

Explanatory Statement

Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister's Rules 2020

Purpose and Authority

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) 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).

The Amendment Rules introduce a measure to support approved providers and individuals by adding a rule that permits approved providers to waive their fees for child care services in areas subject to Stage 3 or higher “stay at home” restrictions in response to the COVID-19 pandemic.

Commencement

The Amendment Rules commence on 13 July 2020.

Consultation

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

Amendment Rules means the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister's Rules 2020*.

Family Assistance Act means the *A New Tax System (Family Assistance) 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.5) Minister's Rules 2020*.

Section 2 provides that the Amendment Rules commence on 13 July 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.

Schedule 1 – Amendments

Extension of period during which providers can waive gap fees for services in areas with “stay at home” restrictions

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 so-called child care “gap fees” (the difference between the child care fees charged by the provider and an individual’s entitlement to child care subsidy in relation to those 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. Between 23 March and 30 June 2020, the section also enabled providers to waive gap fees, whether or not the service closed – although it should be noted that between 6 April and 12 July 2020, providers have not been able to charge fees in any case (see section 47AA of the Principal Rules).

Essentially, from 13 July 2020, unless a child care service is closed on advice of a health agency, the approved provider that operates it will need to start recovering gap fees from individuals whose children are cared for by the service.

However, in response to increased numbers of coronavirus cases in certain areas of Victoria, the Victorian government has recently imposed significant restrictions on people’s access to, and activities in, those areas. These restrictions have included “stay at home” directions, applicable in specific areas, that require people to stay at home and not leave except for a small number of reasons, such as obtaining food and other necessities, medical treatment, or essential work.

As a consequence of these restrictions, the Australian Government expects child care services in the affected areas to experience a substantial decline in attendance. Nevertheless, it is important that services that are able to remain open do so, to ensure that essential workers can continue to put their children in care. As part of a package of measures designed to assist these services and

the families that rely on them, providers will be able to waive gap fees for child care provided at services located in affected areas once they begin to charge fees again (from 13 July 2020).

Schedule 1 to the Amendment Rules amends section 54A of the Principal Rules to give effect to this policy.

Item 2 inserts a new paragraph (3)(c) with the effect that, where a child does not attend a session of care provided by an open service located in a “Restricted Areas” – the areas of Victoria specified by the Victorian government as areas in which “stay at home” restrictions apply – then the provider is able to waive the gap fees for that session of care service.

Item 3 inserts new subsection (4A) which prescribes the period during which providers are able to waive gap fees in the circumstances set out at new paragraph 3(c). Effectively, providers will be able to waive gap fees if, at the time the session of care is provided, the area in which the service is located is subject to the Stay at Home Directions. This period will end either when the Stay at Home Directions cease to apply to the area in which the service is located, or on 31 December 2020 (whichever is earlier).

New subsection 54A(5) inserted by **item 4** defines *health agency* (consistently with its current definition) as well as the *Stay at Home Directions*. The latter refers to the instrument made by the Victorian government under the **Public Health and Wellbeing Act 2008** of Victoria that sets out the restrictions and limits on residents of specified areas from leaving their places of residence.

Information on the *Stay at Home Directions* is available at the Victorian Government Department of Health and Human Services website at: <https://www.dhhs.vic.gov.au/victorias-restriction-levels-covid-19>. This information is current as at 8 October 2020.

Item 1 amends section 4 of the Principal Rules to insert a signpost definition of *Stay at Home Directions*.

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. 5) 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

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

The Amendment Rules introduce a measure to support approved providers and individuals by adding a rule that permits approved providers waiving their fees for child care services in areas subject to Stage 3 or higher “stay at home” restrictions in response to the COVID-19 pandemic.

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.

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 which will support children and families to continue to access and/or remain enrolled in quality child care. In particular, the measures in the Amendment Rules continue to advance the rights of parents and children by enabling providers to reduce the cost of care for parents. This will help 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.

Conclusion

The Amendment Rules are compatible with human rights.

Dan Tehan
Minister for Education