

Explanatory Statement

Child Care Subsidy Amendment (Coronavirus Response Measures No. 8) Minister's Rules 2020

Purpose and Authority

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 8) 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* (Acts Interpretation Act).

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(1) 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* (Principal Rules).

The Amendment Rules make the following amendments to the Principal Rules to give effect to measures supporting child care providers and families in response to the COVID-19 pandemic and strengthen compliance by:

- increasing the number of allowable absence days for children enrolled in approved child care services in Victoria by 15 days for the 2020-2021 financial year;
- providing that an individual is eligible for Child Care Subsidy (CCS) for days that their child is absent from care, both before the child first attends care following their enrolment, and after the child last attends care before their enrolment ceases. This measure applies to absences during the period beginning on 13 July 2020 and ending on 31 December 2020 from care provided by a service that was located in a Restricted Area in Victoria (within the meaning of the Stay at Home Directions) at any time during that period;
- extending the measure that permits approved providers to waive their fees for child care services that are required to close due to health directions, from 31 December 2020 to 31 January 2021;
- providing that engaging in an Australian course of study, including a master's degree or doctoral degree, will be a recognised activity for the CCS activity test;
- clarifying that a failure by a provider to take reasonable care in providing information to the Secretary under the Family Assistance Law (in particular, in session attendance reports) is a matter the Secretary must consider in deciding whether to impose a sanction on the provider; and
- clarifying that a failure by a provider to take reasonable care to comply with a condition imposed on the approval of the provider by the Family Assistance Law is a matter the Secretary must consider when deciding whether cancellation of the provider's approval is an appropriate sanction to impose for the non-compliance.

Commencement

The Amendment Rules commence on the day after they are registered on the Federal Register of Legislation.

Consultation

The Department of Education, Skills and Employment (the department) has been consulting weekly with stakeholders in the early childhood education and care sector through the Early Childhood Education and Care Reference Group on COVID-19 issues. In addition, during May and June 2020, the department has run additional consultation sessions with stakeholder groups.

Regulation Impact Statement

A Prime Minister's exemption has been granted for all COVID-19 related measures where they have more than a minor regulatory impact.

Abbreviations used in this Explanatory Statement

Amendment Rules means the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 8) 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*.

Principal 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 Response Measures No. 8) Minister's Rules 2020*.

Section 2 provides that the Amendment Rules commence on the day after they are registered.

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

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

Schedule 1 – Amendments

Further 15 day increase in allowable absence days for individuals in Victoria

Under section 10 of the Family Assistance Act, a child is taken to have been provided with a session of care by an approved child care service on a day if the child attends the session of care, or the child does not attend that session of care in the circumstances set out in subsections (2) or (3).

Subsection 10(2) sets out what are known as “allowable absence days”. Essentially, a child can be absent from sessions of care on up to 42 days in a financial year, and the child’s parent or guardian will remain eligible for CCS for sessions of care on those days.

The number of allowable absence days under subsection 10(2) can be increased in the Minister’s rules. The Minister’s rules must prescribe the circumstances or event that triggers the increase in allowable absence days, and prescribe any conditions that must be satisfied in order for those allowable absence days to be accessible by an individual.

Under subsection 5AA(5) of the Minister’s rules, individuals using child care services located in Victoria who use up all of their 42 ordinary allowable absence days, have an additional 30 allowable absence days for the 2020-2021 financial year, making of total of 72 allowable absence days. Section 5AA is a response to the COVID-19 pandemic.

Item 1 amends subsection 5AA(5) to increase the extra allowable absence days by 15 days (from 30 to 45) bringing the total allowable absence days to 87 days. **Item 2** makes a consequential amendment to the Note to subsection 5AA(5).

Individuals eligible for CCS for absences occurring immediately after enrolment and immediately before enrolment ceases

For an individual to be eligible for CCS, their child must have been provided with a session of care by an approved child care service operated by an approved provider (subsection 85BA(1) of the Family Assistance Act).

Subsections 10(2) and (3) of the Family Assistance Act set out the circumstances in which a service is taken to have provided a session of care to a child who did not attend the session of care – so-called “allowable absences” and “other absences”.

Amongst other things, a child cannot have either an allowable absence or another absence:

- on a day after the child is enrolled with a service, but before the child first attends a session of care (subparagraphs 10(2)(b)(ii) and 10(3)(c)(ii)); or
- on a day after the child last attends a session of care before the child’s enrolment ceases (subparagraphs 10(2)(b)(iii) and 10(3)(c)(iii)).

Essentially, irrespective of a child’s period of enrolment with a service, an individual is not eligible for CCS until their child first attends a session of care, and is not eligible for CCS after the child last attends a session of care.

Subsections 10(2A) and (3A) provides that the Minister’s rules can prescribe circumstances in which these subparagraphs do not apply.

Section 5B of the Principal Rules sets out a limited set of circumstances in which an individual remains eligible for CCS for the period of enrolment up until their child first attends a session of care, or for the period after their child last attends a session of care before their enrolment ceases.

The COVID-19 pandemic has resulted in many children being absent from child care for extended periods of time. While these children have remained enrolled with services, the services have been correctly reporting the children as being absent (i.e. using either allowable absences or other absences), and their families have continued to be paid CCS. However, on those children’s enrolment ceasing, all of those recorded absences cease to be legitimate absences, the relevant individual is retrospectively ineligible for CCS for those days, and a debt is raised.

Enrolment may cease for several reasons, often related to the pandemic:

- the family has decided to withdraw the child from care after an extended period of absence;
- automatic cessation of enrolment under subparagraph 200B(1)(b)(iii) of the Family Assistance Administration Act (i.e. the 14 week rule);
- because ownership of the service is transferred between providers (and individuals need to re-enrol with the new provider).

To prevent families from incurring debts, the Government has decided to temporarily suspend the operation of subparagraphs 10(2)(b)(ii) and (iii) and 10(3)(c)(ii) and (iii) of the Family Assistance Act. This measure will apply to areas in Victoria that were subject to Stay at Home Directions in the period 13 July 2020 to 8 November 2020. The suspension will apply for the duration of that Stay at Home period, and continue afterwards until 31 December 2020.

Accordingly, **item 3** amends the Principal Rules to give effect to this policy.

Study of master’s and doctorates to be recognised activities for the CCS activity test

The amount of CCS to which an individual is entitled is dependent, amongst other things, on the individual’s “activity test result”, which is worked out in accordance with Division 1 of Part 5 of Schedule 2 to the Family Assistance Act. Most individuals’ activity test results are worked out

based on the number of hours of “recognised activities” that they undertake in any given fortnight, in accordance with clause 12 of Schedule 2 to the Family Assistance Act.

Subclause 12(2) of Schedule 2 sets out ***recognised activities***, which include activities prescribed by the Minister’s rules (paragraph (d)). In turn, Division 3 of Part 3 of the Principal Rules prescribes certain activities as recognised activities.

Currently, “approved courses of education or study” are recognised activities (paragraph 12(2)(d) of Schedule 2 to the Family Assistance Act). These ***approved courses of education or study*** are defined, ultimately, by the *Student Assistance (Education Institutions and Courses) Determination 2019* made under the *Student Assistance Act 1973*. However, while many higher education courses are approved courses of education or study, not all master’s degrees and doctoral degrees provided by Australian universities are approved.

Item 4 inserts a new section 23A into Division 3 of Part 3 of the Principal Rules, which provides that an Australian course of study (within the meaning of the *Tertiary Education Quality and Standards Agency Act 2011*) is a recognised activity. The *Tertiary Education Quality and Standards Agency Act 2011* defines an Australian course of study as a course leading to a higher education award covered by certain Australian providers. A higher education award means:

- (a) a diploma, advanced diploma, associate degree, bachelor degree, graduate certificate, graduate diploma, master’s degree or doctoral degree; or
- (b) a qualification covered by level 5, 6, 7, 8, 9 or 10 of the Australian Qualifications Framework; or
- (c) an award of a similar kind, or represented as being of a similar kind, to any of the above awards;

other than an award offered or conferred for the completion of a vocational education and training course.

This definition encompasses all higher education courses in Australia, including master’s and doctoral courses that are not currently captured under the definition of approved courses of education or study. This ensures that all higher education courses in Australia are recognised activities for the purposes of the activity test, consistent with the original policy intention of the test.

The net effect of the new section 23A is that studying for a master’s degree or doctoral degree at an Australian higher education provider will be a recognised activity, and hours spent undertaking that study in any fortnight will count towards an individual’s recognised activity test.

A provider’s failure to take reasonable care in complying with its obligations is relevant to sanction decisions about that provider

Subsection 195H(1) of the Family Assistance Administration Act empowers the Secretary to impose a number of sanctions on a provider who the Secretary is satisfied has not complied with a condition of continued approval, including varying, suspending, or cancelling the provider’s approval.

Subsection 195H(2) of the Family Assistance Administration Act authorises the Minister’s rules to prescribe the matters that must be taken into account by the Secretary in imposing such a

sanction. Section 52 of the Principal Rules prescribes those matters for the purposes of subsection 195H(2). In particular, subsection 52(3) of the Rules sets out matters that the Secretary must take into account in deciding whether to impose a sanction on a provider, and subsection 52(4) sets out matters that the Secretary must take into account in deciding what kind of sanction to impose.

Paragraph 52(3)(d) of the Principal Rules provides that the Secretary must, in deciding whether to impose a sanction on a provider, take into account whether the provider's non-compliance "involves the *deliberate or reckless* giving of inaccurate, false or misleading information to the Secretary" (emphasis added).

Subparagraph 52(4)(b)(ii) of the Principal Rules provides that the Secretary must, in deciding whether the appropriate sanction to impose on a provider is cancellation of its approval, take into account whether the provider's non-compliance "indicates a *deliberate or reckless* disregard for the obligation to comply with the condition, or a lack of ability to understand that obligation" (emphasis added).

In the recent Federal Court decision of *Al-Huda Pty Ltd v Secretary, Department of Education, Skills and Employment* [2020] FCA 1613, the court held that words "deliberate or reckless" in these provisions required the Secretary to assess the subjective state of mind of the provider.

This interpretation is inconsistent with the original policy intention of these provisions and imposes a significant burden on the Secretary in taking action to preserve the integrity of the CCS scheme. In essence, in making sanction decisions against non-compliant providers, the Secretary would be required to assess the *actual* state of mind of a provider who has given incorrect information to the Secretary, and assess the *actual* state of mind of a provider who has been non-compliant with a condition of approval – as opposed to assessing the provider's actions against the standards expected of a reasonable provider in the same situation as the provider.

The importance of accurate information being provided to the Secretary to the integrity of the CCS scheme cannot be overstated. Information submitted by the provider is fundamental to the calculation of correct entitlements under the Family Assistance Law, and inaccuracies can lead to families being both underpaid their entitlements and incurring sizeable debts to the Commonwealth. Accurate information being provided by providers is crucial; a single provider who gives inaccurate information to the Secretary can affect the entitlements of dozens or even hundreds of families, and millions of dollars of taxpayer funds.

Given the significant impacts that providers can have on families and their entitlements, it is expected that information submitted by providers is not only true and accurate, but that they take great care to ensure that it is, such as by establishing robust governance arrangements, including where the collection and submission of information is devolved to staff and contractors.

The amendments made by **items 5 and 6** remove the obligation for the Secretary to consider whether a provider *actually* thought about whether the information they were giving was inaccurate in deciding whether to impose a sanction; and *actually* turned their mind to their non-compliance in deciding whether to cancel their approval.

Instead, the Secretary will be obliged to consider whether a provider's actions or omissions reflect a "failure to take reasonable care", that is, to measure the provider's actions in providing

inaccurate information, or otherwise not complying with the conditions of its approval, against the standards expected of a reasonable provider in the provider's situation.

It is important to note that, in doing so, the Secretary is still able to have regard to whether the provider's actions were in fact deliberate or reckless. That is, a provider who the Secretary is satisfied was intentionally or recklessly non-compliant will have failed to take reasonable care to comply. The amendments do not prevent the Secretary from considering whether non-compliance was deliberate or reckless, they simply remove the obligation on the Secretary under subsection 195H(2) of the Family Assistance Administration Act to do so.

Extension of period during which providers can waive gap fees for services in areas with “stay at home” restrictions

Subsection 201B(1A) of the Family Assistance Administration Act allows the Minister's rules to prescribe particular events or circumstances in which a provider is not required to take reasonable steps to enforce payment of so-called child care “gap fees” (the difference between the child care fees charged by the provider and an individual's entitlement to CCS in relation to those fees).

Relevantly, section 54A of the Principal Rules permits providers to not recover gap fees for a service where the service is closed because a health agency has advised or required the service to close. Providers are allowed to waive gap fees for a service until the relevant health direction ceases to apply to the service, or 31 December 2020, whichever happens first.

The amendment made by **item 7** extends the gap fee waiver permission for services affected by health directions from 31 December 2020 to 31 January 2021. This will allow services subject to health directions to continue to waive their gaps fees over the usual summer holiday period.

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 Response Measures No. 8) Minister's Rules 2020

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*.

Overview of the Legislative Instrument

The Amendment Rules make the following amendments to the Principal Rules to give effect to measures supporting child care providers and families in response to the COVID-19 pandemic and strengthen compliance by:

- increasing the number of allowable absence days for children enrolled in approved child care services in Victoria by 15 days for the 2020-2021 financial year;
- providing that an individual is eligible for child care subsidy (CCS) for days that their child is absent from care, both before the child first attends care following their enrolment, and after the child last attends care before their enrolment ceases. This measure applies to absences during the period beginning on 13 July 2020 and ending on 31 December 2020 from care provided by a service that was located in a Restricted Area in Victoria (within the meaning of the Stay at Home Directions) at any time during that period;
- extending the measure that permits approved providers to waive their fees for child care services that are required to close due to health directions, from 31 December 2020 to 31 January 2021;
- providing that engaging in an Australian course of study, including a master's degree or doctoral degree, will be a recognised activity for the CCS activity test;
- clarifying that a failure by a provider to take reasonable care in providing information to the Secretary under the Family Assistance Law (in particular, in session attendance reports) is a matter the Secretary must consider in deciding whether to impose a sanction on the provider; and
- clarifying that a failure by a provider to take reasonable care to comply with a condition imposed on the approval of the provider by the Family Assistance Law is a matter the Secretary must consider when deciding whether cancellation of the provider's approval is an appropriate sanction to impose for the non-compliance.

Analysis of human rights implications

The Amendment Rules engage Articles 3, 19 and 27 of the *Convention on the Rights of the Child* (CRC).

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.

Article 27 of the CRC recognises the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, social and moral development. Article 27 also requires States Parties to take appropriate measures to assist parents and others responsible for the child to implement this right and shall, where required, provide material assistance and support programmes.

Early childhood education and child care play a vital role in the development of Australian children and the rights of the child listed above are fundamentally engaged by the Family Assistance Law generally in facilitating access to subsidised child care. Moreover, 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.

Accordingly, these Amendment Rules will support children and families to continue to access and/or remain enrolled in quality child care. In particular, the measures in the Amendment Rules continue to advance the rights of parents and children by enabling providers to reduce the cost of care for parents. This will help ensure that vulnerable and disadvantaged families in particular are able to access subsidised child care at reasonable costs as they transition back to CCS and ACCS.

Conclusion

The Amendment Rules are compatible with human rights.

Dan Tehan
Minister for Education