that States Parties recognise the right to work, including through developing policies and techniques to achieve steady economic, social and cultural development and full and productive employment. Article 9 recognises the right of everyone to social security.

The Australian Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. The right to work goes to the core objective of new CCS and ACCS payments and the new IHC program, to help parents who want to work, or who want to work more. The Rules reinforce this commitment by ensuring child care fee assistance can be paid in a broader range of circumstances that will further the capacity of individuals to engage in work, study, training and other activities that promote workplace participation and engagement.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

In particular, new sections 72 and 73 allow for notices that would otherwise be taken not to have been given because they were not provided within the required timeframe (i.e. enrolment and session reports), to be given. This ensures that the individual will not be adversely affected by because of a fault of the provider. Further to this, in order to support the continuation of child care fee assistance during the transition period, those individuals with arrangements for care prior to the commencement of CCS that are transitioned, will be taken to have complying written arrangements in place (see section 71). This ensures that the basic eligibility criteria can be taken to have been met, and CCS (or ACCS) can be paid, while providers and individuals are transitioning.

The Rules will also support parents of children including those with disability by facilitating pathways to appropriate support to help maintain their workforce participation and provide access to subsidised child care for their children where necessary, without which these parents may have had to reduce their level of participation in the workforce or stop work altogether.

Specifically, the Rules will support workforce participation for families by providing a flexible option where the family is not able to access other types of approved child care services during the times care is required (particularly with respect to the new IHC service type). Parents and carers who work non-standard hours or are geographically isolated face significant challenges with workforce participation where other forms of approved child care are not readily available. Similarly, workforce participation for families with challenging and complex needs are often inhibited. IHC supports such families through provision of access to education and care in the family home at times suitable for parents and carers, thereby facilitating increased workforce participation through access to child care fee subsidies.

Right to equality and non-discrimination

The Rules support the purpose of the CRPD under Article 1, which is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.

Article 4(1) requires States Parties to adopt appropriate legislative, administrative and other measures for the implementation of the rights of persons with disabilities

Article 7 requires that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. States Parties are obligated to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

These Rules, specifically in relation to IHC, support families who cannot access other forms of approved child care, which may include where a family has a child with disability whose care needs cannot be catered for through other disability support services or child care settings. In particular, section 48A(2)(b) provides a condition for continued approval for approved providers of IHC services, which is to develop a program that acknowledges and strengthens the cultural identity of children to whom care is provided.

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826

Conclusion

The Rules are compatible with human rights. Measures in the Rules are compatible with and advance human rights under the CRC, ICESCR and CRPD. These measures ultimately enable parents who wish to work by providing avenues to child care fee assistance, with the aim that children can have access to care that promotes their development and wellbeing.

Simon Birmingham
Minister for Education and Training

Authorised Version Explanatory Statement registered 22/06/2018 to F2018L00826