EXPLANATORY STATEMENT

Child Care Benefit (Allocation of Child Care Places) Amendment Determination 2011 (No. 1)

Authority

The Child Care Benefit (Allocation of Child Care Places) Amendment Determination 2011 (No. 1) (this Determination) is made under section 206 of the A New Tax System (Family Assistance) (Administration) Act 1999 (the Act), which forms part of the family assistance law.

Section 206 empowers the Minister to determine, by legislative instrument, guidelines relating to allocation of child care places to child care services approved under the Act for the purposes of the family assistance law, and to reduction of the allocated number of places.

This Determination is a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Purpose of this Determination

This Determination makes amendments to the Child Care Benefit (Allocation of Child Care Places) Determination 2000 (the Allocation Determination), primarily to support allocation of places to approved in-home care services and reductions of the number of places allocated to such services. For consistency of the legislation, and to make clearer the current operation of the provisions, some minor amendments are also made to the corresponding provisions relating to allocation of places to approved occasional care services.

Under subsection 207(1) of the Act, the Secretary must allocate child care places to child care services approved under the Act for the purposes of the family assistance law and covered by a determination made by the Minister under section 206. The Secretary must allocate places to these kinds of services in accordance with such a determination. Once places are allocated to a service, it is a condition of continued approval of the service that the service does not provide more places than the number which have been allocated by the Secretary.

Allocation decisions are reviewable by the Administrative Appeals Tribunal.

Allocation of places

Section 206 of the Act authorises the Minister to determine guidelines relating to the allocation of child care places, about:
procedures relating to the allocation of child care places to approved child care services (paragraph 206(a));

• matters to be taken into account in working out the number (if any) of child care places to be allocated to approved child care services (paragraph 206(b));

• the maximum number of places that can be allocated to approved child care services in a specified class (paragraph 206(c)); and

• any other matters to be taken into account in making such an allocation (paragraph 206(d)).

The Minister has made the determination under section 206, relating to allocation of places, the *Child Care Benefit (Allocation of Child Care Places) Determination 2000* (the Allocation Determination), which applies to two kinds of approved child care services: approved occasional care services and approved in-home care services. It specifies, among other things, the matters that the Secretary has to take into account when determining the areas of Australia in which child care places may be allocated for both approved occasional care services and approved in-home care services and the number of places for each area for each kind of services, and the number of places to be allocated to an approved child care service of that kind.

One such matter is the in-home care or occasional care needs of people who have work, training or study commitments. In the context of allocation of in-home care places, the requirement for the Secretary to consider only the needs of people with such commitments is unnecessarily restrictive, given that the in-home care program is designed for children in particular circumstances (for example, children who are sick or living in a remote or rural area, or whose parents’ disability reduces their caring capacity), irrespective of the parents’ work, training or study commitments.

This Determination amends the Allocation Determination to remove the requirement to take into account the needs of people with work, training or study commitments when making determinations relating to allocation of in-home care places and to ensure that in-home care places are allocated to an in-home care service having regard to the needs of the children for whom in-home care services may be provided. The circumstances in which in-home care may be provided are set out in paragraph 10(1B)(a) of the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* made under section 205 of the Act.

This Determination makes other minor amendments to clarify that the Secretary, when determining the number of places to be allocated to an approved in-home or occasional care service, out of a limited number of places available for allocation in the area in which the service operates, is required to take into consideration the needs of people using (or that may be using) that service versus the needs of people that may be using other services in the same area, and that the Secretary may take into account any matter, in addition to the matters the Secretary is required to take into account, if the Secretary thinks it is relevant to deciding the number of places (if any) to be allocated. These amendments are consistent with the operation of the current provisions relating to the allocation of places and are made to improve the transparency of the Allocation Determination.

There are also some technical amendments correcting drafting errors.
Reduction of the number of allocated places

Subsection 207A(1) of the Act provides that the Secretary may, in accordance with the Allocation Determination, reduce the number of child care places allocated to an approved child care service, if:

(a) that number exceeds the number of child care places provided by the service; or

(b) that number exceeds the number of child care places that the service is under a law of a State or Territory, licensed to provide.

Reduction decisions are reviewable by the Administrative Appeals Tribunal.

Section 206 of the Act provides the Minister with a discretionary power to make guidelines relating to the reduction of the number of allocated places, about:

- procedures relating to the reduction under section 207A of the Act of the number of the child care places allocated to approved child care services (paragraph 206(e));
- matters to be taken into account in working out the number of child care places by which the number of child care places allocated to approved child care services may be reduced (paragraph 206(f));
- any other matter to be taken into account in reducing, or deciding whether to reduce the number of child care places allocated to approved child care services (paragraph 206(g)).

The Minister has not, until now, made guidelines relating to the reduction of allocation of places.

This Determination amends the Allocation Determination to include guidelines relevant to the Secretary’s decision under section 207A of the Act about the reduction of the number of allocated in-home care places.

In particular, the guidelines specify which places are to be considered to be in excess of the places provided by a service, and therefore may be taken out of the service’s allocation. As a result of the amendments, only a place that has been unoccupied continuously for 6 months immediately before the Secretary gives the service a notice of intended reduction of allocation may be considered as not being provided and therefore available for reduction. The amendments also ensure that the service will be given at least 28 days (after the notice is given) for making a submission to the Secretary concerning the proposed reduction of allocation of the service’s places.

Consultation Statement

The Department consulted with the 69 existing in-home care service operators, as well as operators that have recently expressed interest in receiving an allocation of in-home care places. The operators were invited to provide comment on the proposed
amendments by contacting the Department via email, post or telephone. Information was also available on the Department’s website. Of the 31 operators that provided submissions during the consultation period, feedback was overwhelmingly supportive of the proposed amendments and no modifications to the original proposal were required.

Amendments to the provisions relating to allocation of places to approved occasional care services are of a minor nature and do not intend to change the current operation of those provisions. As such, consultation with the OCC sector was considered unnecessary.

**Regulation Impact Statement**

Office of Best Practice Regulation was consulted in the preparation of this Determination and assessed that no Regulation Impact Statement was required as the Determination would be likely to have no or low impacts on business and individuals or the economy.

**Explanation of Provisions**

**Sections 1, 2 and 3** of this Determination are functional provisions. Section 1 sets out the name of this Determination. Section 2 specifies that this Determination commences on the day after it is registered. Section 3 states that Schedule 1 amends the *Child Care Benefit (Allocation of Child Care Places) Determination 2000*.

**Item 1 of Schedule 1** repeals the definition of ‘parent’ in subsection 3(1) of the Allocation Determination. Amendments to the Allocation Determination made by the *Child Care Benefit (Allocation of Child Care Places) Amendment Determination 2006 (No. 1)* made this definition obsolete but did not repeal that definition. Item 1 repeals the obsolete definition.

**Item 2 of Schedule 1** amends section 3A of the Allocation Determination, which is an application provision. This amendment is made as a consequence of the amendments made by item 6, inserting guidelines relating to reduction of in-home places. Item 2 substitutes new section 3A, which provides that the Allocation Determination applies to the allocation of child care places to approved child care services that are either approved in-home care services or approved occasional child care services (the current application) and to the reduction of the number of places allocated to an approved in-home care service.

**Item 3 of Schedule 1** amends section 5 of the Allocation Determination relating to allocation of places to update cross-references to the provisions relevant to allocation of places. This amendment is consequential to the amendment made by item 6 inserting new Part 2A relating to reduction of in-home places.
Item 4 of Schedule 1 inserts a heading into section 7 of the Allocation Determination: “Determination of number of places for an area” to enhance readability of this section. This amendment is technical in nature.

Item 5 of Schedule 1 amends section 7 of the Allocation Determination by substituting subsections 7(3), 7(4) and 7(5) with new subsections 7(3), 7(4), 7(5), 7(6), 7(7), 7(8), 7(9) and 7(10).

Section 7 deals with allocation of occasional care places and in-home care places to areas of Australia and to approved occasional or in-home care services. Among other things, it sets out the matters the Secretary must take into account when determining the areas and the number of places that may be allocated to those areas, and when working out the number of places (if any) to be allocated to an approved occasional or in-home care service.

Allocations to areas of Australia

Subsection 7(1) requires, that, before an allocation of places is made by the Secretary to an approved child care service, the Secretary must first determine in writing the areas of Australia in which child care places may be allocated and the number of places of a particular kind that may be allocated in an area. Subsection 7(2) allows for a further division or divisions of that number for children in particular age groups.

Subsection 7(3) specifies two matters which the Secretary is required to take into account when making determinations for areas of Australia under subsection 7(1): the relative need of different areas of Australia for the kind of child care places to be allocated and the relative child care needs of people in each area who have work, training or study commitments. This applies to the allocation of both occasional care places and in-home care places.

The in-home care program is designed for children in particular circumstances (for example, children who are sick or living in a remote or rural area, or whose parents’ disability reduces their caring capacity), irrespective of the parents’ work, training or study commitments. The circumstances in which in-home care may be provided are set out in paragraph 10(1B)(a) of the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000 (the Eligibility Determination) made under section 205 of the Act. It is a condition of continued approval of an in-home care service that it provides care only to children in those circumstances.

The current requirement for allocation of in-home places to areas of Australia, to consider the needs of people with work, training and study commitment rather than the needs of people for whom an in-home care services may be provided, is misaligned with the intention of the in-home care program as expressed in paragraph 10(1B)(a) of the Eligibility Determination.

To remedy the problem, new subsection 7(4), which operates only for allocations of in-home care places to areas of Australia, requires the Secretary to take into account only the relative needs of different areas of Australia for this kind of places (the
current restrictive requirement to take into account the needs of people with work, training or study commitments will no longer apply when making determinations relating to allocation for areas of Australia of in-home care places).

New subsection 7(3), which operates only for allocations of occasional care places to areas of Australia, requires the Secretary to take into account the matters currently required by subsection 7(3) to be taken into account.

Allocations to an approved child care service

Subsection 7(4) sets out the matters that the Secretary must take into account when working out the number of places to be allocated to an approved child care service (whether an occasional care service or an in-home care service).

Subsection 7(4) is replaced with new subsections 7(5) and 7(6) specifying the matters to be taken into account when working out the number of places to be allocated to an occasional care service and with new subsections 7(7) and 7(8) specifying the matters to be taken into account when working out the number of places to be allocated to an in-home care service. A new heading Determination of number of places for an approved child care service preceding new subsection 7(5) helps the reader to identify provisions relating to allocation of places to individual services.

Some matters to be taken into account are common to the allocation of both in-home and occasional care places. The key difference in the matters as they apply to allocation of places to approved in-home care services and occasional care services lies in the considerations contained in paragraphs 7(5)(c) and 7(7)(c), respectively.

New subsection 7(5) operates only for allocation of places to occasional care services. It specifies in new paragraphs (a) to (d) the matters that the Secretary must take into account when working out the number of places (if any) to be allocated to an occasional care service.

The matter specified in new paragraph 7(5)(a) is the number of child care places for occasional care services that may be allocated in an area in which the service operates (the number determined under subsections 7(1) and (2)). It is a matter that the Secretary is currently required, by paragraph 7(4)(a), to take into account when working out the number of places to be allocated to any service, given that the allocation of places to child care services in an area of Australia is limited by the total number determined as available for allocation in the area. This matter corresponds to the matter specified in new paragraph 7(7)(a) in relation to allocation of places to in-home care services.

The matter specified in new paragraph 7(5)(b) is the needs for occasional care places of the people who are using or are likely to use the service, relative to the needs of the people using or likely to use another service in the area in which the service operates. This matter corresponds to the matter specified in new paragraph 7(7)(b) in relation to allocation of places to in-home care services. Explanation provided in the context of that paragraph is also relevant to new paragraph 7(5)(b).
The matter specified in new paragraph 7(5)(c) is the occasional care service’s ability to provide child care that best meets the needs of people who have work, training or study commitments. It is a matter that the Secretary is currently required, by paragraph 7(4)(b), to take into account when working out the number of places to be allocated to any service. A comparable matter for allocations of places to in-home care services is contained in new paragraph 7(7)(c).

The matter specified in new paragraph 7(5)(d) is the service’s or operator’s past conduct as a provider of child care, including compliance with any relevant Commonwealth, State or Territory requirements in relation to provision of child care and the management of child care services. This matter corresponds to the matter currently required, by paragraph 7(4)(c), to be considered by the Secretary. The matter specified in new paragraph 7(5)(d) is mirrored in new paragraph 7(7)(d) relating to allocation of places to in-home care services. Explanation provided in the context of new paragraph 7(7)(d) is also relevant to new paragraph 7(5)(d).

New subsection 7(6) specifies that, when working out the number of places to be allocated to an occasional care service, the Secretary may take into account any other matter that the Secretary considers relevant to the making of the allocation decision for the service. This provision corresponds to new subsection 7(8) relating to allocation of places to in-home care services. Explanation provided in the context of that paragraph is also relevant to new subsection 7(6).

New subsection 7(7) operates only for allocation of places to in-home care services. It specifies in new paragraphs (a) to (d) the matters that the Secretary must take into account when working out the number of places (if any) to be allocated to an in-home care service.

The matter specified in new paragraph 7(7)(a) is the number of child care places for in-home care services that may be allocated to an area in which the service operates (the number determined under subsections 7(1) and (2)). It is a matter that the Secretary is currently required, by paragraph 7(4)(a), to take into account when working out the number of places to be allocated to any service. This matter is the matter specified in new paragraph 7(5)(a) relating to allocation of places to occasional care services.

The matter specified in new paragraph 7(7)(b) is the needs for in-home care places of the people who are using or are likely to use the service, relative to such needs of the people using or likely to use another service in the area, in which the service operates. The matter covered by this new paragraph corresponds to the matter specified in new paragraph 7(5)(b) relating to allocation of places to occasional care services. It is a matter that the Secretary necessarily considers in the context of making allocation decisions requiring a judicious division of limited number of places. To improve transparency of the Allocation Determination, the new paragraphs make it clear that the Secretary is required to take into account the needs of people using the service that applies for allocation as compared with the needs of people using another service of the same kind. The intention of this paragraph is to consider not only such factors like the size of the demand for care in a particular service as demonstrated by the service but also whether the needs of the people, or a group of people, using a particular service are such, that, in the Secretary’s view, should be given allocation priority.
because, for example, of the particular social characteristic of the people or their particular circumstances.

New paragraph 7(7)(c) relates to ability of an in-home care service to provide child care that best meets the needs of a particular group of people.

Currently, paragraph 7(4)(b) requires the Secretary to take into account, when working out the number of places to be allocated to any kind of an approved child care service, the service’s ability to provide care that best meets the needs of people who have work, training or study commitments.

As explained in the context of new subsections 7(3) and 7(4) relating to allocation of places to areas of Australia, the requirement of paragraph 7(4)(b), as it applies to allocation of in-home places, is misaligned with the intention of the in-home care program as expressed in paragraph 10(1B)(a) of the Eligibility Determination. Under subsection 10(1B) of the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000, it is a condition for approval of an in-home care service for the purposes of the family assistance law that the person applying for the service’s approval undertakes that the service will provide in-home care only to a child to whom the circumstances mentioned in subsection 10(1C) apply and to whom only an in-home care service can provide suitable care. The parents’ work/training or study commitments are not the focus of these circumstances. The relevant circumstances include: illness or disability of the child, the child’s sibling or the parents/guardians, the child living in a remote or rural area, the parent’s working hours occurring during the time when no other child care services operate, the parent/guardian caring for at least three children who have not yet commenced school, or the circumstances determined by the Secretary for the particular child.

New paragraph 7(7)(c) specifies therefore that the Secretary must take into account the service’s ability to provide child care that best meets the needs of children to whom paragraph 10(1B)(a) of the Eligibility Determination applies. In this context, the service’s ‘ability’ may depend on such factors as, for example, the sufficient number of carers in the service able to provide disability care, availability of the carers in rural or remote areas, or the financial viability of the service (for example, if the number of places that would support a service’s financial viability cannot be allocated to the service, the Secretary may decide not to allocate any place to the service).

The matter specified in new paragraph 7(7)(d) is the service’s or operator’s past conduct as a provider of child care, including compliance with any relevant Commonwealth, State or Territory requirements in relation to provision of child care and the management of child care services. The matter specified in new paragraph 7(7)(d) is mirrored in new paragraph 7(5)(d) relating to allocations to occasional care services. This matter corresponds to the matter currently required, by paragraph 7(4)(c), to be considered by the Secretary. The new paragraphs provide for consideration of the past conduct in the situations where the service is an approved child care service, or the service’s operator has previously been an operator of an approved child care service or the operator of the service was previously a party to the ‘childcare assistance agreements’ (a child care assistance regime in operation before the commencement of the Act in 2000). New paragraph 7(7)(d) includes a minor modification correcting a drafting error in paragraph 7(4)(c) (the current reference to a service that has been previously approved should have been a reference to the

Explanatory Statement to F2011L01902
operator of the service being previously an operator of an approved child care service).

New subsection 7(8) specifies that, when working out the number of places to be allocated to an in-home care service, the Secretary may take into account any other matter that the Secretary considers relevant to making the allocation decision for the service. This provision corresponds to new subsection 7(6) relating to allocation of places to occasional care services. While, in making an allocation decision, the Secretary is not currently prevented from taking into account other relevant matters than the ones the Secretary is required to take into account, the new subsections make clear the operation of these provisions.

New subsection 7(9) replicates current subsection 7(5) and operates for both occasional care and in-home care services. It prevents the Secretary from allocating in a particular area of the total number of places of a particular kind exceeding the number of places available in that area (as determined under subsection 7(1)) by more than 15%.

New subsection 7(10) operates for both occasional care and in-home care services. It states that the Secretary may make an allocation of places at the time and in the manner that the Secretary considers appropriate (this does not alter the current operation of the law, but makes it more transparent). As a matter of administration, it is generally intended to make an allocation decision for a particular service following the ‘allocation rounds’ occurring twice yearly (services will be notified of the time and the applicable administrative process). This means, for example, that an application for approval of an in-home service for the purposes of the family assistance law, which depends on the places of a particular kind being available for allocation to the service, may not be determined until after the result of the ‘allocation round’ has been decided. In a particular situation, if the Secretary considers it appropriate, the Secretary is and will be able to make a decision to allocate places (if any are available) to a service outside the ‘allocation rounds’.

**Item 6 of Schedule 1** inserts new Part 2A, which includes new sections 8A, 8B, 8C and 8D.

New section 8A is an application provision. It states that Part 2A applies to the reduction of the number of child care places allocated to an approved in-home care service under subsection 207A(1) of the Act. Paragraph 207A(1)(a) allows the Secretary to reduce a service’s allocation of places by the number of places which exceed the number of places provided by the service.

New subsection 8B(1) requires that before reducing the number of child care places allocated to an approved in-home care service, the Secretary must first work out the number of places the child care service provides.

New subsection 8B(2) provides that, in working out the number of places a service provides, the Secretary must not consider a place as being provided by the service if the place has been unoccupied continuously for 6 months immediately before the Secretary gives a notice under subsection 207A(2) of the Act. A note at the end of...
new subsection 8B(2) informs the reader that the notice under subsection 207A(2) is a notice of proposed reduction given to an approved child care service before a reduction decision is made.

Paragraph 207A(2)(c) requires the Secretary to invite the service, when the notice of proposed reduction is given, to make a written submission to the Secretary, about the proposed reduction. In deciding whether to make a reduction, the Secretary must have regard to any submissions made. New section 8C provides that any submission must be made within 28 days after the notice is given to the service, or, if the Secretary specified in the notice any longer period, within that period.

New section 8D provides that section 224A of the Act applies to a notice of proposed reduction made under subsection 207A(2) in the same way as it applies to a notice of a decision of an officer under Part 8. Section 224A of the Act deems a notice of a decision of an officer under Part 8 (Approval of child care services and registered carers) to be given if it was given as provided for in subsections 224A(1),(2) and (3).