Explanatory Statement

## *Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister’s Rules 2020*

## Purpose and Authority

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister’s Rules 2020* (Amendment Rules) are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

Amongst other things, subsection 33(3) of the Acts Interpretation Act provides that a power to make an instrument of a legislative character (such as subsection 85GB(1) of the Family Assistance Act) includes a power to amend such an instrument.

The Amendment Rules amend the *Child Care Subsidy Minister’s Rules 2017* (Principal Rules).

In summary, the Amendment Rulesprescribes the further circumstances, conditions and period during which an approved child care provider is not required to enforce the payment of child care gap fees (essentially the difference between provider’s hourly session fees and any Child Care Subsidy (CCS), Additional Child Care Subsidy, and certain third party payments) from parents under section 201B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). In particular, under these amendments, a child care provider is not required to enforce payment of child care gap fees for a session of care provided (or taken to have been provided) by a service that is open where children are absent from care.

These amendments are intended to provide further business continuity for the child care sector and will enable child care services to provide fee relief to families during the COVID-19 pandemic where the abovementioned conditions apply.

The Amendment Rules further provide for the making of business continuity payments to providers in respect of their services under Division 6 of Part 8A of the Family Assistance Administration Act. In particular, under these amendments, subject to meeting certain conditions, a child care provider will receive business continuity payments in respect of its services based on a percentage of its fees charged during a reference period.

These amendments are intended to provide further business continuity for the child care sector by providing stable income during a period of falling enrolments and so allow them to continue to operate, and provide fee relief to families during the COVID-19 pandemic. These amendments will also support children of essential workers and vulnerable and disadvantaged children to access free child care during these difficult times. These amendments acknowledge and are intended to cater for dynamic circumstances during the COVID-19 pandemic.

## Commencement

These rules commence on the day after they are registered on the Federal Register of Legislation, unless otherwise specified in the commencement table.

## Consultation

The measures in the Amendment Rules are in response to stakeholder feedback in relation to the COVID-19 pandemic. The Department of Education, Skills and Employment has been consulting weekly with stakeholders in the early childhood education and care sector through the Early Childhood Education and Care Reference Group on COVID-19 issues.

## Regulation Impact Statement

In relation to the business continuity payments, the regulatory impact is minimal because there is no direct regulatory impact other than those required to administer the payments or that already exist in Family Assistance Law. In relation to the circumstances in which providers will not be required to collect gap fees from individuals, the regulatory impact will be determined per a Prime Minister’s exemption has been granted for two years for all COVID-19 related measures where they have more than a minor regulatory impact.

Abbreviations used in this Explanatory Statement

**Amendment Rules** means the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister’s Rules 2020*;

**CCS** means Child Care Subsidy

**Family Assistance Act** means the *A New Tax System (Family Assistance) Act 1999*;

**Family Assistance Administration Act** means the *A New Tax System (Family Assistance) (Administration) Act 1999*;

**Principal Rules** means the *Child Care Subsidy Minister’s Rules 2017* (being the rules made by the Minister under subsection 85GB(1) of the Family Assistance Act).

Detailed Explanation of Amendments

**Preliminary**

Sections 1 to 4 of the Amendment Rules are formal provisions providing for the name, commencement, authority etc. for the instrument.

**Section 1** states the name of the instrument as the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister’s Rules 2020*.

**Section 2** provides that sections 1 to 4 and Schedule 1, other than item 2 of the Amendment Rules to commence on the day after the instrument is registered on the Federal Register of Legislation. Schedule 1, item, 2 commences on 23 March 2020.

**Section 3** states that the Amendment Rules are made under the Family Assistance Act.

**Section 4** provides that the Principal Rules are amended as set out in the Schedule to the Amendment Rules.

**Limited waiver of requirement to enforce payment of hourly fees**

Subsection 201B(1) of the Family Assistance Administration Act requires approved providers to take all reasonable steps to ensure that individuals pay the provider the difference between the fee charged and the CCS paid. To enable child care services to provide fee relief to families, subsection 201B(1A) permits providers not to comply with subsection 201B(1):

* in particular circumstances or events prescribed by the Minister’s rule; and
* where the session of care occurs during the period prescribed by the Minister’s rule for the event or circumstance; and
* where any other conditions prescribed by the Minister’s rule are met.

Subsection 54A(2) of the Principal Rules currently prescribes, for the purposes of subsection 201B(1A) of the Family Assistance Administration Act, that the particular event or circumstance is the COVID-19 pandemic. Subsections 54A(3) and (4) respectively prescribe the conditions which must be met in relation to the circumstance or event, and the applicable period for the prescribed circumstance or event.

**Item 1** inserts into section 4 of the Principal Rules a definition for ‘business continuity payment’, namely a payment made under 205A of the Family Assistance Administration Act.

**Item 2** repeals subsections 54A(3) and (4) of the Principal Rules and replaces them with new subsections 54A(3), (3A), (4) and (4A), which prescribe the conditions for when a provider is not required to take all reasonable steps under section 201B in relation to a session of care provided by a service to a child, and the period for which this exemption applies.

Subsection (3) prescribes the following conditions where a child is absent from care:

* the service is closed because a health agency has advised or required the service to be closed as a result of the COVID-19 pandemic;
* the service is not closed.

Subsection (3A) prescribes an additional condition where the session of care was provided by a family day care service or an in home care service that has not closed. The condition is that the Secretary has not, since 2 July 2018, made a compliance decision in respect of the service or the approved child care provider.

Subsection (4) provides that for the purpose of paragraph 54(3)(a), the period for which a provider is not required to take reasonable steps under section 201B is the period beginning on the day the child care service closes as a result of the advice or requirement by a health agency and ending on the earlier of the last day in the period that the health agency advises or requires the child care service to be closed or 30 June 2020.

Subsection (4A) provides that for the purpose of paragraph 54(3)(b), the period is 23 March 2020 to 30 June 2020.

These amendments are intended to provide further business continuity for the child care sector and will further enable child care services to provide fee relief to families during the COVID-19 pandemic where the above mentioned conditions apply. As the COVID-19 pandemic has made it difficult for parents to continue paying their child care fees, this rule will enable child care providers to waive parents’ gap fees during this period.

**Coronavirus response business continuity payments to child care providers**

Subsection 205A(1) of the Family Assistance Administration Act provides that the Secretary may make a business continuity payment to an approved provider where three criteria are met:

* the provider is required, under subsection 204B(1) of that Act to give a report about children for whom care is provided during a week (a “weekly session report”);
* the provider does not give the report for the week by the time required; and
* the Secretary is satisfied that the failure to give the report is due to circumstances set out in the Minister’s rules.

Subsection 205A(2) provides that the Minister’s rules must prescribe a method for calculating business continuity payments.

The Amendment Rules prescribe the circumstances in which business continuity payments will be payable to providers for weeks between 6 April 2020 and 28 June 2020, and the method for calculating those payments.

**Item 3** inserts a new heading, ‘Division 1’ before section 57 of the Principal Rules, which is a technical amendment to accommodate the addition of a new ‘Division 2’ by the Amendment Rules to deal specifically with the COVID-19 response business continuity payments. Item 3 also inserts a new subsection 57AA to the Principal Rules, which provides that Division 1 will apply to periods where Division 2 does not apply.

**Item 4** inserts the new *Division 2 – Coronavirus response business continuity payments* into Part 6 of the Principal Rules. The new Division consists of sections 60A to 60F inclusive.

Section 60A deals with the application of Division 2. Division 2 applies to business continuity payments for a week in the period beginning 6 April 2020 and ending 28 June 2020.

Section 60B sets out the definition of ‘reference fortnight’. The hourly session fees charged by the child care provider during the reference fortnight are used to calculate the business continuity payments to that service under this measure. The reference fortnight for an Outside School Hours Care service that provides only vacation care is the fortnight that starts on the Monday of the first week in the school holidays between term 3 and term 4 in 2019. For all other services, the reference fortnight is the fortnight starting 17 February 2020.

Section 60C sets out the circumstances in which a business continuity payment will be made. These circumstances are similar to those currently applicable to business continuity payments in the ordinary case, set out in section 57 of the Principal Rules. That is, the failure to give a weekly session report is due to circumstances beyond the provider’s control and which prevent the provider from giving the report by the required time.

Section 60D is the method for determining the base weekly amount of business continuity payment, which is the sum of the amounts worked out under section 60D and 60E, rounded to the nearest $100.

Section 60E provides that the base weekly amount is worked out for each service of a provider:

* that received fee reduction amounts under section 67EB of the Family Assistance Administration Act in the reference fortnight (typically the fortnight starting 17 February 2020); and
* for which the provider is unable to give weekly session reports.

The base weekly amount is the sum of hourly session fees for all sessions of care provided by the service during the reference fortnight, divided by two (to get a weekly amount).

For services that did not receive fee reduction amounts during the reference fortnight, amounts will be worked out in accordance with section 60F.

Subsection 60E(2) provides that, for the purpose of subsection (1), the reference hourly fee is 50 per cent of the lower of the actual hourly session fee charged by the provider and the CCS hourly rate cap (as set out in subitem 2(3) of Schedule 2 to the Family Assistance Act).

Subsection 60E(3) provides that, notwithstanding the calculation in subsection (1), where a provider or a service does not meet particular requirements, the amount of the business continuity payment in relation to a service is nil. Some of these conditions are set out in the *Early Childhood Education and Care Relief Package Payment Conditions* document as it exists from time to time. Subsection 85GB(2A) of the Family Assistance Act allows the Minister’s rules to apply any matter contained in a document as it exists from time.

The conditions are intended to ensure that services remain open to provide child care, are providing care, and are not charging fees for providing that care.

Section 60F provides for payments of supplementary amounts worked out in accordance with the *Early Childhood Education and Care Relief Package Payment Conditions* document. This recognises that there may be a number of services that did not receive fee reduction amounts during the reference fortnight, and so will not have an amount calculated under section 60E. Additionally, for some services, the amount may not be appropriate. The *Early Childhood Education and Care Relief Package Payment Conditions* document will set out circumstances in which these supplementary payments are payable, and the amounts of those payments.

Statement of Compatibility with Human Rights

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

## *Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister’s Rules 2020*

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.*

## Overview of the Legislative Instrument

In summary, the Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister’s Rules 2020 (Amendment Rules)prescribes the further circumstances, conditions and period during which an approved child care provider is not required to enforce the payment of child care gap fees (essentially the difference between provider’s hourly session fees and any Child Care Subsidy, Additional Child Care Subsidy, and certain third party payments) from parents under section 201B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). In particular, under these amendments, a child care provider is not required to enforce payment of child care gap fees for a session of care provided (or taken to have been provided) by a service that is open and children are absent from care, due to COVID-19.

These amendments are intended to provide further business continuity for the child care sector and will enable child care services to provide fee relief to families during the COVID-19 pandemic where the abovementioned conditions apply.

The Amendment Rules further provide for the making of business continuity payments to providers in respect of their services under Division 6 of Part 8A of the Family Assistance Administration Act. In particular, under these amendments, subject to meeting certain requirements, a child care provider will receive business continuity payments in respect of its services based on a percentage of its fees charged during a reference period.

These amendments are intended to provide further business continuity for the child care sector by providing stable income during a period of falling enrolments and so allow them to continue to operate, and provide fee relief to families during the COVID-19 pandemic. These amendments will also support children of essential workers and vulnerable and disadvantaged children to access child care for no cost during this difficult times. These amendments acknowledge and are intended to cater for dynamic circumstances during the COVID-19 pandemic.

## Analysis of human rights implications

The Amendment Rules engage Articles 3, 19 and 27 of the *Convention on the Rights of the Child* (CRC).

**Article 3** of the Convention on the Rights of the Child (CRC) recognises that in all actions concerning children, the best interests of the child shall be a primary consideration. **Article 19** of the CRC requires that appropriate measures are taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

**Article 27** of the CRC recognises the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, social and moral development. Article 27 also requires States Parties to take appropriate measures to assist parents and others responsible for the child to implement this right and shall, where required, provide material assistance and support programmes.

Early childhood education and child care play a vital role in the development of Australian children and the rights of the child listed above are fundamentally engaged by the family assistance law generally in facilitating access to subsidised child care. Moreover, children’s preparation for school and access to this care is also one of the most effective early intervention strategies to break the cycle of poverty. Accordingly, the Amendment Rules supports children and families to continue to access and/or remain enrolled in quality child care during the COVID-19 event and ensure business continuity for child care services.

In particular, the measures in the Amendment Rules continue to advance the rights of parents and children by prescribing circumstances for when business continuity payments may be made to approved providers of child care services under section 205A. This will provide stable income to child care providers during a time of falling enrolments and so allow them to continue to operate, and provide fee relief to families during the COVID-19 pandemic. This will also support children of essential workers and vulnerable and disadvantaged children to access child care at no cost during this difficult times.

## Conclusion

The Amendment Rules are compatible with human rights.

Dan Tehan

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