

EXPLANATORY STATEMENT

Child Care Benefit (Children in respect of whom no-one is eligible) Amendment Determination 2017

Summary

The *Child Care Benefit (Children in respect of whom no-one is eligible) Amendment Determination 2017* (the Amendment Determination) is made by the Minister for Education and Training under subsection 49(3) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act).

The Amendment Determination amends the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the Current Determination), under subsection 33(3) of the *Acts Interpretation Act 1901*. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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.

The purpose of the Amendment Determination is to set out a new class of children with respect to whom no-one is eligible for child care benefit (CCB) and therefore also child care rebate (CCR). The class includes children who attend a family day care (FDC) service and are aged 14 years or older, or who attend secondary school, subject to exceptions (referred to below as “specified circumstances”). The specified circumstances cover situations where a child cannot reasonably be left alone, or in the care of another adult, and the child is an ‘eligible disability child’, an ‘eligible ISP child’, lives in a remote or very remote area of Australia, or (for children who have not yet turned 16 years of age), if each of the individuals who would otherwise be eligible and caring for the child, works for a minimum of 5 hours on a day that the child is attending child care. There are no specified circumstances available in respect of individuals who have already turned 18 years of age. Therefore, there will be no circumstances in which an individual will be eligible for Commonwealth child care payments in relation to an individual who is 18 or above where the individual attends an FDC service.

For an individual or service to be eligible for Commonwealth child care payments in respect of children who fall within the new class, the approved FDC service providing the care will be required to hold documentary evidence that a specified circumstance exists, within the relevant timeframes applicable to the entering of an attendance report into the Child Care Management System (CCMS).

The changes being made by the Amendment Determination are supported by changes to the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Eligibility Determination), the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping Amendment Rules 2017* (the Record Keeping Rules), intended to commence at the same time as the Amendment Determination.

The Amendment Determination also more precisely defines terms supporting the child swapping integrity measure, as set out in section 8 of the Current Determination, and introduces timeframes by when documentary evidence must be provided for a specified circumstance to apply.

The Amendment Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Background

The Family Assistance Act sets out the criteria to determine an individual's eligibility for CCB and CCR, which are payments towards a family's child care costs. Subsection 49(3) of the Family Assistance Act provides that the Minister may, by legislative instrument, determine that children specified in a certain class are children in respect of whom no-one is eligible for CCB. Eligibility for CCR is linked to eligibility for CCB and therefore the amendments also impact eligibility for CCR payments.

Limits to the age of the child in FDC

The Amendment Determination establishes a class of children for whom no-one is eligible for CCB/CCR by reference to the age of the child being cared for. Specifically, as a result of these amendments, no eligibility will arise where the care is being provided by an approved FDC service to a child who is 14 years of age or older or who attends secondary school, unless a specified circumstance exists. The effect of introducing this new class of children is that an individual (or a service, where applicable) may sometimes be eligible for CCB for care provided to an older child where there are good reasons, as set out by the Amendment Determination, but will never be eligible for CCB for a child who has turned 18 years of age.

Specified circumstances where eligibility may arise for care provided to an older child

Eligibility for CCB may still arise for an individual (or a service, where applicable) if it can be shown that one of the specified circumstances is applicable to the circumstances of the child. Documentary evidence must be held by the service to establish whether: a child is an 'eligible disability child', an 'eligible ISP child', resides in a remote or very remote part of Australia, or where the individual for whom the child is the FTB child or regular care child, and would otherwise care for the child on that day, is required to work for at least 5 hours on the day on which the session of care is provided. For all specified circumstances, eligibility is also contingent on the service holding documentary evidence, in the form of a statutory declaration, setting out the reasons why the child cannot reasonably be left alone, and needs to be cared for by the approved FDC service in the circumstances. The documentary evidence must be held by the service within specified timeframes that correspond with the timeframes imposed for the submission of attendance reports through the Child Care Management System (CCMS).

The amendments ensure that children with ongoing high support needs, who are undergoing assessment of disability and where a child care service is receiving funding under the ISP in relation to those children, are covered by the exception. The amendments also support workforce participation and assist working families with the cost of child care.

The Amendment Determination applies to all new and existing approved FDC services and takes effect with respect to sessions of care provided to a child from 13 March 2017.

Consultation

Consultations were held on 24 November 2016 including with FDC peak bodies and other stakeholders from the broader child care sector. Further detailed consultations were held during January 2017 with FDC peaks bodies. There was broad agreement that changes were necessary to address practices that are inconsistent with the policy intent of child care fee assistance. The consultations with FDC peaks resulted in the instruments being refined.

Review of the efficacy of the child swapping measures

Following a full review of the efficacy of the child swapping measures in June 2016, which included consultations with FDC peak bodies, a number of recommendations were made to address improvements that could be made and which were identified as part of implementing the integrity measure. The review recommended that, where a specified circumstance exists, an approved FDC service should have evidence of a specified circumstance prior to an attendance report for the session of care being entered into the CCMS. This recommendation is implemented by the Amendment Determination. The Amendment Determination also inserts a definition of 'engaged in activities' to reflect the intent that the 'education' specified circumstance provides for programmed educational activities.

Regulation

The regulatory impact of implementing these changes is negligible. The vast majority of approved FDC services will not have to change any of their standard business practices as a result of the amendments. For approved FDC services that do provide care to older children, and individuals who engage a service for this purpose, a minor regulatory burden will be placed on the service and individual, if a specified circumstance in relation to their child/ren is applicable. This would generally include completing a statutory declaration and obtaining other formal evidence to establish that the child has, for instance, been diagnosed with a disability. Another minor regulatory burden will be imposed on approved FDC services, through this Amendment Determination, where a service has not previously applied for funding under the ISP on behalf of an FDC carer with a child undergoing assessment for a disability. A small number of approved FDC services may now decide to apply for the ISP so a child, or children being provided sessions of care by the service, are not included within the specified class of children for whom no-one is eligible for CCB.

In addition, the changes made to the Eligibility Determination and Record Keeping Rules, to support the inclusion of a new class of children for whom no-one is eligible, are expected to have some impact on the business practices of approved FDC services which provide care to older children, and where a specified circumstance exists. In summary, the effect of changes to those instruments is to require those services to maintain a register containing certain documentary evidence required to establish that a specified circumstance exists. The regulatory impact of the measures is contained in the instruments amending the Eligibility Determination and

Record Keeping Rules are explained in further detail in the Explanatory Statements accompanying those instruments.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Amendment Determination as any amendments to the Determination are effectively of a minor nature and do not substantially alter existing arrangements (OBPR ID 21442, dated 27 October 2016 and OBPR ID 21647, dated 16 December 2016).

Statement of Compatibility with Human Rights

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

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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*.

Background

The *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) establish Child Care Benefit (CCB) and Child Care Rebate (CCR), which are payments towards a family's child care costs.

Subsection 49(3) of the Family Assistance Act provides that the Minister may, by legislative instrument, determine that children specified in a certain class are children in respect of whom no-one is eligible for CCB. The classes are set out in the *Child Care Benefit (Children in respect of whom no-one is eligible) Amendment Determination 2015* (the Current Determination).

The *Child Care Benefit (Children in respect of whom no-one is eligible) Amendment Determination 2017* (the Amendment Determination) amends the Current Determination and establishes a new class of children: those who are attending secondary school or are 14 years of age or older, other than in specified circumstances. Child care fee assistance is not available under any circumstances in respect of individuals who have turned 18, as such persons are considered too old to benefit from the child care system.

The addition of a further class of children for whom no-one is eligible for CCB is intended to more closely align Commonwealth fee assistance with genuine, formal child care arrangements. Commonwealth fee assistance is not intended to be available for teenagers, that is, the policy intent underpinning the changes is for fee assistance to only be payable for FDC provided to younger children, unless a specified circumstance applies.

The specified circumstances include where the child cannot reasonably be left alone in the circumstances, no adult can provide alternative care and:

- the child has a diagnosed disability and therefore meets the definition of an 'eligible disability child'; or
- the service is receiving funding for the child under the Commonwealth Inclusion Support Programme (ISP), of Inclusion Development Fund (IDF) Family Day Care Top Up, because the child is undergoing assessment of disability; or
- the child lives in a remote or very remote area; or

- where the child has not yet turned 16 years old, the eligible individual (and their partner) is/are required to work for at least 5 hours other than for an FDC service on the day on which the session of care is provided.

Human rights implications

The Amendment Determination engages the following rights:

- rights of the child under the Convention on the Rights of the Child (CRC), particularly Article 18(2); and
- the right to work under the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Rights of the child

Article 3 of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 18(2) of the CRC requires State Parties to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and ensure the development of institutions, facilities and services for the care of children.

The Amendment Determination clarifies and expands the existing classes of children in respect of whom no-one is eligible for CCB. The purpose of this expansion is to ensure that FDC is delivered in line with the policy intent for this type of care. The policy intent is that fee assistance will be paid for FDC provided to young children, unless there is a demonstrable need for an older child to be provided with formal child care subsidised by the Government.

Individuals will still be able to access FDC for their older child, even if the child is in the class of children set out in section 9 of the Amendment Determination. However, they will not be eligible for CCB for this care unless they are able to provide documentary evidence of a specified circumstance. They can also obtain sessions of care in another care type, such as long day care, occasional care or outside school hours care and be eligible for CCB for this care.

The exceptions recognise that there are children with a disability, or who live in remote areas, and who may face greater barriers to accessing alternative forms of care. As such, the measures do not seek to limit the payment of Commonwealth child care fee subsidies where such a need can be demonstrated, in acknowledgment that the payments remain an important aid to alleviate the challenges faced by children and their parents in such circumstances.

These amendments are compatible and reinforce the rights of the child as they are aimed at ensuring only genuine child care is subject to Commonwealth fee assistance, thus enhancing the integrity and financial sustainability of the payment scheme to ensure it can continue to provide effectively targeted support to individuals.

Right to work

Article 6 of the ICESCR requires that a person has a right to work, which includes the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses or accepts, and appropriate steps are taken to safeguard this right.

The Australian Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. The amendments reinforce this commitment by ensuring child care fee assistance for older children is only paid in circumstances where an eligible individual (and their partner) is required to work, there is no other individual who can care for the child and the family considers the child cannot reasonably be left at home alone. Where these conditions are met, child care fee assistance is still payable, therefore supporting the individual's right to work.

Conclusion

The Amendment Determination is compatible with human rights, particularly the rights of the child and the right to work.

Senator the Hon Simon Birmingham, Minister for Education and Training

Explanation of the provisions

Section 1 of the Amendment Determination states the name of the instrument. **Section 2** states Schedule 1 of the Amendment Determination commences on 13 March 2017. **Section 3** sets out the Minister's authority to make the instrument. **Section 4** sets out application provisions to clarify that the amendments made by the Amendment Determination only apply to eligibility for sessions of care that occur on and from commencement (and ensures that no part of the Amendment Determination takes effect retrospectively). **Section 5** sets out that the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* is amended by Schedule 1 to the Amendment Determination.

Item 1 amends the definition of 'eligible disability child' in section 4 to specify that there are timeframes by which the documentary evidence containing diagnosis of the child's disability, referred to in this definition, must be provided to the approved FDC service. The relevant timeframes are set out in new section 10 and correspond with the timeframes within which the service must submit its attendance reports for the session of care, under the Family Assistance Administration Act. New section 10(2) clarifies that the documentary evidence in relation to whether a child meets the 'eligible disability child' definition, only needs to be provided to the service once within the relevant timeframes applicable to giving the first attendance report that covers sessions of care for which a specified circumstance applies. That is, there is no intention to impose a requirement upon the individual to provide the service with the same documentary evidence on a fortnightly basis where the specified circumstance is ongoing (which is how frequently attendance reports are usually submitted). This general rule in new subsection 10(2) is subject to circumstances changing, such as (for example) the child being enrolled in a different approved FDC service, or a diagnosis of the child's condition being updated. Where circumstances change, an individual (or a service, where applicable) which seeks to assert that a specified circumstance applies in relation to further sessions of care provided to the child will be obliged to provide fresh documentary evidence within the same timeframes stipulated in section 10, to assess whether the specified circumstance continues to apply in relation to sessions of care provided to that child.

Item 2 inserts a definition in section 4 for the term 'engaged in activities', used in section 8 of the Current Determination relating to child swapping, to reflect the intent that the 'education' specified circumstance only relates to formal programmed educational activities, occurring at a time that usually overlaps or conflicts with the session of care, and that are outside the control of the FDC educator. Programmed educational activities may include lectures that must be attended (in person or online) at a time determined by the educational institution, and where the person cannot reasonably opt to undertake those courses at a time that would not conflict or overlap with the session of care. For example, David, an FDC carer, is also enrolled in a Diploma of Disability. David provides sessions of care to three children, and in addition looks after his daughter at the same time, every Monday between 9am to 4pm. He attends a lecture and a workshop that same day at the campus from 5pm to 9pm, and so he books a session of care with another approved FDC service for his daughter from 4.30pm to 9.30pm. At the beginning of the semester, David was given the option of attending the lectures on a Thursday morning, but David did not select the option as he worked part time as a disability support worker during that time. David may be eligible for the study specified circumstance in relation to his daughter as, despite having provided sessions of care on the Monday, the lecture and

workshop are at a time that he cannot reasonably control, and the session of care provided to his daughter that evening overlaps with his compulsory attendance requirements. However, if David did not work part time on the Thursday morning, then he could reasonably be expected to request enrolment into that alternative lecture and workshop, and thus provide care for his daughter on Monday night himself, without requiring the services of another approved FDC service. In this latter case, he would be unlikely to be eligible for CCB/CCR for his daughter if he does book a session of care as participation in the lecture and workshop that evening could reasonably occur on a different day that is not the care day.

Item 3 amends the definition of ‘remote area child’ in section 4 to include a reference to timeframes in section 10 which apply in relation to when documentary evidence needs to be provided by. The effect of referring to the timeframes in section 10 is that the service must have the documentary evidence that the child is a ‘remote area child’ prior to an attendance report being submitted through CCMS, which is generally by the end of the second week after the session of care is provided. Again, as for the explanation for Item 1 above, the documentary evidence need only be submitted once in accordance with the timeframes, unless circumstances change (see subsection 10(2)). Where circumstances change, such as (for example) the child moving to a different address, or the parent enrolling the child in a different approved FDC service, the requirement will again arise to provide the documentary evidence within the relevant timeframe to assess whether the child continues to meet the definition of ‘remote area child’ for the purpose of assessing eligibility in respect of ongoing sessions of care provided to that child by the approved FDC service.

Item 4 amends section 5 to include a reference to new section 9, which establishes a further class of children for whom no-one is eligible, being children who are attending secondary school, or who have turned 14 years of age, unless a specified circumstance applies.

Items 5 & 6 amend subparagraphs 8(2)(c)(iii) and section 8(2)(d)(iv) to insert a reference in each provision to new section 10 which sets out the timeframes by when documentary evidence required by these provisions must be provided to the approved FDC service, for a child swapping specified circumstance to apply. That is, according to new section 10, the service must hold the documentary evidence prior to submitting an attendance report under section 219N of the Family Assistance Administration Act—that is, generally by the end of the second week immediately following the week the session of care was provided.

Item 7 amends section 8 to insert a new definition for the term ‘documentary evidence’ to clarify what needs to be provided to support a claim that a child swapping specified circumstance exists for a person to be eligible. The definition is divided into two parts. The first part explains that, for the work related circumstance to apply, the documentary evidence must show a person’s usual hours of work in order to establish that these hours conflict or overlap with the session of care. The usual hours of work are typically set out in an employment contract or payslip. Where this is not the case, the relevant employer must provide a signed letter confirming the usual hours of work. The second part explains that, for the study related circumstance to apply, a copy of an enrolment form detailing the usual study requirements and hours the person is formally engaged in the study must be provided, again to establish whether the session of care overlaps or conflicts with the

study. Where the enrolment form does not contain these details, it must be supplemented by additional evidence such as an official course timetable.

Item 8 inserts new sections 9 and 10. Section 9 adds a further class of children attending secondary school or aged 14 years or older, for whom no-one is eligible for CCB/CCR. The general rule is that an individual (or a service, where applicable) cannot be eligible where the child is aged 14 years or older or is attending secondary school, unless a specified circumstance applies. No individual or service is eligible in respect of children who have already turned 18 years of age, as such persons are considered too old to benefit from the child care payments system.

Subsection 9(2) specifies the circumstances in which a child is not included in the class of children for whom no-one is eligible. In any of these circumstances, an individual (or a service, if applicable) may be eligible for CCB/CCR for the session of care provided to their child by the approved FDC service. For a specified circumstance to apply, it needs to be demonstrated (through the provision of documentary evidence) that the approved FDC service needs to provide care to the child who cannot reasonably be left alone in the circumstances, and no other adult is available to provide suitable care to the child and one of the following applies:

- a. The child is an 'eligible disability child'. This specified circumstance applies if the child has been diagnosed within the last 24 months as having one of the disabilities listed in Schedules 1 or 2 of the Current Determination and documentary evidence of this has been provided to the approved FDC service providing care to the child;
- b. The child is an 'eligible ISP child'. This specified circumstance applies if the child is being provided sessions of care by an approved FDC service that is receiving funding, under a funding agreement entered into under the auspices of the Commonwealth Inclusion Support Programme (ISP), of Inclusion Development Fund (IDF) Family Day Care Top Up, for that child because the child is undergoing assessment for disability, as referred to in the *Inclusion Support Programme Guidelines 2016-2017 to 2018-2019*;
- c. The child resides in 'remote Australia' or 'very remote Australia' in accordance with the *Australian Statistical Geography Standard (ASGC) Volume 5 – Remoteness Structure*, July 2011 (cat. no. 1270.0.55.005), published by the Australian Bureau of Statistics, and documentary evidence of the child's residential address has been provided to the service;
- d. The child has not yet turned 16 years of age, and each individual for whom the child is an Family Tax Benefit (FTB) child or a regular care child, and who would otherwise care for the child on the care day, is required to work for at least 5 hours on the day the session of care is provided, in paid work which is not for an approved FDC service.

Section 9 requires that, for each of the specified circumstances, other than for an eligible ISP child, the service must have documentary evidence of the specified circumstance in accordance with the timeframes in new section 10. A definition of 'documentary evidence' for the purposes of meeting the specified circumstances in section 9 is inserted. Importantly, for any of the specified circumstances to apply, the service must have evidence of the reasons that the child could not reasonably have been left alone in the circumstances and why there was no individual over the age of 18 who could have provided suitable care to the child in those circumstances. Evidence to demonstrate this may be in the form of a statutory declaration, prepared by an individual who is conditionally eligible for child care benefit in respect of the

child (or by the service, or another appropriate person, where the service is itself eligible).

For the specified circumstance in paragraph (3)(a) to apply, the documentary evidence is required only to be submitted to the service once, unless the circumstances change, and only by the individual who is eligible for CCB/CCR. To avoid doubt, as set out by new subsection 10(4), where the service is itself eligible, this requirement applies to the service obtaining and holding the documentary evidence within section 10 timeframes.

For the specified circumstance in paragraph 3(b) to apply, the documentary evidence needs to show the child's residential address would ordinarily be in a remote or very remote area on the day a session of care is provided. If the child lives at a single residence, at least one of the conditionally eligible individuals needs to provide the documentary evidence confirming the child's address, to the service. If the child has multiple residential addresses, for instance where the child's parents are separated, only the address of the residence where the child would ordinarily reside on the day the care is provided, needs to be evidenced. For example, Alex and Eleanor are separated. Alex lives alone on a farm outside of Nyngan, whilst Eleanor lives in Sydney. Their child, Tim, who is 14, lives with Alex during school holidays. Alex is unavailable to provide care to Tim on Sunday as he is fighting local bushfires. It is not reasonable to leave Tim alone on the farm at night because the bushfires mean that the farm is not a safe environment for a child. Alex has not been able to make other suitable arrangements for Tim so he arranges for an approved FDC carer to provide a session of care to Tim during this time. Only Alex, and not Eleanor, needs to provide documentary evidence to the service proving residential address of Alex and Tim is located in a remote or very remote area. This is because Eleanor would not have been looking after Tim on the Sunday night, and therefore her metropolitan address is not relevant. Where the service is itself eligible in respect of the child, the service may prepare a statutory declaration confirming the child's residential address is in a remote, or very remote area, in the absence of any conditionally eligible individuals being available to do so.

For the specified circumstance in paragraph (3)(c) to apply, the documentary evidence outlined must be provided by each individual for whom the child is an FTB child or a regular care child, and who would otherwise care for the child on the care day. That is, each individual must have evidence to prove that they work for at least 5 hours a day, and provide separate pay slips (for example) to the service to meet the requirements of this specified circumstance. In the case of separated parents, only the parent who would otherwise care for the child on the day which the session of care is provided would need to show that he or she was required to work on the day that he or she also had the child in care. However, if both parents were members of the same couple, then each would need to demonstrate that they met the minimum 5 hour work day requirements on the day on which the session of care is provided. Any partner of a conditionally eligible individual must also meet the minimum 5 hour work day requirements on that day and provide documentary evidence to that effect.

Amendments made separately to the Eligibility Determination establish a requirement to maintain a register of documentary evidence in relation to the specified circumstances.

New section 10 inserts timeframe requirements for documentary evidence to be held by the service for a specified circumstance to apply. These timeframes correspond to the timeframes for reporting attendance under paragraphs 219N(5)(a) and 219N(5)(b) of the Family Assistance Administration Act. In other words, if the documentary evidence has not been provided to the service within the required timeframes, the specified circumstances do not apply and no-one is eligible for CCB/CCR for the session of care. Subsection 10(2) clarifies that the timeframes apply only once in relation to each matter to be evidenced, as long as the circumstances remain the same. In other words, once the relevant evidence has been provided prior to the submission of the first attendance report for sessions of care for which the specified circumstance applies for the first time, the timeframes will be taken to be met in relation to future attendance reports submitted for the same child in respect of the same matters and circumstances. There is no further requirement to provide the documentary evidence again each time an attendance is reported through CCMS in respect of that same child, unless the circumstances have changed, which will require re-examination of whether that specified circumstance continues to apply.