

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. 5) Minister's Rules 2021

AUTHORITY

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) 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 child care providers to waive gap fees in COVID-19 hotspots where certain conditions are met. This will ease the financial burden on families in COVID-19 hotspot locations whose children are not attending child care.

The gap fee is the hourly session fee, minus the fee reduction amount and any other prescribed amount. Effectively, it is the amount that parents are required to pay for child care, with the remainder of fee liability being covered by child care subsidy.

The Amendment Rules will permit the waiver of gap fee rules in two situations:

- For all COVID-19 hotspots, gap fee waivers will be permissible from the eighth day the child care service is in a COVID-19 hotspot, and
- For COVID-19 hotspots where a State or Territory public health order provides that only certain children are permitted to attend child care, gap fee waivers will be permissible from the first day the service is in a COVID-19 hotspot.

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://obpr.pmc.gov.au/published-impact-analyses-and-reports/prime-ministers-exemption-covid-19-related-measures>.

COMMENCEMENT

The Amendment Rules commence on 13 August 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 temporarily and conditionally remove an obligation to enforce payment of gap fees that is imposed on providers under section 201B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). Ordinarily, this obligation is enforceable as an offence or a civil penalty.

Importantly, the Amendment Rules do not require providers to waive gap fees. Providers will be entitled to hourly session fees under their contract with families and are still able to recover those fees if they choose. However, if providers wish to ease the financial burden on families by waiving gap fees for children who are not attending care, the Amendment Rules will allow them to do so.

The Amendment Rules also have a beneficial effect on families, as where a child care provider chooses to waive the payment of gap fees in accordance with the Amendment Rules, this will ease the financial burden on families.

Having the Amendment Rules commence on 13 August 2021 will allow greater support for families in areas that are COVID-19 hotspots. This includes areas such as Canberra, which became a COVID-19 hotspot in the evening of 12 August 2021, and Melbourne, which will be in its eighth day of being a COVID-19 hotspot on 13 August 2021.

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. 5) Minister's Rules 2021

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) 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 child care providers to waive gap fees in COVID-19 hotspots where certain conditions are met. This will ease the financial burden on families in COVID-19 hotspot locations whose children are not attending child care.

The gap fee is the hourly session fee, minus the fee reduction amount and any other prescribed amount. Effectively, it is the amount that parents are required to pay for child care, with the remainder of fee liability being covered by child care subsidy.

The Amendment Rules will permit the waiver of gap fee rules in two situations:

- For all COVID-19 hotspots, gap fee waivers will be permissible from the eighth day the child care service is in a COVID-19 hotspot, and
- For COVID-19 hotspots where a State or Territory public health order provides that only certain children are permitted to attend child care, gap fee waivers will be permissible from the first day the service is in a COVID-19 hotspot.

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 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.

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. 5) 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. 5) Minister's Rules 2021*.

Section 2 – Commencement

2. This provision provides that the whole of the instrument commences on 13 August 2021.
3. This means that the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister's Rules 2021* (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 temporarily and conditionally remove an obligation to enforce payment of gap fees that is imposed on providers under section 201B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). Ordinarily, this obligation is enforceable as an offence or a civil penalty.
5. Importantly, the Amendment Rules do not require providers to waive gap fees. Providers are entitled to hourly session fees under their contract with families and are still able to recover those fees if they choose. However, if providers wish to ease the financial burden on families by waiving gap fees for children who are not attending care, the Amendment Rules will allow them to do so.
6. The Amendment Rules also have a beneficial effect on families, as where a child care provider chooses to waive the payment of gap fees in accordance with the Amendment Rules, this will ease the financial burden on families.

7. Having the Amendment Rules commence on 13 August 2021 will allow greater support for families in areas that are COVID-19 hotspots. This includes areas such as Canberra, which became a COVID-19 hotspot in the evening of 12 August 2021, and Melbourne, which will be in its eighth day of being a COVID-19 hotspot on 13 August 2021.

Section 3 – Authority

8. 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 – Schedules

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

SCHEDULE 1 – Amendments

Item 1

10. This item inserts a new Part 2 into Schedule 3 of the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to set out the COVID-19 pandemic related conditions for when a provider is not required to take reasonable steps to enforce payment of gap fees.
11. Subclause 2.1(1) provides that clause 2.1 sets out the conditions for when a provider is not required to take reasonable steps to enforce payment of the gap fees under section 201B of the Family Assistance Administration Act.
12. Subclause 2.1(2) prescribes the COVID-19 pandemic as the particular event or circumstance for the exemption from enforcing payment of gap fees.
13. Subclause 2.1(3) prescribes 13 August 2021 to 12 August 2022 as the period in which the exemption from enforcing payment of gap fees applies.
14. Subclause 2.1(4) provides the conditions for when the exemption applies. The first condition is that the child did not attend any part of the session of care. The intention of the Amendment Rules is to ease the financial burden of COVID-19 on families in a COVID-19 hotspot whose children are not attending care, and not to provide free care for families whose children are using child care. The second condition is that the service is not closed on the day. The third condition is that either subclause (5) or subclause (6) applies to the session of care.

15. Subclause 2.1(5) applies if the session of care occurs on a day the child care service is in a COVID-19 hotspot, and the session of care occurs on or after the eighth continuous day the child care service has been in that COVID-19 hotspot. The intention is that for most COVID-19 hotspot declarations, gap fee waivers will be available from the eighth day of the declaration, and not for the first seven days of the declaration. This is because the financial impact of longer-term lockdowns that go for more than seven days is greater than the financial impact of short-term lockdowns.
16. Where an area is in a COVID-19 hotspot, that COVID-19 hotspot declaration comes to an end, and then the area is later declared a COVID-19 hotspot again, the earlier hotspot declaration would not be counted in determining when the eighth day occurs. Each time there is a break between COVID-19 hotspot declarations, the counting of days will start again for the purposes of determining the eighth day.
17. Subclause 2.1(6) applies if the session of care occurs on a day the child care service is in a COVID-19 hotspot, and on that day, the relevant State or Territory public health order provides that only certain children may attend child care or that children may only attend child care in certain circumstances.
18. In general, State or Territory public health orders since the beginning of the COVID-19 pandemic have provided exemptions so that people are able to leave their house to attend child care, or to facilitate dropping children off and picking them up from child care. However, in some instances it is only available for certain children (e.g. vulnerable children or children of essential workers) or in certain circumstances (e.g. where the child cannot be cared for at home). This subclause captures the instances where the State or Territory public health order only provides a part-exemption for people to leave their house for child care purposes. In these instances, gap fee waivers will be available from the first day the child care service is in a COVID-19 hotspot, regardless of the period of the COVID-19 hotspot.
19. Subclause 2.1(7) provides the definition for when a child care service is “in a COVID-19 hotspot”. A child care will only be “in a COVID-19 hotspot” on a day if its location is covered by both of the following for at least 12 hours of that day:
 - 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 that the location is a COVID-19 hotspot for the purposes of Commonwealth support for a period. 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).
20. The term “State or Territory public health order” is intended to have a broad meaning. It encompasses instruments that may not have the word “order” in the title, but which are made for a public health purpose and which place restrictions on people in a certain area. For example, it would also include a public health direction instrument or a public health declaration instrument.

21. The requirement that the location be covered for at least 12 hours is so that days that are in lockdown for a brief period only are not counted. For example, if an area becomes a COVID-19 hotspot from 11:59pm on a particular day, that day will not count. The following day will be the “first day” for the purposes of determining when the eighth day occurs and gap fee waivers are permissible under subclause 2.1(6).
22. On the other hand, if a state or territory public health order lifts at 5:00pm, and the Commonwealth declaration of a COVID-19 hotspot ends at 11:59pm, the area will be covered by both until 5:00pm, or more than 12 hours. Accordingly, this day would be counted as a day when the area is “in a COVID-19 hotspot”. Gap fee waivers would be permissible under subclause 2.1(7) on this day, and would be permissible under subclause 2.1(6) if the area had been in a COVID-19 hotspot for seven days prior to that day.