

Explanatory Statement

Child Care Subsidy Amendment (Coronavirus Economic Response Package) Minister's Rules 2020

Purpose and Authority

The *Child Care Subsidy Amendment (Coronavirus Economic Response Package) Minister's Rules 2020* (Amendment Rules) are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act), as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

Amongst other things, subsection 33(3) of the Acts Interpretation Act provides that a power to make an instrument of a legislative character (such as subsection 85GB(2) of the Family Assistance Act) includes a power to amend such an instrument.

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Minister's Rules).

Overview of the Legislative Instrument

The Amendment Rules include four rules that will assist help families and early childhood education and care services manage the impact of COVID-19.

Schedule 1, Part 1 – amendments commencing day after registration

The first rule prescribes that a service does not need to receive a certificate issued by a medical practitioner for an additional absence caused by an illness where symptoms are similar to the symptoms of COVID-19, for either the child, the individual, the partner of the individual or an individual with whom the child lives until 31 December 2020.

The second rule will create an additional absence reason until 31 December 2020 for Child Care Subsidy to be payable where a child self-isolates on advice from a health authority during the COVID-19 pandemic.

The third rule provides an exemption to the current obligation of child care providers to take reasonable steps to enforce payment of gap fees from individuals in response to the COVID-19 pandemic. This will enable ongoing fee relief to families where a service is forced to close for a period of time on public health advice. In this situation, providers cannot charge more than the hourly session fee that was charged immediately before the period specified in the Minister's Rule. This rule is in effect until 31 December 2020.

Schedule 1, Part 2 – amendment commencing 19 April 2020

Lastly, this rule allocates 20 extra allowable absence days for the 2019-20 financial year, in addition to the current 42 days, in response to COVID-19. The allocation of extra allowable absence days is intended to help offset absence days taken as a result of the impact of COVID-19, and so help ensure continued subsidised fee relief for families with children enrolled in approved child care.

This rule will commence on 19 April 2020. This power has been included to account for changes being made to the Child Care Subsidy IT payment System.

Commencement

Schedule 1, Part 1 of the Amendment Rules commence on the day after the instrument is registered on the Federal Register of Legislation.

Schedule 1, Part 2 commences on the later of immediately after the commencement of the provisions covered by table item 2 and the start of 19 April 2020.

Consultation

The measures in the Amendment Rules are in response to stakeholder feedback in relation to the COVID-19 pandemic. The Department of Education, Skills and Employment has been consulting weekly with sector stakeholders through the Early Childhood Education and Care Reference Group on COVID-19 issues. The Departments of Finance, Treasury, the Prime Minister and Cabinet have been consulted and are broadly supportive of these amendments.

Regulation Impact Statement

The Office of Best Practice and Regulation has assessed the amendments to have no more than minor impact on individuals, businesses and community organisation and no Regulatory Impact Statement is required.

Abbreviations used in this Explanatory Statement

ACCS means Additional Child Care Subsidy;

Amendment Rules means the *Child Care Subsidy Amendment (Coronavirus Economic Response Package) Minister's Rules 2020*;

CCS means Child Care Subsidy;

Family Assistance Act means the *A New Tax System (Family Assistance) Act 1999*;

Family Assistance Administration Act means the *A New Tax System (Family Assistance) (Administration) Act 1999*;

Minister's Rules means the *Child Care Subsidy Minister's Rules 2017* (being the rules made by the Minister under subsection 85GB(1) of the Family Assistance Act).

Detailed Explanation of Amendments

Preliminary

Sections 1 to 4 of the Amendment Rules are formal provisions providing for the name, commencement, authority etc. for the instrument.

Section 1 states the name of the instrument as the *Child Care Subsidy Amendment (Coronavirus Economic Response Package) Minister's Rules 2020*.

Section 2 states that sections 1 to 3 and Schedule 1, Part 1 of the Amendment Rules commence on the day after the instrument is registered on the Federal Register of Legislation; and that Schedule 1, Part 2 commences on the later of immediately after the commencement of the provisions covered by table item 2 and the start of 19 April 2020.

Section 3 states that the Amendment Rules are made under the Family Assistance Act.

Section 4 provides that the Minister's Rules are amended as set out in the Schedule to the Amendment Rules.

Definitions and technical amendments

Item 1 inserts definitions into section 4 of the Minister's Rules for 'government agency', 'health agency' and 'relevant person'. This is a consequential amendment to give clarity to the amendments at items 3, 4, 5, and 6.

No medical certificate required for certain additional absences

Subsection 10(3) of the Family Assistance Act sets out when a child care service may be taken to have provided a session of care to a child, where the child was enrolled for care on that day but did not attend, and the child has already used 42 absence days within that financial year under subsection 10(2) – an 'additional absence day'.

Relevantly, paragraph 10(3)(e) provides an additional absence day may only be claimed for an illness if the service has been given a medical certificate issued by a medical practitioner in relation to the illness. In the context of the COVID-19 pandemic, families have indicated that in some cases it has been difficult or impossible to obtain a medical certificate if an individual has contracted the COVID-19 illness (or exhibits COVID-19 like symptoms), particularly where the affected individual is required to self-isolate.

Subsection 10(3A) enables the Minister's Rules to prescribe circumstances in which paragraph 10(3)(e) does not apply – that is, circumstances where a medical certificate would not be required in order to claim an additional absence day due to illness.

Accordingly, **item 2** inserts new section 5AB into the Minister's Rules to prescribe that a medical certificate is not required in relation to the additional absence of a child on or prior to 31 December 2020, for an illness if the child or one of their family members reports symptoms similar to the symptoms of COVID-19.

Additional absence reasons due to COVID-19 pandemic

Item 3 inserts paragraph 6(1)(f) into the Minister's Rules, which allows for an additional absence day to be claimed if a 'relevant person' has decided the child's attendance on the day would put the child or any other person at risk of contracting COVID-19, and:

- the absence occurs during a period that is reasonable having regard to advice published by a government agency; and
- the day is on or before 31 December 2020; and
- the absence is not due to an illness already mentioned in paragraph 10(4)(a) or (b) of the Family Assistance Act.

Item 4 inserts subsection 6(1A) to the Minister's Rules to clarify that a relevant person may make a decision about a child's attendance for the purposes of paragraph 6(1)(f) by reference to the child specifically or by reference to a class of children (for example, where a government agency makes a decision about a child's attendance by ordering the closure of the child care service due to the COVID-19 pandemic).

Item 5 inserts a definition for 'relevant person' in subsection 6(2) of the Minister's Rules. This is a consequential amendment to give clarity to who a 'relevant person' is, for the purpose the prescribed additional absence paragraph 6(1)(f) and subsection 6(1A), for deciding whether a child's attendance on the day would put the child or any other person at risk of contracting COVID-19. This amendment specifies that a relevant person may be any of:

- the individual to whose care the child is or usually is;
- a child care service which the child attends;
- a medical practitioner for the child; or
- a government agency.

Limited waiver of requirement to enforce payment of hourly gap fees

Subsection 201B(1) of the Family Assistance Administration Act requires approved providers to take all reasonable steps to ensure that individuals pay the provider the difference between the fee charged and the Child Care Subsidy CCS paid. To enable child care services to provide fee relief to families, new subsection 201B(1A) permits providers not to comply with subsection 201B(1):

- in particular circumstances or events prescribed by the Minister's rule; and
- where the session of care occurs during the period prescribed by the Minister's rule for the event or circumstance; and
- where any other conditions prescribed by the Minister's rule are met.

Additionally, subsection 201C states that where a provider is not recovering fees from families in accordance with subsection 201B(1A), the provider cannot charge more than the hourly session fee that was charged immediately before the period specified in the Minister's rule.

Item 6 inserts a new Division 1A into Part 5 of the Minister's Rules. It specifically inserts a new section 54A, which sets out, for the purpose of new subsection 201B(1A), the circumstance, period and conditions for when a provider is not required to take all reasonable steps under

section 201B of that Act in relation to a session of care provided by a child care service to a child. It prescribes:

- the event or circumstance to be the COVID-19 pandemic; and
- the condition to be met to be that a health agency advises or requires a child care service to close as a result of the COVID-19 pandemic; and
- the period to be the period during which the health agency advises or requires child care services to close as a result of the COVID-19 pandemic prior to 31 December 2020.

This amendment provides business continuity for the child care sector and enables child care services to provide fee relief to families during the COVID-19 pandemic, in circumstances where, and the period for which, a child care service is required by a health agency to close.

It remains a condition of eligibility for Child Care Subsidy, under paragraph 85BA(1)(b) of Family Assistance Act, that an individual, or the individual's partner, has incurred a liability to pay for the session of care under a complying written arrangement. Whether an individual, or the individual's partner, has incurred a liability to pay for a session of care by a service that is closed will depend on the terms of the complying written arrangement and the Australian Consumer Law.

Prescribing extra allowable absences for specified events or circumstances

Section 10 of the Family Assistance Act defines when a child care service provides a session of care to a child for the purposes of the Family Assistance Act and the Family Assistance Administration Act. Child Care Subsidy and Additional Child Care Subsidy are only payable in respect of sessions of care. If the child does not attend a session of care the child is enrolled for, the child's parents or guardians are liable for full, unsubsidised fees, unless the absence provisions apply.

Subsection 10(1) provides that a session of care is provided to a child if either:

- the child is enrolled for care by the service and the child *attends* the session of care or any part of it; or
- if the child does not attend any part of the session of care—the service is *taken to have provided* the session of care to the child under subsection 10(2) or (3).

Subsection 10(2) deals with when a child care service may be taken to have provided a session of care to a child in respect of an initial 42 days in a financial year where the child was enrolled for care on that day but did not attend – an 'absence day'.

Amongst other requirements, paragraph 10(2)(c) provides that an allowable absence day may only be claimed if:

- the child has not exceeded 42 absence days in the financial year; and
- if the Minister's Rules prescribe a particular event or circumstance – that the conditions referred to in subsection (2AA) are met.

Subsection 10(2AA) of the Family Assistance Act provides that the conditions are that:

- any conditions prescribed by the Minister's Rules for the prescribed event or circumstance are met; and
- if the Minister's Rules prescribe a number of days for the specified event or circumstance - that the child has not already claimed more than the prescribed number of absence days for that specified event or circumstance.

Item 7 of the Amendment Rules inserts section 5AA into the Minister's Rules to prescribe, for the purposes of subparagraph 10(2)(c)(ii) and subsection 10(2AA), that a session of care will be taken to be provided to a child (and for which Child Care Subsidy and Additional Child Care Subsidy will therefore be payable) if:

- an absence is claimed for reasons relating to the COVID-19 pandemic (the particular event or circumstance);
- the session of care would have been attended by the child in the 2019-2020 financial year (the condition); and
- the child has not already claimed 19 absence days for reasons relating to the COVID-19 pandemic (the number of extra allowable absence days).

Section 5AA of the Minister's Rules operates to provide a child with up to 20 days of extra allowable absences from a child care service within the 2019-2020 financial year. A higher absence rate is anticipated in the 2019-2020 financial year as a consequence of the COVID-19 pandemic due to illness and the need for social isolation. As such, increasing allowable absences aims to reduce the risk of, or number of, absences for which no subsidy is payable. Combined with other measures, this measure will help ensure that families can keep their children enrolled in care during the evolving COVID-19 pandemic, and avoids or reduces the cost to families of unpaid absences.

Statement of Compatibility with Human Rights

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

Child Care Subsidy Amendment (Coronavirus Economic Response Package) Minister's Rules 2020

This Legislative Instrument, being the *Child Care Subsidy Amendment (Coronavirus Economic Response Package) Minister's Rules 2020* (Amendment Rules), 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

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Schedule 1, Part 1 – amendments commencing day after registration

The first rule prescribes that a service does not need to receive a certificate issued by a medical practitioner for an additional absence caused by an illness where symptoms are similar to the symptoms of COVID-19, for either the child, the individual, the partner of the individual or an individual with whom the child lives until 31 December 2020.

The second rule will create an additional absence reason until 31 December 2020 for subsidy to be payable where a child self-isolates on advice from a health authority during the COVID-19 pandemic.

The third rule provides an exemption to the current obligation of child care providers to take reasonable steps to enforce payment of gap fees from individuals in response to the COVID-19 pandemic. This will enable ongoing fee relief to families where a service is forced to close for a period of time on public health advice. In this situation, providers cannot charge more than the hourly session fee that was charged immediately before the period specified in the Minister's Rule. This rule is in effect until 31 December 2020.

Schedule 1, Part 2 – amendment commencing 19 April 2020

Lastly, this rule allocates 20 extra allowable absence days for the 2019-20 financial year, in addition to the current 42 days, in response to COVID-19. The allocation of extra allowable absence days is intended to help offset absence days taken as a result of the impact of COVID-19, and so help ensure continued subsidised fee relief for families with children enrolled in approved child care.

This rule will commence on 19 April 2020. This power has been included to account for changes being made to the Child Care Subsidy IT payment System.

Analysis of human rights implications

The Amendment Rules implement some of the policy objectives of the *Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019* (Building on the Child Care Package Act). The Building on the Child Care Package Act did not represent a material departure from the overall policy objectives of the measures introduced in the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*.

The Amendment Rules engage many of the human rights, which were analysed for passage of the Building on the Child Care Package Act, which are set out below.

The Amendment Rules engage the following rights:

- Articles 3, 19 and 27 of the *Convention on the Rights of the Child* (CRC); and
- Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and

The rights of parents and children

Article 3 of the Convention on the Rights of the Child (CRC) recognises that in all actions concerning children, the best interests of the child shall be a primary consideration. **Article 19** of the CRC requires that appropriate measures are taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

Early childhood education and child care play a vital role in the development of Australian children. Children's preparation for school and access to this care is also one of the most effective early intervention strategies to break the cycle of poverty. The Amendment Rules supports children and families to continue to access quality child care during times of national emergency or disasters by providing Government with limited flexibility to manage the impacts of the COVID-19 event (as well as future disasters) on families and on business continuity for child care services.

The measures in these Amendment Rules continue to advance the rights of parents and children by:

- (a) prescribing a specific event or circumstance for which extra allowable absence days are permitted;
- (b) prescribing circumstances in which a service does not need to receive a certificate issued by a medical practitioner for an absence caused by an illness; and
- (c) prescribing an event or circumstance and a specific period for which:
 - i. an approved provider's current obligation in section 201B to 'take all reasonable steps' to ensure payment of the gap fee is waived; and
 - ii. an approved provider must not charge higher fees than the hourly session fee that was charged immediately before the period specified in the rule.

Right to adequate standard of living

Article 27 of the CRC requires that State Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The

Schedule advances this right through amendments that help ensure children have access to an adequate amount of child care to aid socialisation and development. For example, the new Amendment Rules relating to increasing allowable absence days promote this right by reducing barriers to children accessing early childhood education and child care, such as exhausting allowable absences as a result of COVID-19, so families do not have to pay fees without subsidy.

The Amendment Rules help to further advance these rights by restricting services from charging higher fees than the hourly session fee that was charged immediately before the period specified in a Minister's Rule.

Right to social security

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security.

The schedule promotes this right by:

- (a) extending social security entitlements in the form of extra allowable absence days in circumstances prescribed by the Minister's rules; and
- (b) addressing the risk that an inability to see a medical practitioner to obtain a medical certificate does not prevent an individual from being able to access additional absence days in prescribed circumstances.

Conclusion

The Amendment Rules are compatible with human rights. They ensure that the uncertainties and extraordinary impacts of the COVID-19 pandemic on families and child care providers can be flexibly managed. The Amendment Rules do this by prescribing extra allowable absences, additional absence days without medical evidence and circumstances where approved child care providers are not required to enforce payment of child care gap fees. This enables children to continue to access Child Care Subsidy and otherwise remain enrolled with their approved child care services where they are unable to attend child care because of the COVID-19 pandemic. The Amendment Rules also support families and services in the event the service is directed to close on public health advice.

Dan Tehan
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