

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Education and Youth

### ***A New Tax System (Family Assistance) Act 1999***

#### ***Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2021***

##### **AUTHORITY**

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2021* (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* (Acts Interpretation Act).

Under subsection 33(3) of the Acts Interpretation Act, 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.

##### **PURPOSE AND OPERATION**

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to allow extra allowable absences for eligible individuals that are affected by COVID-19 lockdowns and stay at home orders. The extra allowable absences will ensure that families can continue to receive subsidised fee relief when their children are unable to attend care due to COVID-19 lockdowns or stay at home orders.

The Child Care Subsidy (CCS) scheme provides assistance towards the costs of child care for eligible families where a session of care is provided or is taken to have been provided. Child care fees are often structured such that families are charged for sessions of care their children are booked into, even if the child cannot attend the session of care. Ordinarily, CCS is available for a maximum of 42 sessions of care per financial year that the child does not attend, but is taken to have attended under subsection 10(2) of the Family Assistance Act.

Due to the COVID-19 pandemic and stay at home orders that have been made by states and territories to reduce the spread of COVID-19 pandemic, many children are unable to attend child care. If a child is absent for more than 42 days in a financial year, families lose their entitlement to CCS, and become liable to pay full fees for child care that their children cannot attend. The Amendment Rules will provide extra allowable absences that occur during periods when child care services are in a COVID-19 hotspot, so that absences during the period a location is declared a COVID-19 hotspot would not use up the usual limit of 42 days.

## **REGULATORY IMPACT**

A Prime Minister's exemption has been granted for all COVID-19 related measures where they have more than a minor regulatory impact – see <https://ris.pmc.gov.au/2020/03/18/prime-ministers-exemption-%E2%80%93-covid-19-related-measures>.

## **COMMENCEMENT**

The Amendment Rules commence on 23 June 2021.

This means that the Amendment Rules will commence before they are registered. Subsection 12(1A) of the *Legislation Act 2003* (Legislation Act) provides that legislative instruments may provide that the instrument commences before the instrument is registered. Subsection 12(2) of the Legislation Act provides that an instrument that commences retrospectively does not apply to the extent that the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person, or liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.

The Amendment Rules have a purely beneficial effect. They confer an entitlement to extra allowable absences upon individuals eligible for child care fee assistance. The effect of this is that these individuals can continue to access child care fee assistance where their children cannot attend child care due to the child care service being located in a COVID-19 hotspot. Accordingly, the Amendment Rules are not affected by subsection 12(2) of the Legislation Act.

The Amendment Rules need to have retrospective effect due to how suddenly the COVID-19 situation can change. Hotspots can be declared on very short notice, and it is not possible to predict when locations in Australia will require additional Commonwealth support because of a COVID-19 outbreak.

Certain Local Government Areas in the Greater Sydney region were declared a COVID-19 hotspot for the purposes of Commonwealth support from 23 June 2021. This declaration is anticipated to be in place until at least 28 August 2021. Families in this area need extra allowable absences to ensure any absences as a result of being in a COVID-19 hotspot would not use up their usual limit of 42 days. For future COVID-19 hotspots of more than seven days, this amendment will apply to affected families as outlined in the Amendment Rules.

## **CONSULTATION**

The Department of Education, Skills and Employment (the Department) has been consulting regularly with stakeholders in the early childhood education and care sector through the Early Childhood Education and Care Reference Group on COVID-19 issues.

## 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 2021

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2021* (the Amendment Rules) are 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 Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to allow extra allowable absences for eligible individuals that are affected by COVID-19 lockdowns and stay at home orders. The extra allowable absences will ensure that families can continue to receive subsidised fee relief when their children are unable to attend care due to COVID-19 lockdowns or stay at home orders.

#### **Human rights implications**

The Amendment Rules engage the following human rights:

- **Article 3, 18 and 27** of the Convention on the Rights of the Child (CRC).
- **Article 9** of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

#### Article 3 of the CRC

Article 3 of the CRC recognises that in all actions concerning children, the best interests of the child shall be a primary consideration.

These Amendment Rules will promote the best interests of children by removing barriers to accessing child care fee assistance for parents in COVID-19 hotspots.

#### Article 18 of the CRC

Article 18 of the CRC, and in particular, paragraph 3, requires that state parties take 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.

The Amendment Rules will allocate extra allowable absences to parents, including working parents, to ensure they continue to receive child care fee assistance and to ease the burden of child care fees on working parents who need their children to remain enrolled in child care.

### Article 27 of the CRC

Article 27 of the CRC requires that State 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 also requires State Parties to take appropriate measures to assist parents, including providing material assistance and support programmes where needed.

The Amendment Rules provide material assistance and support to parents through the allocation of extra allowable absences, to ensure that parents can continue to access child care fee assistance.

### Article 9 of the ICESCR

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

The Amendment Rules promotes this right by extending social security entitlements in the form of extra allowable absences during the period a location is declared a COVID-19 hotspot

### **Conclusion**

The Instrument is compatible with human rights because it advances the protection of human rights.

**Minister for Education and Youth, Alan Tudge**

***Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules  
2021***

**EXPLANATION OF PROVISIONS**

**Section 1 – Name**

1. This is a formal provision specifying the name of the instrument as the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2021*.

**Section 2 – Commencement**

2. This provision provides that the whole of the instrument commences on 23 June 2021.
3. This means that the Amendment Rules will commence before they are registered. Subsection 12(1A) of the *Legislation Act 2003* (Legislation Act) provides that legislative instruments may provide that the instrument commences before the instrument is registered. Subsection 12(2) of the Legislation Act provides that an instrument that commences retrospectively does not apply to the extent that the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person, or liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.
4. The Amendment Rules have a purely beneficial effect. They confer an entitlement to extra allowable absences upon individuals eligible for child care fee assistance. The effect of this is that these individuals can continue to access child care fee assistance where they have incurred a liability to pay child care fees but their children cannot attend child care due to the service being in a COVID-19 hotspot. Accordingly, the Amendment Rules are not affected by subsection 12(2) of the Legislation Act.
5. The Amendment Rules need to have retrospective effect due to how suddenly the COVID-19 situation can change. Hotspots can be declared on very short notice, and it is not possible to predict when locations in Australia will require extra Commonwealth support because of a COVID-19 outbreak.
6. Certain Local Government Areas in the Greater Sydney region were declared a COVID-19 hotspot for the purposes of Commonwealth support from 23 June 2021. This declaration is anticipated to be in place until at least 28 August 2021. Families in this area need extra allowable absences to ensure any absences as a result of being in a COVID-19 hotspot would not use up their usual limit of 42 days.

**Section 3 – Authority**

7. This provision provides that the Amendment Rules are made under section 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act), which

allows the Minister to make rules required or permitted to be prescribed by either the Family Assistance Act or the Family Assistance Administration Act.

#### **Section 4 – Title of Section**

8. This section provides that the Principal Rules are amended as set out in the Schedule to the Amendment Rules.

#### **SCHEDULE 1 – Amendments**

##### **Item 1**

9. This item repeals and amends the heading to section 5AA of the Principal Rules. Section 5AA provided for allowable absences relating to the COVID-19 pandemic for the 2019-20 and 2020-21 financial years. New section 5AAB, which is inserted by item 2, will allocate extra allowable absences relating to the COVID-19 pandemic for 23 June 2021 onwards. The heading to section 5AA is amended so the distinction between the two provisions is clear.

##### **Item 2**

10. This item introduces new section 5AAB into the Principal Rules.
11. Under section 85BA of the Family Assistance Act, an individual is eligible for Child Care Subsidy (CCS) for a session of care that is provided by an approved child care service to a child. Section 10 of the Family Assistance Act sets out when a session of care is provided, or taken to be provided, by an approved child care service. In particular, sub-paragraph 10(2)(c)(ii) of the Family Assistance Act provides that a child care service may be taken to provide a session of care to a child on a day in a financial year if paragraphs 10(2)(a) and 10(2)(b) are met, the Principal Rules prescribe a particular event or circumstance, and any conditions prescribed by the Minister's Rules under subsection 10(2AA) are met. Sessions of care that are taken to have been provided under subsection 10(2) of the Family Assistance Act are known as "allowable absences".
12. New section 5AAB prescribes a particular event or circumstance and conditions that must be satisfied for extra allowable absences to be accessible by an individual.
13. Subsection 5AAB(2) provides that the particular event or circumstance is the COVID-19 pandemic.
14. Subsection 5AAB(3) prescribes the condition that must be met in order for the session of care to be an "allowable absence." The condition is that the day is during a period that the child care service is located is in a COVID-19 hotspot. The "day"

referred to in this subsection is the day when the session of care is taken to have been provided under subsection 10(2) of the Family Assistance Act.

15. Subsection 5AAB(4) provides a definition for when a service is “in a COVID-19 hotspot”. For section 5AAB(3) to apply and extra allowable absences to be available, the location must be covered by both of the following:
  - a. a State or Territory public health order restricting the movement of persons for a period, and
  - b. a determination by the Commonwealth Chief Medical Officer to be a COVID-19 hotspot for the purposes of Commonwealth support for a period of more than 7 days. The list of hotspots that may from time to time be declared by the Chief Medical Officer is available on [health.gov.au](https://www.health.gov.au).
16. The Amendment Rules will only apply to locations that are determined to be a hotspot by the Commonwealth Chief Medical Officer for more than 7 days. This measure is not intended to apply to short term lockdowns that last 7 days or less. Extra allowable absences are only intended to be available where the location is affected by a lockdown for over a week. The impact on families of longer-term lockdowns is much more significant, and families subject to lockdowns lasting over a week are in greater need of extra allowable absences to prevent them losing access to child care fee assistance.
17. This section has the effect that if a child was enrolled at care on a particular day with a service in a location that was both subject to a public health order restricting the movement of people and determined to be a hotspot by the Commonwealth Chief Medical Officer, the session of care is an “allowable absence”. This means the absence does not count towards the usual limit of 42 allowable absences per year.
18. Paragraph 10(2A)(b) of the Family Assistance Act allows the Minister’s Rules to prescribe a maximum number of sessions of care that can be taken to be provided due to a particular event or circumstance prescribed under sub-paragraph 10(2)(c)(ii). For the purposes of the Amendment Rules, no maximum is prescribed. This means that a family can access extra allowable absences for every day when the child was enrolled in a session of care in a COVID-19 hotspot, regardless of how long the location remains a COVID-19 hotspot.
19. Section 5AAB(5) clarifies that if a child care service could be taken to have been provided under either section 5AA or section 5AAB, section 5AAB will prevail. Both sections 5AA and 5AAB can apply to the period 23 June 2021 to 30 June 2021. Practically, there is unlikely to be any overlap. This section clarifies that if there is a session of care to which both apply, the conditions that apply are the ones in section 5AAB, not section 5AA. This has a beneficial effect, as there is a maximum number of absences prescribed as a condition under section 5AA but not under section 5AAB.