

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

A New Tax System (Family Assistance) Act 1999

Family Assistance (Studying Overseas Full-time) Determination 2021

The Family Assistance (Studying Overseas Full-time) Determination 2021 (this Determination) is made under section 3C of the *A New Tax System (Family Assistance) Act 1999* (the Act).

Purpose

This Determination gives continued meaning to the term ‘studying overseas full-time’ since the current instrument that provides its meaning – the Family Tax Benefit (Studying Overseas Full-Time) Determination 2011 – is due to sunset on 1 October 2021.

‘Studying overseas full-time’ informs the meaning of ‘senior secondary school child’ in section 22B of the Act.

Subject to other requirements in the Act, an individual aged 16-19 who is a ‘senior secondary school child’ may be the FTB child of an adult under subsections 22(3) and (4) of the Act.

An adult individual may be eligible for family tax benefit if they have, under section 21 of the Act, at least one FTB child.

Background

An FTB child who leaves Australia may remain an FTB child of a person for up to 6 weeks, or a longer period in some circumstances, up to 3 years if an extension is granted for particular purposes listed in section 24 of the Act. If the child is studying overseas full-time in a way that would, in the Secretary’s opinion, assist or allow the individual to complete the final year of secondary school or an equivalent level of education, they may remain a senior secondary school child and attract the payment of family tax benefit.

The definition of ‘studying overseas full-time’ in this Determination continues to be closely modelled on the definition of ‘undertaking full-time study’ for family tax benefit in respect of a young person who is studying in Australia. The meaning of ‘undertaking full-time study’ for a young person studying in Australia (see section 3 of the Act) is found in section 541B of the *Social Security Act 1991* and its related definitions in the *Student Assistance Act 1973* and the Student Assistance (Education Institutions and Courses) Determination 2019.

Commencement

This Determination commences on the day after it is registered.

Consultation

Consultation was undertaken with the Department of Education, Skills and Employment (DESE) due to its policy responsibility for secondary education. DESE did not have any comments.

Consultation was undertaken with the Australian Council of Social Service (ACOSS) and its relevant affiliates given they are peak bodies for social welfare matters and the instrument may be relevant to clients who engage with them. ACOSS did not have any input to the instrument.

Consultation was undertaken with Services Australia since they are the agency that will be implementing the family tax benefit payments that will be enabled once this Determination is in force. Services Australia also had no comments on the instrument.

Regulation Impact Statement (RIS)

A Regulatory Impact Statement or a Regulatory Burden Measure is not required (OBPR reference 44322). The measure in this Determination affects individuals' entitlements to government payments. They are not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact on business.

Availability of independent review

Independent internal and external merits review under Part 5 of the *A New Tax System (Family Assistance) Administration Act 1999* is available in respect of all administrative decisions made under the family assistance law that are guided by this Determination.

Explanation of the provisions

Part 1 (sections 1 to 6) of this Determination set out provisions of a technical nature.

Section 1 provides that the name of this Determination is the Family Assistance (Studying Overseas Full-Time) Determination 2021.

Section 2 provides that the Determination commences on the day after it is registered.

Section 3 sets out that section 3C of the Act is the authority under which this Determination is made.

Section 4 provides that any instrument specified in Schedule 1 to this Determination is amended or repealed according to Schedule 1's terms. In this instance, Schedule 1 repeals the Family Tax Benefit (Studying Overseas Full-time) Determination 2011.

Section 5 contains definitions that are used in the Determination.

Under subsection 5(1), 'Act' means the *A New Tax System (Family Assistance) Act 1999*.

The other definitions are explained in the context of the provision that calls upon the definition.

Section 6, pursuant to subsection 5(1), provides the framework for ascertaining whether or not an individual is undertaking the 'required amount of study' in an approved foreign course of education or study, for the period in which the individual is enrolled in the course. The 'required amount of study' is the specified amount of study that an individual must, as a minimum, undertake in order for them to retain their status as an FTB child. Section 6 mirrors the concept of 'undertaking full-time study' in section 541B of the *Social Security Act 1991*.

- Under subsections 5(1) and (2), an 'approved foreign course of education or study' means a course of education or study that is delivered by a foreign educational institution where the course is accredited under a law of a foreign country as a course of education or study for secondary or tertiary aged students. It must additionally be a course that, upon completion, results in a level of education that is broadly equivalent to that resulting from a completion of a course determined by the Minister to be a secondary or tertiary course under subsection 5D(1) of the *Student Assistance Act 1973*. For the purposes of family tax benefit, this definition intends to achieve parity between the level of studies required of students studying in Australia and those studying overseas.
- Under subsection 5(1), 'foreign educational institution' means a bona fide educational institution established by a law of a foreign country, or registered as an educational institution by the relevant education recognition authority of the foreign country. As far as possible, this definition mirrors the definition of Australian educational institutions in the *Student Assistance (Education Institutions and Courses) Determination 2019*. A foreign educational institution could satisfy the definition at subsection 5(1) regardless of whether it is located inside or outside Australia.

Paragraph 6(1)(a) provides that, where an individual is not covered by subsection (3) (allowing a reduced amount of study) in order for an individual to be undertaking the required amount of study, the individual must be undertaking at least three-quarters of the defined amount of full-time study for the period in which they are enrolled in the course.

- Subsection 6(5) relevantly defines the 'defined amount of full-time study'. Paragraph 6(5)(a) provides that where an individual's circumstances warrant, the Secretary can determine a number of hours of study per week for that individual. This will be done in accordance with the methodology set out in subsection 22B(2A) of the Act.
- Otherwise, paragraph 6(5)(b) provides the defined amount of full-time study is consistent with the foreign educational institution's typical requirements (subparagraph 6(5)(b)(i)), or an amount equivalent to the average amount of full-time study that an individual would have to undertake for the duration of the course in order to complete the course efficiently in the minimum amount of time required (subparagraph 6(5)(b)(ii)). Paragraph 6(5)(b) aims to mirror,

as much as possible, paragraphs 541B(2)(b) and (c) of the *Social Security Act 1991*.

Paragraph 6(1)(b) permits a reduction from three-quarters to two-thirds of the defined amount of full-time study if subsection 6(3) applies.

- Subsection 6(3) provides three circumstances when the permitted reduction in paragraph 6(1)(b) may occur. The three circumstances are as follows:
 - i. Paragraph 6(3)(a): the usual requirements of the foreign educational institution prevent the individual from undertaking at least three-quarters of the defined amount of full-time study. For example, pre-requisite subjects have not yet been completed and the individual is not permitted to enrol in more subjects, thereby resulting in a situation where they cannot undertake study for three-quarters of the defined amount of full-time study; or
 - ii. Paragraph 6(3)(b): the individual is given a specific direction in writing by the academic registrar, or a person with the equivalent function i.e. role and authority, of the foreign educational institution that prevents them from undertaking at least three-quarters of the defined amount of full-time study. For example, an individual is directed to withdraw from certain classes due to the unavailability of teachers, cancellation of the classes or an untenable number of students wanting to be in those classes. The individual may subsequently be unable to re-enrol in any other alternative classes; or
 - iii. Paragraph 6(3)(c): the academic registrar, or a person with the equivalent function i.e. role and authority, of the foreign educational institution recommends in writing that the individual should only study for two-thirds of the defined amount of full-time study for specified academic or vocational reasons. For example, there may be instances where an individual is having difficulty studying overseas due to low language proficiency levels or a health issue that affects their learning abilities.
- Subsection 6(4) only allows the third circumstance (paragraph 6(3)(c)) to apply to an individual for a maximum period of half of the academic year.

Subsection 6(2) provides an exception to paragraphs 6(1)(a) and (b) for the first fortnight of classes. It provides that if an individual attends at least one day in the first fortnight of classes (as defined in subsection 4(1)) in a study period, they are considered to have undertaken the required amount of study for that first fortnight of classes. For clarity, this exception applies irrespective of whether the individual is otherwise required to be studying three-quarters or two-thirds of the defined amount of full-time study (whichever applies to them).

- Under subsection 5(1), 'first fortnight of classes', in relation to a study period, means the space of time between the first day of classes in said study period and the Friday of the second week of classes in said period.

This exception acknowledges that an individual may not undertake the normally required workload of three-quarters or two-thirds (whichever applies to them) of the defined amount of full-time study in their first two weeks of a course period due to circumstances that are difficult to control. It is intended to cover a broad spectrum of situations that may arise in the initial stages of a course study period. The situations may include administrative errors attributable to the foreign educational institution. They can also include events incidental to undertaking studies, such as issues with finding suitable accommodation or obtaining transportation to the foreign educational institution despite already having taken reasonable measures.

Section 7 in Part 2 provides the meaning of 'studying overseas full time' for the purposes of section 3C of the Act. An individual is studying overseas full-time if the following three matters are satisfied:

1. Firstly, the individual must be either:
 - a. currently enrolled in an approved foreign course of education or study (see subsection 4(2)); or
 - b. previously enrolled in an approved foreign course of education or study and has (since no longer being enrolled) always intended to re-enrol in the course when re-enrolments in the course are next accepted; or
 - c. previously enrolled in an approved foreign course of education or study and has (since no longer being enrolled) always intended to enrol in another approved foreign course of education or study when enrolments in the other course are next accepted. The other course may be at the same or a different foreign educational institution.
2. Secondly, the individual must be either:
 - a. currently undertaking the required amount of study (see section 6) in the course, in the study period in which the individual is enrolled in the course; or
 - b. intending to undertake the required amount of study in the course, in the study period in which the individual intends to be enrolled in the course.
3. Thirdly, in the Secretary's opinion, the individual must be making satisfactory progress towards completing the course. In forming this opinion, the Secretary will consider how the individual is tracking in their progress towards completing the course in the minimum amount of time typically needed or expressly stipulated by the foreign educational institution. Regard may be had to: the individual's record of attendance, their academic results, any disciplinary remarks from the foreign educational institution, and anything else that the Secretary deems relevant.

Schedule 1 repeals the Family Tax Benefit (Studying Overseas Full-time) Determination 2011.

Statement of Compatibility with Human Rights

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

Family Assistance (Studying Overseas Full-time) Determination 2021

The Determination 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 *Family Assistance (Studying Overseas Full-time) Determination 2021* (the Determination) is made under section 3C of the *A New Tax System (Family Assistance) Act 1999* (the Act). Under the *Legislation Act 2003*, legislative instruments sunset 10 years after commencement, and are automatically repealed or cease to have effect after that date if no action is taken. The Determination replaces the *Family Tax Benefit (Studying Overseas Full-time) Determination 2011*, which is due to sunset on 1 October 2021.

Children aged 16-19 qualify as Family Tax Benefit children if they are participating in full-time study senior secondary study. The Determination defines the requirements for a Family Tax Benefit child to be considered to be “studying overseas full-time” in order to meet the criteria to be a senior secondary school child under section 22B of the Act. It thereby enables children participating in full-time education overseas to meet Family Tax Benefit participation requirements in order to be considered Family Tax Benefit children under family assistance law.

The current Family Tax Benefit portability period is 6 weeks, meaning that most families residing outside of Australia for long enough for their children to be able to enrol in full-time overseas study are not eligible for Family Tax Benefit. However, families with a portability extension of up to three years who have children studying overseas full-time will depend on the Determination to retain eligibility for Family Tax Benefit. They comprise families who experience certain exceptional circumstances whilst overseas that prevent them from returning home, and those who are overseas on the Medical Treatment Overseas Program.

The Determination largely replicates the *Family Tax Benefit (Studying Overseas Full-time) Determination 2011*.

Human rights implications

This legislative instrument engages the following rights:

- the right to social security – Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2;
- the right of a child to benefit from social security – Article 26 of the *Convention of the Rights of the Child* (CRC);
- the right to an adequate standard of living – Article 11 of the ICESCR;
- the right of a child to education – Article 28 of the CRC.

Right to social security the right of a child to benefit from social security

Article 9 of the ICESCR recognises the right of everyone to social security, while Article 26 of the CRC recognises that every child has the right to benefit from social security. The Determination promotes these rights by enabling children participating in full-time education overseas to be considered Family Tax Benefit children under the Act, allowing them and their families to benefit from the payment where they would otherwise be unable to.

Right to an adequate standard of living

Article 11(1) of the ICESCR recognises the right to an adequate standard of living. The Determination promotes this right by enabling families with children studying overseas full-time to receive financial assistance with the costs of raising their children, including the costs of their education.

Right of a child to education

Article 28 of the CRC recognises the right of children to education, with a view to achieving this right progressively and on the basis of equal opportunity. The Determination promotes this right by ensuring that families with children studying overseas full-time are provided with financial assistance to support the costs of raising their children, including costs associated with their schooling. It also upholds the equal treatment of Australian families with children studying overseas full-time and those with children studying full-time in Australia.

Conclusion

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

Anne Ruston, Minister for Families and Social Services