

Explanatory Statement

Child Care Subsidy (What Constitutes a Session of Care) Determination 2018

Summary

The *Child Care Subsidy (What Constitutes a Session of Care) Determination 2018* (the Determination) is made under section 9 of the *A New Tax System (Family Assistance) Act 1999* (the Assistance Act).

The Determination revokes the *Child Care Benefit (Session of Care) Determination 2016* (the previous Determination). In doing so, the Determination relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which states that, 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 previous Determination will still apply in relation to sessions of care that occurred on or before 1 July 2018 because of item 8 in Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (the Amendment Act).

The purpose of the Determination is to set out what constitutes a session of care in section 6, emphasising the need for the existence of a genuine legal liability to pay fees in relation to care provided.

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

Background

The Amendment Act amends the family assistance law to give effect to the legislative elements of the Australian Government's new child care package (the package), including the new Child Care Subsidy (CCS) and Additional Child Care Subsidy (ACCS) commencing from 2 July 2018. The centrepiece of the package is the CCS, which replaces the existing Child Care Benefit (CCB) and Child Care Rebate (CCR).

Prior to those amendments, the previous Determination operated with respect to CCB and CCR. This Determination replaces the previous Determination to take into account the package references to CCS, instead of CCB.

Section 9 of the Assistance Act is a power for the Minister to define the term session of care, which are periods of child care in respect of which the following child care payments are able to be made under the Assistance Act:

- CCS under section 85BA;
- ACCS (child wellbeing) under section 85CA;
- ACCS (temporary financial hardship) under section 85CG;
- ACCS (grandparent) under section 85CJ; and
- ACCS (transition to work) under section 85CK.

An individual may only be eligible for CCS or ACCS, and an approved child care provider may only be eligible for ACCS (child wellbeing), in respect of the provision of a session of care by an approved child care service.

Under subsection 85BA(1) of the Assistance Act, amongst other things, for an individual to be eligible for CCS, the individual, or the individual's partner must have incurred a liability

to pay for the session of care under a complying written arrangement. The Determination expressly states that a session of care only occurs where an approved provider imposes a liability on an individual by charging a real commercial fee, irrespective of whether any child care payment is made by the Government to reduce some or all of that liability. That is, the arrangement between the provider and the individual must be one that is commercial in nature, and requires the payment of fees in return for the provision of child care.

In particular, a session of care has not occurred for the purposes of eligibility for CCS or ACCS where:

- the reported fee does not reflect the actual out of pocket expenses that the eligible individual (or partner) would need to pay if CCS or ACCS were not payable;
- the reported care was not provided at all (it does not meet the basic rule about when a session of care is provided in section 10 of the Assistance Act);
- the service was not actually open and available to provide child care (except where the service was closed due to a public holiday or declared local emergency).

This follows from subsection 6(1) of the Determination, which clarifies that a session of care is time for which a fee is charged for the provision of child care. Where a provider charges a fee for a purpose other than providing a child care service, including for a period where it could not have provided child care because it was not open and available (and the exceptions above in the third dot point do not apply), that fee cannot attract CCS or ACCS as it cannot be a fee in respect of a session of care as defined.

The Determination also specifies the maximum length of time for a session of care and when a session is treated as having occurred.

The Determination works in concert with provisions in the *Child Care Subsidy Minister's Rules 2017* (Minister's Rules), including those, in particular, which prescribe certain sessions of care with respect to which an individual is not eligible for CCS (see section 8 of the Minister's Rules).

Consultation

The package reflects extensive consultation and expert analysis over several years commencing with the Productivity Commission's 2014 report into Childcare and Early Childhood Learning. This was followed by a Regulation Impact Statement (RIS) consultation process, three Senate Inquiry processes and ongoing consultation with the child care sector by the Department of Education and Training (the department).

The making of the Determination is machinery in nature to support the implementation of the package to commence 2 July 2018.

In developing the Determination, the department consulted with a wide range of stakeholders, including child care providers and relevant Government departments through targeted consultation and an exposure draft of the Determination.

Stakeholders were advised of the review of the previous Determination to support the package and CCS, with the removal of Part 3 of the previous Determination to remove the requirement to report standard periods for before and after school care sessions, and Part 4 as those requirements have been largely addressed through Minister's Rules.

Regulation Impact Statement

The purpose of the Determination is to amend the previous Determination to support the implementation of the package; a RIS for the package was published on 22 February 2016 (Office of Best Practice Regulation (OBPR) ID: 1872).

The removal of the requirement to report standard periods for before and after school care sessions at Part 3 of the previous Determination has reduced regulatory burden for approved providers.

OBPR assessed and determined a RIS is not required (OBPR reference: 22401).

Authority

The *Child Care Subsidy (What Constitutes a Session of Care) Determination 2018* is made under section 9 of the Assistance Act.

Explanation of Provisions

Part 1 Preliminary

Section 1 sets out that the name of the instrument is the *Child Care Subsidy (What Constitutes a Session of Care) Determination 2018*.

Section 2 provides that the instrument commences on 2 July 2018 (the same day the new CCS and ACCS child care payments commence).

Section 3 sets out that the authority for the instrument is section 9 of the *A New Tax System (Family Assistance) Act 1999*.

Section 4 revokes the *Child Care Benefit (Session of Care) Determination 2016*.

Section 5 provides a definition.

Section 6 sets out what constitutes a session of care for the purposes of the Assistance Act, which is relevant to determining an individual's eligibility for CCS or ACCS (and, in rare circumstances, an approved provider's eligibility for ACCS (child wellbeing)).

This section provides that a session of care is the minimum period for which a provider charges a fee for providing child care (subject to a maximum of 12 hours), and it is this fee charged that goes towards determining the amount of CCS or ACCS that an individual may be eligible for. This provision ensures that session reports only reflect the actual period of time for which fees are charged for providing child care, and for which CCS or ACCS is paid. A session of care must be no longer than the period of time for which an individual has a liability to pay the fee charged for providing care to a child, especially no longer than the time that the service is actually open for business and in any case must not be longer than 12 hours.

While 12 hours is the maximum length for a session of care, this should in no way be interpreted as a standard session length. Rather, providers should determine session lengths that are appropriate to the needs and circumstances of families, their operating environment and business model.

Under the former *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Rules 2017*, certain service types had been subject to conditions for continued approval relevant to setting "standard hours", however a requirement of this nature has not been included in either this instrument or the Minister's Rules to enable providers to operate with more flexibility. Further, while the concept of "standard hours" had been part of the rate calculation process for CCB, this concept does not factor into how CCS will be calculated.

Providers are required to give session reports that accurately reflect care provided to enrolled children and the parents' liability to pay for that care under the terms of their complying written arrangement, as defined under subsection 200B(3) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act). This obligation continues to apply where a service starts to provide care earlier, or continues to provide care later than the routine or expected session time. In this situation the provider can either:

- report an additional session for the extra period of care outside the routine session for that day (before or after the routine session, or both); or
- report a longer session to reflect the additional time the child was actually in care (provided that the parents are liable to pay for the additional time in which the child is in care and it would not cause the session to exceed the maximum length of 12 hours).

Importantly, the definition of "session of care" focusses on fees charged specifically for child care and excludes charges imposed for other purposes. Where additional charges are imposed on parents that are not specifically fees for child care (such as transport levies or wait list fees) these charges do not attract CCS.

This section works together with section 8 of the Minister's Rules, which prescribes circumstances in which there is no eligibility for a session of care. In particular, there is no eligibility for a session of care if a child is attending school during any of part of the session. Therefore, if a provider of an outside school hours care (OSHC) service has reported a session as being partly provided during the time when the child was attending school, no parent can be eligible for CCS or ACCS for that child in relation to that session of care. Also, while Part 3 of the previous Determination is not included in this Determination, sessions of before school care should not start excessively early, and after school sessions should not end excessively late, when children are not routinely attending the service.

Subsection 6(2) establishes the importance of there being a genuine fee liability in respect of the session of care. The complying written arrangement, as referred to in section 85BA of the Family Assistance Act between a provider and an individual must impose a "genuine legal liability" for the session to be a session of care for which CCS or ACCS is payable. In plain terms, this means that the individual (or their partner) must be liable to pay the full reported child care fees, irrespective of whether CCS or ACCS is payable as a contribution towards those fees. The intention of this provision is to require providers to report fees that are genuinely charged to the individual for the care provided, that are not in excess of the usual fees charged at the service, and are not inflated in order to attract a higher rate of CCS or ACCS. This provision ensures that child care payments are only payable with respect to the actual fee that the parent (or relevant guardian) is genuinely liable to pay for the sessions of care. Where a fee liability is not genuinely incurred by parents in respect of a session, the whole session is not a session of care for which individuals may be eligible for CCS or ACCS.

This concept of genuine liability is also consistent with sections 201B and 201C of the Administration Act. Section 201B requires a provider to take all reasonable steps to ensure that an individual who is eligible for fee reduction pays the provider the difference between the total hourly session fees for all sessions of care provided and the applicable fee reduction amount received.

An approved provider is also obliged under section 201C to not charge an individual who is eligible for ACCS, for a session of care provided by a service, an hourly session fee that exceeds what the provider would ordinarily charge an individual who is eligible for CCS for the session of care.

An **hourly session fee** for an individual is defined in subclause 2(2) of Schedule 2 to the Assistance Act as the amount that an individual is liable to pay for a session of care (per hour), and reduced by the hourly rate of any subsidy (other than CCS or ACCS) and any reimbursement fringe benefit which the individual benefits from in respect of that session.

Subsection 6(4) clarifies that if a session of care starts on one day and ends on the following day, for reporting purposes, it is taken to have been provided on the first day.

Statement of Compatibility with Human Rights

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

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The *Child Care Subsidy (What Constitutes a Session of Care) Determination 2018* (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 Determination is made by the Minister for Education and Training under section 9 of the *A New Tax System (Family Assistance) Act 1999* (the Assistance Act).

The *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (the Amendment Act) amends the family assistance law to give effect to the legislative elements of the Australian Government's new child care package (the package), including the new Child Care Subsidy (CCS) and Additional Child Care Subsidy (ACCS) commencing from 2 July 2018. The centrepiece of the package is the CCS, which replaces the existing Child Care Benefit (CCB) and Child Care Rebate (CCR).

Following those amendments, the Determination revokes the *Child Care Benefit (Session of Care) Determination 2016* (the previous Determination). The Determination replicates two key provisions in the previous Determination and is largely machinery in nature to enable current legislative requirements set out in the previous Determination to continue on and from 2 July 2018, taking into account the amendments made by the Amendment Act in relation to the introduction of CCS and ACCS.

Section 9 of the Assistance Act is a power for the Minister to define the term "session of care". Sessions of care are periods of child care in respect of which the following child care payments are able to be made under the Assistance Act:

- CCS under section 85BA;
- ACCS (child wellbeing) under section 85CA, where a child is at risk of serious abuse or neglect;
- ACCS (temporary financial hardship) under section 85CG, where an individual is taken to be experiencing temporary financial hardship;
- ACCS (grandparent) under section 85CJ, where the child's grandparent or great-grandparent is the principal carer of the child; and
- ACCS (transition to work) under section 85CK, where an individual receives a transition to work payment.

An individual is only eligible for CCS or ACCS, and an approved provider is only eligible for ACCS (child wellbeing), in respect of the provision of a session of care by an approved child care service.

The purpose of the Determination is to set out what constitutes a session of care, emphasising the need for the existence of a genuine legal liability to pay fees in relation to care provided.

Human Rights Implications

The Determination engages the following rights:

- rights of the child under the *Convention on the Rights of the Child* (CRC), particularly Article 18(2);
- right to work under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), particularly Article 6.

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 Determination clarifies what constitutes a session of care with regard to a liability being imposed on an individual irrespective of child care fee assistance being paid.

The Determination is intended to ensure that Commonwealth child care payments are only paid in respect of true cases of fee liability for child care and is therefore consistent with the overall objectives of the child care payments system. This in turn, is in the best interests of children, as it ensures that care is provided to children is in accordance with an arrangement between the provider and parents. In accordance with subsection 6(2) of the Determination, it ensures that parents should only be charged for child care provided in respect of a session of care as agreed under an arrangement between the provider and parents. This supports the integrity of the payment system to ensure that it is sustainable, fair and accessible for all families. The Determination intends to only affect approved providers who are not providing sessions of care consistent with these objectives.

To the extent that the Determination engages the rights of the child, it is compatible with the right.

Right to work

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

The Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. The Determination is aimed at ensuring that Commonwealth expenditure on child care remains targeted at real and genuine instances of fees payable for child care under a legislative framework that also supports child care providers being able to offer flexible child care arrangements to support parents who choose to work, train, study or undertake other recognised activity.

Conclusion

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

Simon Birmingham
Minister for Education and Training