

Explanatory Statement

Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2020

Purpose and Authority

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) 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).

As part of the Early Childhood Education and Care (ECEC) Relief Package, the department has, since 6 April 2020, made business continuity payments (BCPs) under the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) to providers of child care approved under that Act (approved providers). These BCPs have been paid in lieu of Child Care Subsidy (CCS) and Additional Child Care Subsidy (ACCS), to ensure the viability of the early childhood education and care sector and provide fee relief to families. The ECEC Relief Package will cease on 12 July 2020. From 13 July 2020, CCS and ACCS will recommence.

The Amendment Rules introduce a number of new measures to support approved providers and individuals with children in care through this period, which includes:

- providing an additional one week baseline payment during the ECEC Relief Package period.
- temporarily relaxing the CCS activity test to help individuals impacted by COVID-19 to get back into their workforce participation activities, for 12 weeks from 13 July to 4 October 2020. During this period, individuals can access 100 hours of subsidised child care per fortnight where they now have a reduced number of hours of work, training, study or other recognised activity, compared to their activity level immediately prior to COVID-19
- extending the Minister's rule which permits child care services to waive gap fees until 31 December 2020 in the event that the service is forced to close on public health advice for COVID-19 reasons.
- making it a condition for continued approval that an approved provider is not paid an amount of JobKeeper payment for an individual who is not an eligible employee of the provider, and in the case of approved providers that are self-employed, is not paid an amount of JobKeeper payment for themselves. Employees of approved providers who are principally engaged in the operation of a child care service, and self-employed providers, will be ineligible for JobKeeper payments from 20 July 2020.

These amendments are intended to ensure that government support is targeted appropriately and families continue to have access to subsidised child care.

These amendments acknowledge and are intended to cater for dynamic circumstances during the COVID-19 pandemic, and continue to support families and viability for the sector. The measures are temporary, only applying to a transitional period to support the return to CCS and ACCS.

The amendments also make administrative and technical amendments to the Principal Rules:

- inserting a cap on the appropriation in section 233 of the Family Assistance Administration Act for payments under the Community Child Care Fund (CCCCF) Special Circumstances Grant Opportunity program of \$584 million for the 2020-21 financial year;
- replacing references to “newstart allowance” in the Principal Rules with “jobseeker payment”, repealing one version of a duplicated definition, and renumbering provisions that have duplicated numbers.

Commencement

Part 1 of Schedule 1 of these Amendment Rules commence the day after this instrument is registered.

Part 2 of Schedule 1 of these Amendment Rules commence on 1 July 2020.

Consultation

The Four Week Review of the ECEC Relief Package (released in May 2020), involved a survey of more than 7,000 child care providers. The survey found the package had succeeded in its objective of keeping services open and viable, with 99 per cent of around 13,400 services operational as of 8 May 2020. Eighty six percent of respondents reported the package had helped them to stay open, 86 per cent reported the package helped them to retain staff, and 87 per cent reporting the package had helped them to provide child care to the children of essential workers and vulnerable children. Feedback received through the survey indicated the ECEC sector wanted at least four weeks’ notice of any major changes to the ECEC relief package and the transition back to CCS.

The Department of Education, Skills and Employment (the Department) has been consulting weekly with stakeholders in the ECEC sector through the Early Childhood Education and Care Reference Group on COVID-19 issues. In addition, during May and June 2020, the department has run additional consultation sessions with stakeholder groups.

Regulation Impact Statement

A Prime Minister’s exemption has been granted for all COVID-19 related measures where they have more than a minor regulatory impact.

Abbreviations used in this Explanatory Statement

ACCS means Additional Child Care Subsidy;

Amendment Rules means the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2020*;

BCP means business continuity payments as defined under section 4 of the Principal Rules;

CCCF-SC means the Community Child Care Fund Special Circumstances Grant Opportunity;

CCS means Child Care Subsidy;

ECEC Relief Package means the Early Childhood Education and Care Fee Relief Package;

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*;

JobKeeper Rules means the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*;

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);

Relief Package Transition Arrangements means the Early Childhood Education and Care Relief Package Transition Arrangements; and

Transition Payments means payments made to approved providers in accordance with grant agreements entered into between an approved provider and the Department under section 85GA of the Family Assistance Act, and which form part of the Transition Arrangements.

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.4) Minister's Rules 2020*.

Section 2 provides for the commencement dates of the Amendment Rules.

Section 3 states that the Amendment Rules are made under the Family Assistance Act. Most of the amendments commence on the day after the Amendment Rules are registered. However, Part 2 of Schedule 1 to the Amendment Rules will commence on 1 July 2020. Part 2 of Schedule 1 amends section 78 of the Principal Rules, which relates to the operation of section 233 of the Family Assistance Administration Act. The commencement of Part 2 of Schedule 1 is tied to amendments to section 233 of the Act made under Part 2 of Schedule 4 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*, which commences on 1 July 2020.

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

Schedule 1 – Amendments

Amendments to activity test requirements

Item 11 inserts a new Subdivision C after section 40 of the Principal Rules, which sets out the circumstances in which an individual has a Minister's rule result in the 12 weeks following the end of the ECEC Care Relief Package.

Section 40AA is an application provision, which clarifies that Subdivision C applies for the purpose of working out a Minister's rule result for an individual for a CCS fortnight that begins in the period beginning on 13 July 2020 and ending on 4 October 2020. It also limits the application of Subdivision C to circumstances where Subdivision B does not also produce a Minister's rule result for an individual.

Section 40AB provides that individuals who can no longer engage in the same number of hours of work, training, study or other activity recognised by the CCS activity test that they were able to engage in immediately prior to the COVID-19 crisis, will be entitled to 100 hours of subsidised child care per fortnight.

If, in at least one CCS fortnight between 13 January and 22 March 2020, an individual engaged in at least 16 hours of recognised activities, or if they were a member of a couple, their partner engaged in at least 16 hours of recognised activities and they engaged in at least 8 hours of recognised activities, and in the current CCS fortnight, the person (and their partner, if they are a member of a couple) engaged in at least 8 hours of recognised activities, they will have a Minister's rule result of 100 (i.e. will be entitled to 100 hours of subsidised child care in the current fortnight).

These amendments to activity test requirements are intended to assist families to return to the level of work, study or training they were doing before the COVID-19 crisis, or to undertake more activities than before, by allowing them to access greater levels of subsidised care during this transition period.

Shifting approved providers and eligible employees from JobKeeper payments to Transition Payments

One component of the Relief Package Transition Arrangements includes shifting approved providers and their eligible employees from receiving JobKeeper payments (in accordance with the JobKeeper Rules) to receiving Transition Payments instead. These Transition Payments are administered directly by the Department via a grant funding program established under section 85GA of the Family Assistance Act, and will be made available to *all* approved providers who were eligible to receive BCPs under the ECEC Relief Package between 6 April 2020 and 12 July 2020.

In order to give effect to this arrangement, the JobKeeper Rules (which governs JobKeeper payments and is administered by the Treasury) will be amended so that approved child care providers are excluded from being entitled to JobKeeper payments from 20 July 2020 in respect of their childcare operations.

Item 12 inserts new section 47AB into the Principal Rules, which makes it a condition for continued approval for the purposes of section 195E of the Family Assistance Administration Act that:

- (a) an approved provider is not paid JobKeeper in respect of any individuals who are not “eligible employees” of the provider because of paragraph 9(4)(d) of the JobKeeper Rules; and
- (b) an approved provider is not paid an amount of JobKeeper to which they are not entitled because of paragraph 11(1)(ba) of the JobKeeper Rules.

The new condition will complement amendments to the JobKeeper Rules in relation to approved child care providers and their employees, and to ensure the integrity of Transition Payments by enabling them to be appropriately targeted towards approved providers who are no longer eligible to receive government support through the JobKeeper scheme.

The new condition for continued approval will provide the Department with the ability to properly monitor providers’ compliance with the requirements that they must meet in order to continue receiving Transition Payments during the transition payment period (which will run from 13 July 2020 to 27 September 2020), and to provide the Australian Taxation Office with information about providers’ compliance with the condition for the proper administration of JobKeeper payments.

Item 5 and **item 6** are technical amendments which insert the new heading ‘Subdivision A – Preliminary’ before section 31 of the Principal Rule and ‘Subdivision B – Circumstances in which an individual has a Minister’s rule result – general’ before section 32 of the Principal Rules. These headings have been inserted to distinguish, and better articulate context of, the provisions that follow.

Extension of period during which gap fees may be waived

Section 201B(1A) of the Family Assistance Administration Act allows the Principal Rules to prescribe particular events or circumstances in which a provider is not required to take reasonable steps to enforce payment of hourly gap fees. Section 54A of the Principal Rules currently permits providers to not recover gap fees where the service is closed because a health agency has advised or required the service to close as a result of the COVID-19 pandemic; or where the service is otherwise not closed. The period for which this circumstance applies currently ends on 30 June 2020.

Item 13 of the Amendment Rules amends subparagraph 54A(4)(b)(ii) of the Principal Rules so that the period during which a provider is permitted to waive the payment of gap fees is extended until 31 December 2020, where the service is closed as a result of the COVID-19 pandemic (noting that services which are open and provide care after the end of the BCP period will be required to enforce gap fees). This amendment is intended to ensure families can continue to pay minimal or no child care gap fees while being able to maintain enrolments for their children at closed services where the COVID-19 pandemic continues to affect the normal operation of child care services.

Amendments to coronavirus response business continuity payments to childcare providers

Subsection 205A(1) of the Family Assistance Administration Act provides that the Secretary can pay BCP to an approved provider where certain criteria are met. Subsection 205A(2) provides that the Principal Rules must prescribe a method for calculating BCPs.

Section 60A of the Principal Rules currently provides that coronavirus response BCP is to be calculated under Division 2 of Part 6 and paid in relation to the period beginning 6 April 2020 and ending on 28 June 2020. **Item 15** amends section 60A so that the period in which coronavirus response BCPs are to be made is extended to 12 July 2020.¹ This amendment has been made to provide additional time for services and families to make the transition back to CCS.

Section 60E of the Principal Rules sets out the method for calculating BCPs for services that received fee reduction amounts for the reference fortnight.

Item 16 amends subsection 60E(2) by omitting the words “50 per cent”, being the current rate the “reference hourly fee” is calculated, and replacing them with “the relevant percentage” to allow for different percentages to be prescribed in different circumstances.

Item 17 inserts a new subsection 60E(2A) which provides that for subsection 60E(2), the “relevant percentage” is:

- (a) 100 per cent for BCPs made in the week beginning on 6 July 2020; and
- (b) 50 per cent for BCPs made in all other weeks during the coronavirus response period.

¹ From 13 July 2020, approved providers will cease to receive coronavirus response BCPs and CCS/ACCS payments will resume, complemented by a new Transition Payment which is to be calculated at 25 per cent of providers’ fee revenue or the existing hourly rate cap, whichever is lower, in the relevant reference fortnight (which is set out at section 60B of the Minister’s Rules).

The intent behind these amendments is to provide an additional one week baseline payment during the ECEC Relief Package period. The measure will help services as they transition back to CCS and ACCS.

Prescribing amount and grant purpose supported by annual appropriation

Subsection 233(1) of the Family Assistance Administration Act generally provides that payments made under the family assistance law are supported by special appropriation. However, subsection 233(2) expressly excludes from the special appropriation any grant payments made under section 85GA of the Family Assistance Act, unless those grant payments are prescribed in the Principal Rules.

Section 78 of the Principal Rules currently prescribes payments made for the purposes of an agreement under the *Community Child Care Fund Special Circumstances Opportunity Guidelines* for the purposes of subsection 233(2). That is, payments under such agreements are supported by the standing appropriation in subsection 233(1) of the Family Assistance Administration Act.

Section 233 of the Family Assistance Administration Act will be amended under Part 2 of Schedule 4 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* with effect from 1 July 2020. Those amendments will require the Principal Rules to set out annual caps on the amounts that may be paid out of the standing appropriation for the grant purposes prescribed for subsection 233(2), beginning in the financial year 2020-21.

Subsection 233(3) will provide if any grant payments are prescribed in the Principal Rules in accordance with subsection 233(2) of the Family Assistance Administration Act, the Minister must also prescribe the total amount that may be paid by special appropriation in respect of a financial year for all of those grant payments.

Subsection 233(5) will provide that the Minister may also prescribe the total amount that may be paid in respect of a specific grant payment prescribed by the Minister's Rules.

Accordingly, **item 20** amends section 78 of the Principal Rules from 1 July 2020 to give effect to the legislative provisions listed above. Firstly, subsection 78(1) provides that payments made for the purposes of an agreement entered into under the CCCF-SC Grant Opportunity are prescribed.

New subsection 78(2) of the Principal Rules provides that for subsection 233(3) of the Family Assistance Administration Act, the total amount that may be paid for prescribed grant purposes in respect of 2020-21 is \$584 million (noting that this figure is the same as the figure prescribed under subsection 78(3) because the CCCF-SC Grant Opportunity is the only grant program to be prescribed under subsection 78(1) of the Principal Rules).

New subsection 78(3) provides that for subsection 233(5) of the Family Assistance Administration Act, the total amount that may be paid for the CCCF-SC Grant Opportunity in respect of 2020-21 is \$584 million.

Technical amendments

Item 1 repeals the first occurring definition of ‘business continuity payment’ in the Principal Rules. There are currently two definitions of ‘business continuity payment’ in section 4 of the Principal Rules, which are substantively the same. The first definition refers to section 57 of the Rules, which in turn refers to a business continuity payment as a payment under section 205A of the Family Assistance Administration Act. The second definition simply defines a business continuity payment as a payment under section 205A of the Family Assistance Administration Act.

Item 14 consequently amends section 57 of the Rules so that the section simply refers to a business continuity payment without defining it.

Subparagraph 85CK(3)(a)(ii) of the Family Assistance Act specifies ‘jobseeker payment’ as transition to work payment.

The *Social Services Legislation Amendment (Welfare Reform) Act 2018* amended subparagraph 85CK(3)(a)(ii) of the Family Assistance Act to substitute a reference to newstart allowance with a reference to jobseeker payment from 20 March 2020. To ensure that the Principal Rules accurately and appropriately reflect the current language of the Family Assistance Act with respect to transition to work payments, **items 2 to 4** and **items 7 to 10** of the Amendment Rules replace references to ‘newstart allowance’ or ‘Newstart Employment Pathway Plan’ in the Principal Rules with references to ‘jobseeker payment’ or ‘Jobseeker Employment Pathway Plan’ as applicable.

Item 18 and **item 19** are technical amendments to renumber sections 60A and 60B in Division 1 of Part 6A of the Principal Rules as these provision numbers already exist in Division 2 of Part 6 (in relation to coronavirus response BCP).

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. 4) 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

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) 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).

As part of the Early Childhood Education and Care (ECEC) Relief Package, the department has, since 6 April 2020, made business continuity payments (BCPs) under the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) to providers of child care approved under that Act (approved providers). These BCPs have been paid in lieu of Child Care Subsidy (CCS) and Additional Child Care Subsidy (ACCS), to ensure the viability of the early childhood education and care sector and provide fee relief to families. The ECEC Relief Package will cease on 12 July 2020. From 13 July 2020, CCS and ACCS will recommence.

The Amendment Rules introduce a number of new measures to support approved providers and individuals with children in care through this period, which includes:

- providing an additional one week baseline payment during the ECEC Relief Package period
- temporarily relaxing the CCS activity test to help individuals impacted by COVID-19 to get back into their workforce participation activities, for 12 weeks from 13 July to 4 October 2020. During this period, individuals can access 100 hours of subsidised child care per fortnight where they now have a reduced number of hours of work, training, study or other recognised activity, compared to their activity level prior to COVID-19
- extending the Minister's rule which permits child care services to waive gap fees until 31 December 2020 in the event that the service is forced to close on public health advice for COVID-19 reasons.
- making it a condition for continued approval that an approved provider is not paid an amount of JobKeeper payment for an individual who is not an eligible employee of the provider, and in the case of approved providers that are self-employed, is not paid an amount of JobKeeper payment for themselves. Employees of approved providers who are principally engaged in the operation of a child care service, and self-employed providers, will be ineligible for JobKeeper payments from 20 July 2020.

These amendments are intended to ensure that government support is targeted appropriately and families continue to have access to subsidised child care.

These amendments acknowledge and are intended to cater for dynamic circumstances during the COVID-19 pandemic, and continue to ensure support for families and viability for the

sector. The measures are temporary, only applying to a transitional period to support the return to CCS and ACCS.

The amendments also make administrative and technical amendments to the Principal Rules:

- inserting a cap on the appropriation in section 233 of the Family Assistance Administration Act for payments under the Community Child Care Fund (CCCF) Special Circumstances Grant Opportunity program of \$584 million for the 2020-21 financial year;
- replacing references to “newstart allowance” in the Principal Rules with “jobseeker payment”, repealing one version of a duplicated definition, and renumbering provisions that have duplicated numbers.

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, these Amendment Rules give effect to the government’s Relief Package Transition Arrangements, which will support children and families to continue to access and/or remain enrolled in quality child care subsequent to the end of the ECEC Relief Package and with the resumption of CCS and ACCS. In particular, the measures in the Amendment Rules continue to advance the rights of parents and children by making it easier for parents and carers to meet the activity test, thereby lowering the threshold for families to access more hours of subsidised child care. This is further supported by an extension to the period in which providers are not required enforce payment of hourly gap fees from 30 June 2020 to 31 December 2020, where the service has been forced to close on public health advice for COVID-19 reasons, which will ensure that vulnerable and disadvantaged families in particular are able to access subsidised child care at reasonable costs as they transition back to CCS and ACCS.

The Amendment Rules also support business continuity and viability of approved child care providers. This ensures that additional financial support continues to be available for the child

care sector, in circumstances where that sector is experiencing increased hardship and financial distress due to natural disasters and emergency events, such as the COVID-19 pandemic.

Conclusion

The Amendment Rules are compatible with human rights.

Dan Tehan
Minister for Education