

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment, Workforce, Skills, Small and Family Business

A New Tax System (Family Assistance) Act 1999

Child Care Subsidy Amendment (Coronavirus Response Measures No. 6) Minister's Rules 2021

AUTHORITY

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 6) Minister's Rules 2021* (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).

Under subsection 33(3) of the Acts Interpretation Act, 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 and amend or vary any such instrument.

PURPOSE AND OPERATION

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to provide for the making of business continuity payments, called COVID-19 viability support payments, to approved child care providers affected by the COVID-19 pandemic. Under these amendments, providers who meet the eligibility criteria will receive COVID-19 viability support payments at certain times. These include where the provider's service is in a COVID-19 hotspot for more than 28 days, or where the provider's service is in a COVID-19 hotspot of more than 7 days, and there are restrictions on whether children can attend care.

In order to receive COVID-19 viability support payments, providers must comply with certain conditions. These include that they must not enforce gap fees for any children not attending care, they must not receive other forms of Commonwealth government funded COVID-19 business support payments, they must not intentionally reduce staffing numbers and they must not increase their hourly session fees.

These amendments are intended to provide stable income for the child care sector, protecting their financial viability and allowing them to continue to operate into the future. Previous COVID-19 related amendments have had the effect that providers are permitted not to enforce "gap fees" that parents would otherwise pay for child care, and that a greater number of unattended sessions of care will attract child care subsidy (CCS). This eases the financial burden on parents, but can make it hard for providers, as the gap fee may usually

be a significant part of their revenue. COVID-19 viability support payments will ease the financial burden that is being placed on child care providers due to the COVID-19 pandemic.

The Amendment Rules also make consequential amendments to other parts of the Principal Rules focussed on COVID-19 pandemic relief. For example, the Amendment Rules also amend the provisions allowing providers not to enforce gap fees, to align it with the eligibility criteria for the COVID-19 viability support payments. The Amendment Rules also repeal a few spent COVID-19 pandemic relief provisions which are no longer needed, to tidy up the Principal Rules.

REGULATORY IMPACT

A Prime Minister's exemption has been granted for all COVID-19 related measures where they have more than a minor regulatory impact – see <https://obpr.pmc.gov.au/published-impact-analyses-and-reports/prime-ministers-exemption-covid-19-related-measures>.

COMMENCEMENT

Sections 1 to 4 and Part 1 of Schedule 1 to the Amendment Rules commence on 23 August 2021.

This means that they commence before they are registered. Subsection 12(1A) of the *Legislation Act 2003* (Legislation Act) provides that legislative instruments may provide that the instrument commences before the instrument is registered. Subsection 12(2) of the Legislation Act provides that an instrument that commences retrospectively does not apply to the extent that the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person, or liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.

Sections 1 to 4 of the Amendment Rules are formal provisions that do not impose any liabilities or affect any rights.

Part 1 of Schedule 1 to the Amendment Rules has a purely beneficial effect. They confer a right to payment on certain providers. They also expand the instances where a provider is not required to comply with the obligation in section 201B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) to enforce the payment of gap fees. Ordinarily, this obligation is enforceable as an offence or a civil penalty.

Part 1 of Schedule 1 to the Amendment Rules places obligations on providers through eligibility criteria that the provider must meet in order to receive the COVID-19 viability support payment. It is not compulsory for a provider to meet the eligibility criteria for COVID-19 viability support payment if the provider does not wish to receive COVID-19 viability support payment.

Giving Part 1 of Schedule 1 to the Amendment Rules retrospective effect will allow greater support for child care providers that are already experiencing adverse financial impacts from

lockdowns in various jurisdictions. Due to the quickly changing nature of the pandemic, it is not always possible to foresee what support will be needed and when. By giving Part 1 of Schedule 1 to the Amendment Rules retrospective effect, the impact of financial damage by child care providers before the Amendment Rules are registered can be mitigated.

Part 2 of Schedule 1 to the Amendment Rules commence the day after the Amendment Rules are registered.

CONSULTATION

The Department of Education, Skills and Employment (the Department) has been consulting regularly with stakeholders in the early childhood education and care sector through the Early Childhood Education and Care Reference Group on COVID-19 issues.

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. 6) Minister's Rules 2021

The *Child Care Subsidy Amendment (Coronavirus Response Measures No. 6) Minister's Rules 2021* (the Amendment Rules) are 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 amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to provide for the making of business continuity payments to approved child care providers affected by the COVID-19 pandemic, called COVID-19 viability support payments. Under these amendments, providers who meet the eligibility criteria will receive COVID-19 viability support payments at certain times. These include where the provider's service is in a COVID-19 hotspot for more than 28 days, or where the provider's service is in a COVID-19 hotspot of more than seven days where there are restrictions on whether children can attend care.

In order to receive COVID-19 viability support payments, providers must comply with certain conditions. These include that they must be waiving gap fees for any children not attending care, they must not be receiving other forms of Commonwealth government funded COVID-19 business support payments, they must not intentionally reduce staffing numbers and they must not increase their hourly session fees.

The Amendment Rules also make consequential amendments to other parts of the Principal Rules focussed on COVID-19 pandemic relief. For example, the Amendment Rules also amend the provision allowing providers not to enforce gap fees, to align it with the eligibility criteria for the COVID-19 viability support payments. The Amendment Rules also repeal a few spent COVID-19 pandemic relief provisions which are no longer needed, to tidy up the Principal Rules.

Human rights implications

The Amendment Rules engage the following human rights:

- **Article 3** of the *Convention on the Rights of the Child* (CRC) which recognises that in all actions concerning children, the best interests of the child shall be a primary consideration.
- **Article 18** of the CRC, which requires States Parties to take all appropriate measures to ensure that children of working parents can benefit from child care services and facilities.

Article 3 of the CRC

Article 3 of the CRC recognises that in all actions concerning children, including those undertaken by administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Amendment Rules are in the best interests of the child as, by providing financial support to child care services, they will ensure that children are able to continue to access continuous, high quality care. The COVID-19 viability support payments will allow services to remain open, so that all children who need child care can return to care after the COVID-19 hotspot status in their area is lifted.

Article 18 of the CRC

Article 18 of the CRC, and particularly paragraph 3 of article 18, requires States Parties to take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible.

The Amendment Rules, by providing for COVID-19 viability support payments to be paid to child care providers, will ensure that child care services are able to remain open despite the financial stress placed on them due to the COVID-19 pandemic. This will prevent closures of services which might risk an under-supply of child care, and ensure that working parents continue to be able to access continuous high quality care for their children.

Conclusion

The Instrument is compatible with human rights because it promotes the protection of human rights.

Minister for Employment, Workforce, Skills, Small and Family Business, Stuart Robert

***Child Care Subsidy Amendment (Coronavirus Response Measures No. 6) Minister's Rules
2021***

EXPLANATION OF PROVISIONS

Section 1: Name

1. This is a formal provision specifying the name of the instrument as the Child Care Subsidy Amendment (Coronavirus Response Measures No. 6) Minister's Rules 2021 (Amendment Rules).

Section 2: Commencement

2. This section provides for the commencement of the Amendment Rules.
3. Sections 1 to 4 and Part 1 of Schedule 1 to the Amendment Rules commence on 23 August 2021.
4. This means that they commence before they are registered. Subsection 12(1A) of the *Legislation Act 2003* (Legislation Act) provides that legislative instruments may provide that the instrument commences before the instrument is registered. Subsection 12(2) of the Legislation Act provides that an instrument that commences retrospectively does not apply to the extent that the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person, or liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.
5. Sections 1 to 4 of the Amendment Rules are formal provisions that do not impose any liabilities or affect any rights.
6. Part 1 of Schedule 1 to the Amendment Rules has a purely beneficial effect. They confer a right to payment on certain providers. They also expand the instances where a provider is not required to comply with the obligation in section 201B of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) to enforce the payment of gap fees. Ordinarily, this obligation is enforceable as an offence or a civil penalty.
7. Part 1 of Schedule 1 to the Amendment Rules places obligations on providers through eligibility criteria that the provider must meet in order to receive COVID-19 viability support payments. It is not compulsory for a provider to meet the eligibility criteria for COVID-19 viability support payment if the provider does not wish to receive COVID-19 viability support payments. Giving Part 1 of Schedule 1 to the Amendment Rules retrospective effect will allow greater support for child care providers that are already experiencing adverse financial impacts from lockdowns in various jurisdictions. Due to the quickly changing nature of the pandemic, it is not

always possible to foresee what support will be needed and when. By giving Part 1 of Schedule 1 to the Amendment Rules retrospective effect, the impact of financial damage to child care providers before the Amendment Rules are registered can be mitigated.

8. Part 2 of Schedule 1 to the Amendment Rules commences the day after the Amendment Rules are registered.

Section 3: Authority

9. This provision provides that the Amendment Rules are made under section 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act), which allows the Minister to make rules required or permitted to be prescribed by either the Family Assistance Act or the Family Assistance Administration Act.

Section 4: Title of Section

10. This section provides that the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) are amended as set out in the Schedule to the Amendment Rules.

SCHEDULE 1 – Amendments

Part 1 – Amendments commencing on 23 August 2021

Item 1

11. This item amends the definition of “business continuity payment”. Previously, a business continuity payment was defined as a payment made under section 205A of the Family Assistance Administration Act. When this definition was inserted, section 205A was the only provision in the Family Assistance Administration Act that provided for the making of business continuity payments, and previously, the Principal Rules have only provided for business continuity payments to be made under section 205A.
12. However, in 2021 the Family Assistance Administration Act was amended to include a new provision allowing for the making of business continuity payments where a child care service has been affected by an emergency or disaster – section 205C. Item 1 is a consequential amendment reflecting that business continuity payments may now be made under section 205A or section 205C.

Item 2

13. This item moves the definition of health agency, which was previously in section 54A, into the definitions section. This is to reflect that the definition is now used in multiple provisions.

Item 3

14. This item inserts definitions for the terms “in a COVID-19 hotspot” and “in a restricted COVID-19 hotspot” into the definitions section.
15. For a service to be in a COVID-19 hotspot on a day, both of the following must apply to the location for at least 12 hours of that day:
- a. a State or Territory public health order (or direction) restricting the movement of persons for a period; and
 - b. a determination from the Commonwealth Chief Medical Officer that the location is in a COVID-19 hotspot for the purposes of Commonwealth support.
16. COVID-19 hotspots can be declared on very short turnarounds, and often commence at a specific time in the day. This requirement makes it easier to determine how many days a COVID-19 hotspot will last, and remove uncertainty where, for example, a COVID-19 hotspot starts at 11:59pm. If both criteria are met for a location from before midday until the end of the day, the location is in a COVID-19 hotspot on that day. However, if the Commonwealth Chief Medical Officer declaration does not commence until late in the day – for example, 5:00pm – the location is not in a COVID-19 hotspot on that day.
17. For a service to be in a restricted COVID-19 hotspot on a day, it must be in a COVID-19 hotspot on that day, and there must be either a State or Territory public health order or State or Territory government agency advice (in advice published on the agency’s website), placing restrictions on children attending child care.
18. During the first year of the pandemic, public health orders or directions generally made attendance at child care an exemption to the requirement to stay at home. However, in mid- to late-2021 there have been a number of outbreaks at schools and child care services, and it has become common for States and Territories to take the position that the majority of children should not be attending child care to mitigate spread of the COVID-19 virus. This has resulted in a greater need for support for child care services in States and Territories who take this position. At times these positions have been reflected in the relevant public health order, but some jurisdictions have issued advice only.

Item 4

19. This item repeals the definition of Stay at Home Directions. This term was previously used in section 54A and section 5B(2)(e) of the Principal Rules, but section 5B(2)(e) and the relevant aspect of section 54A ceased to have effect on 31 December 2020 and accordingly, the definition is being repealed by this instrument.

Item 5

20. This item repeals section 5AA of the Principal Rules. Section 5AA only applied to the 2019-2020 and 2020-21 financial years. Accordingly, it no longer has any effect and can be repealed.

Item 6

21. This item repeals section 5AAB. However, section 5AAB will be remade by item 27 as new clause 3.1. Section 5AAB is a temporary COVID-19 measure. Temporary COVID-19 measures are being moved into Schedule 3, to make these measures easier to find and also ensure they can be neatly removed from the Principal Rules when they are no longer required.

Item 7

22. This item repeals section 5AB. Section 5AB only had effect until 31 December 2020. Accordingly, it can now be repealed.

Item 8

23. This item repeals paragraph 5B(2)(e). Paragraph 5B(2)(e) was a temporary COVID-19 measure that only had effect until 31 December 2020. It can therefore be repealed.

Item 9

24. This item repeals paragraph 6(1)(f) of the Principal Rules. Paragraph 6(1)(f) was a COVID-19 related provision that ceased to have effect on 31 December 2020. It can therefore be repealed.

Item 10

25. This item repeals subsection 6(1A) of the Principal Rules and also repeals the note to the subsection. This is a consequential amendment as a result of repealing paragraph 6(1)(f).

Item 11

26. This item repeals paragraphs 8(1)(h) and 8(1)(i) of the Principal Rules. These paragraphs related to Division 2 of Part 6 and section 47AA of the Principal Rules, respectively. Both Division 2 of Part 6 and section 47AA were temporary COVID-19 measures that are repealed by items 12 and 17 of these Amendment Rules respectively. Paragraphs 8(1)(h) and 8(1)(i) are being repealed as a consequence.

Item 12

27. This item repeals section 47AA of the Principal Rules.
28. Section 47AA of the Principal Rules is a condition of continued approval that only applied for the period beginning on 6 April 2020 and ending on 12 July 2020. It is therefore spent and can be repealed.

Item 13

29. This item repeals section 47AB of the Principal Rules. Section 47AB made it a condition of continued approval that the provider is not paid a JobKeeper payment for an individual who was not an eligible employee of the provider, or if the provider was not entitled to the amount of JobKeeper.
30. The JobKeeper payment was made between 30 March 2020 and 28 March 2021 and has now ceased. Accordingly, section 47AB has no ongoing effect and can be repealed.

Item 14

31. This item repeals Division 1A of Part 5 of the Principal Rules.
32. Division 1A of Part 5 creates an exemption from the obligation in section 201B of the Family Assistance Administration Act, to take reasonable steps to ensure that an eligible individual pays the provider the difference between the hourly session fee and the fee reduction amount (often known as the “gap fee”). The division created three categories of exemption:

- a. where a child care service was advised or required the service to close as a result of the COVID-19 pandemic;
 - b. where the service is not closed; and
 - c. where the service is located in a Restricted Area, within the meaning of the Victorian Stay at Home Directions issued under the *Public Health and Wellbeing Act 2008* (Vic),
33. The first category of exemption is available until 31 December 2021. The second category of exemption is available until 30 June 2020. The third category of exemption is available until 31 December 2020.
34. Accordingly, the second and third categories are spent and can be repealed with no effect. The first category continues to have effect. A new provision which re-creates the first category of exemption, clause 2.2 of Schedule 3, has been inserted by item 26 and is explained further below.

Item 15

35. This item makes a consequential amendment as a result of the repeal of Division 2 of Part 6 of the Principal Rules by item 17. It amends section 57AA, which provides that Division 1 of Part 6 applies to a business continuity payment to a provider for a period to which Division 2 does not apply. As Division 2 is being repealed, these words are not needed.
36. However, it is still necessary to distinguish between business continuity payments made under Division 1 of Part 6, and those made under new Part 3 of Schedule 3. Accordingly, new words are inserted to reflect that Part 6 applies only to payments made under section 205A of the Family Assistance Administration Act. This creates a distinction from business continuity payments under Part 3 of Schedule 3, which are made under section 205C of the Family Assistance Administration Act.

Item 16

37. This item adds a note to the end of section 57AA to alert the reader that matters related to business continuity payments made under section 205C of the Family Assistance Administration Act in relation to the COVID-19 pandemic are set out in Part 4 of Schedule 3.

Item 17

38. This item repeals Division 2 of Part 6 of the Principal Rules.
39. Division 2 of Part 6 provides for business continuity payments to be made to child care providers for the period beginning on 6 April 2020 and ending on 12 July 2020. It therefore has no ongoing effect and can be repealed.

Item 18

40. This item inserts clause 2.1A into Part 2 of Schedule 3. Clause 2.1A explains the purpose of Part 2 of Schedule 3 – that is, that Part 2 of Schedule 3 sets out matters in relation to when a provider is not required to take reasonable steps under section 201B of the Family Assistance Administration Act to enforce payment of gap fees.
41. As Part 2 of Schedule 3 will now include two provisions relating to when a provider is not required to enforce the payment of gap fees, an overriding purpose provision is needed.

Item 19

42. This item amends the heading to clause 2.1 to add the word “general”. This is to distinguish clause 2.1 from clause 2.2, as both relate to the enforcement of the payment of hourly fees during the COVID-19 pandemic.

Item 20

43. This item repeals subclause 2.1(1), as this subclause’s function is now carried out by subclause 2.1A(1).

Item 21

44. This item repeals subclause 2.1(2), including the heading, as this subclause’s function is now carried out by new subclause 2.1A(2).

Items 22 and 23

45. These items amend paragraph 2.1(4)(b) of Schedule 3 to the Principal Rules, and insert new subclause 2.1(4A) to align it with the eligibility criteria for the new COVID-19 viability support payment.
46. They have the effect that providers may elect not to enforce the gap fee for sessions of care not attended by children that occur on a day the service is open, or on a day the service is closed in the short-term, for no more than two weeks, or if the service predominantly provides care to Indigenous children.
47. This is to reflect that in certain circumstances, it will be responsible for services to cease providing care during periods when they are located in a COVID-19 hotspot. For example, the indigenous community is at a higher risk from COVID-19, so if a service predominantly provides care to indigenous children, it may decide to close to mitigate the health risk to those children. Similarly, if child care staff become close

contacts of a confirmed COVID-19 case, those staff members may be required to self-isolate for 14 days. Where the exposure has occurred in the workplace, many staff may be affected, meaning the child care service may not have enough staff to continue operating and may decide to close for the period of self-isolation.

Item 24

- 48. This item amends subclause 2.1(6) of Schedule 3 to the Principal Rules to align it with the eligibility criteria for the new COVID-19 viability support payment.
- 49. Clause 2.1 of Schedule 3 previously allowed providers to choose not to enforce gap fees from the first day that a State or Territory public health order places restrictions on whether children can attend child care. This item expands the scope of clause 2.1 to where a State or Territory government agency provides published advice on its website that restrict whether children should be attending child care, but has not put this in a public health order.
- 50. This reflects that in some jurisdictions, parents are being strongly urged by State or Territory government agencies not to send their children to child care where possible even though the relevant public health order permits people to leave home to take children to child care. Government agency advice that children should not be attending child care where possible is likely to have a significant effect on attendance rates at services.

Item 25

- 51. This item repeals clause 2.1(7), which defined “in a COVID-19 hotspot”. That definition has now been placed in the definitions section of the Principal Rules, so it is no longer needed in this clause.

Item 26

- 52. This item inserts clause 2.2 into Schedule 3 to the Principal Rules.
- 53. Clause 2.2 replaces part of previous section 54A, which is repealed by item 4. As mentioned above, part of previous section 54A is spent, but the aspects of section 54A that meant providers that had been advised or required to close by a health agency as a result of the COVID-19 pandemic could elect not to enforce gap fees, continue to have effect until 31 December 2021. It is intended that this will also cover providers that have been advised to close because they predominantly provide care to indigenous children, who are at a higher risk of COVID-19.
- 54. Clause 2.2 has almost identical scope to the relevant parts of section 54A. However, the exception in paragraph (1)(c) has been made narrower for consistency with the new COVID-19 viability support payments, therefore meaning a greater number of

services will be able to choose not to enforce gap fees. It is now a condition that the Secretary has not, since 2 July 2018, made a cancellation decision in relation to the service or the approved provider. This is intended to cover providers or services whose approval has been cancelled due to substantial non-compliance with the family assistance law, but whose cancellation is yet to take effect, either because it is a recent cancellation decision or because the cancellation decision has been stayed by a Court or Tribunal. Clause 2.2(1)(c) will not cover providers subject to cancellation decisions that have been overturned on internal review or by a Court or Tribunal.

55. The objective of clause 2.2 is to ensure that if a child care service has to close due to advice or a direction from a health agency, the provider is not required to enforce gap fees, and may pass fee relief onto parents when children do not attend care, if the provider chooses.

Item 27

56. This item inserts new Part 3 and Part 4, or clauses 3.1 through to 4.6, into Schedule 3.

Part 3 – Clause 3.1

57. Clause 3.1 is a replacement for previous clause 5AAB repealed by item 6, which provided that a child care service will be taken to have provided a session of care to a child, for the purposes of subparagraph 10(2)(c)(ii) and subsection 10(2AA) of the Family Assistance Act, where the child care service is in a COVID-19 hotspot for a period of more than 7 continuous days.
58. This means that it is the continuous period of time the service will spend in the COVID-19 hotspot overall that matters. As long as the overall period of time will be more than 7 days, allowable absences are available from the first day that the service is in the COVID-19 hotspot.
59. This provision is being moved into Schedule 3 to collocate all temporary COVID-19 measures, so they are easy to find in the Principal Rules.

Part 4 – Clause 4.1 Purpose

60. Clause 4.1 sets out the purpose of Division 1 of Part 4. It provides that the purpose is to set out matters in relation to business continuity payments to providers whose services have been adversely affected by the COVID-19 pandemic. It also prescribes, for the purposes of paragraph 205C(2)(a) of the Family Assistance Administration Act, the COVID-19 pandemic as the relevant “emergency or disaster.” Business

continuity payments made under this Division are known as COVID-19 viability support payments.

Clause 4.2 Definitions

61. Clause 4.2 defines for the Division certain terms for the purposes of the new COVID-19 viability support payments.
62. Firstly, the term “BCP fortnight” is defined. COVID-19 viability support payments under this division will be made in relation to BCP fortnights. For most services, BCP fortnight is defined as meaning the 14 day period beginning on the start day in relation to a service, and each subsequent 14 day period. The start day is defined later in clause 4.2.
63. However, for an outside school hours care service that offers vacation care only, a BCP fortnight is a period of 14 days beginning on or after the COVID-19 viability support payment period, during which the service usually provides care, and each subsequent period of 14 days. Outside school hours care services that only provide vacation care usually provide care during school holidays only. However, as private schools sometimes have an extra week of school holidays, it is possible for a vacation care only service to operate for more than two weeks per school holidays. Either way, the whole school holiday period for which the provider would operate would be part of one or more BCP fortnights. As COVID-19 viability support payments under this Division will be available 23 August 2021 to 30 November 2021, this will be during the school holiday period after term 3.
64. The term “COVID-19 viability support payment” is defined as a business continuity payment under section 205C of the Family Assistance Administration Act payable in accordance with Division 1 of Part 4 of Schedule 3.
65. The term “COVID-19 viability support payment period” means the period prescribed in clause 4.4 – that is, 23 August 2021 to 30 November 2021. This is the period when COVID-19 viability support payments may be made to providers in respect of eligible services.
66. “Reference hourly fee” is defined as the lower of the hourly session fee for the session and the CCS hourly rate cap for the session. CCS is paid subject to an hourly rate cap.
67. Finally, “start day” is defined as meaning the latest of the following days:
 - a. the first day of the COVID-19 viability support payment period – that is, 23 August 2021;
 - b. if the service has been or will be in a restricted COVID-19 hotspot for a period of more than 7 days – the first day the service was in the restricted COVID-19 hotspot;
 - c. if the service has been in a COVID-19 hotspot for more than 28 days – the 29th day the service was in the COVID-19 hotspot.

68. The start day, for services other than vacation care only services, is when the COVID-19 viability support payments begin to be payable. For services already in a restricted COVID-19 hotspot lasting over 7 days on 23 August 2021, this will be 23 August 2021. Otherwise, it will be the first day that the service goes into a restricted COVID-19 hotspot or the 29th day that it is in a COVID-19 hotspot that does not involve child care restrictions.
69. If, for example, the location of a service is declared a COVID-19 hotspot on 6 September 2021, and a government agency publishes advice on its website on 27 September 2021 that most children should not attend child care and the advice and hotspot status remain in place until the end of October 2021, the start date would be 27 September as this is the first day that the service was in the restricted COVID-19 hotspot.
70. This also means that if a service is in a restricted COVID-19 hotspot for 14 days, then the location has its COVID-19 hotspot status lifted and then it goes into another restricted COVID-19 hotspot for 14 days, there will be different start dates for the two COVID-19 hotspot periods. This might mean that for the first period, the payments are made for a Thursday to Thursday fortnight, but for the second period, the payments are made for a Tuesday to Tuesday fortnight.

Clause 4.3 Reference fortnight

71. This clause defines the term “reference fortnight” for the purpose of the Division. This term is used for calculating the amount of the COVID-19 viability support payment. In general, it is a relatively recent fortnight which will roughly reflect the amount of revenue that a service receives in a period when they are not experiencing adverse impacts of COVID-19.
72. Specifically, “reference fortnight” has three definitions, depending on the type and location of the service.
73. For outside school hours care services that provide only vacation care, the reference fortnight is the fortnight commencing on the first Monday of the most recent school holidays for public schools where the service was not in a COVID-19 hotspot for any part of those school holidays. This allows jurisdiction by jurisdiction flexibility. For example, for many jurisdictions the most recent school holidays would be the June 2021 school holidays. However, for example, the greater Sydney region was in a COVID-19 hotspot for part of those school holidays, so for services in greater Sydney, the April 2021 school holiday period would be used instead. This is a fair way to determine the approximate revenue the service would otherwise be receiving if not for COVID-19 hotspot.
74. For other kinds of services located in Victoria, the reference fortnight is the fortnight 10 May 2021 through to 23 May 2021. This is because there have been a number of COVID-19 hotspots in Melbourne since 27 May 2021, but in the period 10 May 2021

to 23 May 2021, it had been a few months since the most recent COVID-19 hotspot in Victoria, so child care service attendance would not have been significantly affected.

75. For all other services, the reference fortnight is the fortnight 17 May 2021 to 30 May 2021.
76. However, under subclause (2), if the service did not provide any sessions of care during the 14 day period mentioned in subclause (1) or the Secretary is satisfied that that 14 day period is not reasonably representative of the service's usual operation, the Secretary may determine another period of 14 days beginning on a Monday as the reference fortnight of the service. This subclause will ensure that new services, which have only commenced since the reference fortnight, may receive COVID-19 viability support payments. The appropriate reference fortnight will depend on the service's particular circumstances, such as when it first opened and when its location has been affected by COVID-19 hotspots, so this flexibility is required in order to ensure these services are appropriately supported. It could also be used if a service had an anomalously low revenue during the reference period, due to circumstances particular to that service – for example, this might include where the service was closed for renovations for the fortnight that would apply under subclause (1).
77. A decision made under clause 4.3(2) is reviewable on the Secretary's own initiative under section 104 of the Administration Act. An internal review decision made under section 104 of the Administration Act is subject to merits review by the Administrative Appeals Tribunal.

Clause 4.4 COVID-19 viability support payment period

78. Clause 4.4 prescribes a period for the purposes of paragraph 205C(1)(d) of the Family Assistance Administration Act, which requires the Minister's Rules to prescribe a period when business continuity payments may be made. For the COVID-19 viability support payments, the period is 23 August 2021 to 30 November 2021.

Clause 4.5 Eligibility criteria

79. This clause prescribes certain eligibility criteria for the purposes of receiving COVID-19 viability support payments under the Division. In addition, item 29 prescribes a further eligibility criterion that providers must comply with the conditions in clause 4.8 of Schedule 3.
80. The first eligibility criterion in subclause (2) is that the service must make an application, in the form and manner determined by the Secretary. The department will issue further guidance on the form and manner for applications, including the timing for applications. For example, the Secretary may determine that applications must be made by the end of a BCP fortnight in order to receive a payment for that

fortnight and future fortnights. Providers will not be required to submit fresh applications for each fortnight.

81. The second eligibility criterion in subclause (3) is that on a day in the BCP fortnight, the service must be either in a restricted COVID-19 hotspot lasting more than 7 continuous days, or in a COVID-19 hotspot that has lasted more than 28 continuous days. Providers will only be eligible to receive COVID-19 viability support payments for periods when one of these apply.
82. This means that if the service is in a restricted COVID-19 hotspot for a period of more than 7 days, they will be eligible from the first day they were in that restricted COVID-19 hotspot. However, if the COVID-19 hotspot is not a restricted COVID-19 hotspot, they will be eligible from the 29th day of being in that hotspot.
83. A minimum length has been included because short term lockdowns, or medium term lockdowns where there are no child care restrictions, will have a much less severe impact on the financial viability of child care providers.
84. The third eligibility criterion in subclause (4) is that on each day in the BCP fortnight, the service must not be closed or, if closed, one of the following must apply:
 - a. a health agency has advised or required the service to close as a result the COVID-19 pandemic,
 - b. the service predominantly provides care to Indigenous children, or
 - c. the service is closed for a period of no more than 14 days (unless the service provides vacation care only).
85. This is to reflect that in certain circumstances, it will be responsible for services to cease providing care during periods when they are located in a COVID-19 hotspot. For example, the indigenous community is at a higher risk from COVID-19, so if a service predominantly provides care to indigenous children, it may decide to close to mitigate the health risk to those children. Similarly, if child care staff become close contacts of a confirmed COVID-19 case, those staff members may be required to self-isolate for 14 days. Where the exposure has occurred in the workplace, many staff may be affected, meaning the child care service may not have enough staff to continue operating and may decide to close for the period of self-isolation. However, in other circumstances, to be eligible to receive COVID-19 viability support payment, child care providers are expected to keep child care services open for vulnerable children or the children of essential workers who cannot care for their children at home.
86. The fourth eligibility criterion in subclause (5) is that the Secretary must be satisfied that the number of sessions of care provided by the service and attended by children during the BCP fortnight is reasonably likely to be less than 50% of the number sessions of care provided during the reference fortnight. A note has been used to clarify the difference between sessions of care that are just “provided” and sessions of care that are also “attended”. A session of care may be taken to have been provided, under section 10 of the Family Assistance Act, even if the child does not

attend any part of the session of care. This is how the sessions of care during the reference fortnight are counted for the purposes of determining whether there has been a 50% decrease. However, during BCP fortnights, only the sessions of care actually attended by a child are used to calculate whether there has been a 50% decrease.

87. Providers will be asked in the application form whether they expect attendance to decrease by 50 per cent, and unless conflicting information comes to light, providers will be paid COVID-19 viability support payments on the basis of the Secretary being satisfied that it is reasonably likely that attendance will be less than 50 per cent compared to the reference fortnight. If a provider finds that its attendance does not experience the requisite 50 per cent decrease, it must notify the Secretary under clause 4.6. Where actual attendance exceeds the 50 per cent level for more than one week, the Secretary may no longer be satisfied that that it is reasonably likely the attendance going forward will be less than 50 per cent, BCP may be switched off for the provider.
88. The final eligibility criterion in subclause (6) is that the Secretary must not have made a cancellation decision in relation to the service or the provider since 2 July 2018. This is intended to cover providers or services whose approval has been cancelled due to substantial non-compliance with the family assistance law, but whose cancellation is yet to take effect, either because it is a recent cancellation decision or because the cancellation decision has been stayed by a Court or Tribunal. This will not cover providers subject to cancellation decisions that have been overturned on internal review or by a Court or Tribunal.

Clause 4.6 Method of determining payment

89. Clause 4.6 prescribes the method of calculating COVID-19 viability support payments for each BCP fortnight.
90. For outside school hours care services (including outside school hours care services that provide vacation care only) the payment for each BCP fortnight is 40 per cent of the sum of the reference hourly fees for all sessions of care provided during the reference fortnight. This will generally be 40 per cent of the service's revenue from child care subsidy and gap fees during the reference fortnight.
91. For other services, including centre-based care, family day care and in home care, the payment for each BCP fortnight is 25 per cent of the sum of the reference hourly fees for all sessions of care provided during the reference fortnight. This will generally be 25 per cent of the service's revenue from child care subsidy and gap fees during the reference fortnight.
92. Outside school hours care services have been more heavily impacted by COVID-19 hotspots due to school closures. Vacation care services are also particularly heavily impacted, as they are only open during school holidays, so being unable to operate

during a school holiday period has a significant impact on their overall revenue. Additionally, vacation care services are more likely to have casual booking systems rather than year long bookings, meaning their booking levels may drop significantly during periods of lockdown.

Part 2 – Amendments commencing on the day after registration

Item 28

93. This item amends subclause 4.5 to include a new eligibility criterion, subclause 4.5(5A). This eligibility criterion means that from the commencement of Part 2, to be eligible to receive COVID-19 viability support payments, the provider must comply with clause 4.7, which prescribes notification requirements, and clause 4.8, which prescribes additional conditions of continued approval for providers receiving COVID-19 viability support payments.

Item 29

94. This item inserts new clauses 4.6 and 4.7 into Schedule 3 to the Principal Rules.

Clause 4.7 Provider in receipt of COVID-19 viability support payments to notify Secretary of certain matters

95. Section 204F of the Family Assistance Administration Act requires an approved provider to give the Secretary written notice of matters prescribed by the Minister's Rules, by the time prescribed for the matter in the Minister's Rules. If the provider fails to do so, it commits a strict liability offence and may be liable to a civil penalty.

96. Clause 4.7 applies to a provider receiving COVID-19 viability support payments. It requires such a provider to notify the Secretary of certain matters, including:

- a. if there is a change to any of the information provided by the provider in its application for COVID-19 viability support payments,
- b. if the provider has ceased or will cease to meet one or more eligibility criteria in clause 4.5 for a BCP fortnight, or if there is any change of circumstance that may affect eligibility for a BCP fortnight under clause 4.5, or
- c. if attendance at the service for a BCP fortnight is greater than 50 per cent of the sessions of care provided by the service during the reference fortnight.

97. The notification in each case must be provided within 7 days of the end of the relevant BCP fortnight.

98. These notification requirements will enable the Secretary to keep track of whether the provider remains eligible for COVID-19 viability support payments, so that she can cease making payments to ineligible providers, if necessary. If a provider is

unsure whether their eligibility is affected, they should still provide notice under table item 2, which includes matters that *may* affect eligibility.

Clause 4.8 Conditions of continued approval for providers receiving COVID-19 viability support payments

99. Section 195E of the Family Assistance Administration Act allows the Minister to prescribe additional conditions of continued approval in the Minister's Rules. New clause 4.8 prescribes conditions of continued approval that only applies to providers receiving COVID-19 viability support payments for a service. This is consistent with subsection 33(3A) of the Acts Interpretation Act 1901, which provides that a power to make an instrument of a legislative or administrative character (including rules), includes a power to make such an instrument with respect to a particular class of those matters.
100. The conditions prescribed under this clause are that:
- a. the provider must not enforce gap fees for children who do not attend any part of a session of care while in receipt of the business continuity payment,
 - b. the provider must not, on or after 6 September 2021, receive any Commonwealth government funded COVID-19 business support payments in relation to the service,
 - c. the provider must not intentionally reduce the number of employees at the service, or the number of FDC educators engaged by the service, and
 - d. the provider must not charge an hourly session fee for a session of care provided by the service during the BCP fortnight that is greater than the fee it would have charged in the two weeks before the start day for the service.
101. These are also prescribed as eligibility criteria under subclause 4.5(5A). However, also prescribing them as conditions of continued approval means that the Secretary may impose a sanction under section 195H of the Family Assistance Administration Act for any providers that do not comply.
102. The condition that providers must not enforce the gap fee for every session of care not attended during a BCP fortnight applies to providers that are permitted not to enforce gap fees for these sessions under clause 2.1 or 2.2 of Schedule 3. If they choose to enforce gap fees, and thus not provide fee relief to parents who are not sending their children to care, they will not be eligible to receive COVID-19 viability support payments and will also be in breach of their conditions of continued approval.
103. The requirement not to receive Commonwealth government pandemic related business support payments will also cover business support payments that are co-funded by the Commonwealth and a State or Territory, such as the JobSaver program in New South Wales. However, it will not cover payments to individuals, such as the COVID-19 Disaster Payment, as this is not a business support payment.

104. The condition does not apply to payments made before 6 September 2021. This is so the condition does not have an adverse effect on providers that were already on a business support payment, such as JobSaver, before this measure was announced. If child care providers are receiving another business support payment, but now choose to receive COVID-19 viability support payments instead, they are expected to opt out of the business support payment during the first two weeks of COVID-19 viability support payments. As long as they do so, they will continue to be eligible COVID-19 viability support payment.
105. The requirement not to reduce staffing levels will apply to intentional reductions, such as redundancies or termination. It is not intended to apply where staffing levels decrease beyond the provider's control, such as if an employee or FDC educator resigns or retires, and the provider is not yet able to engage replacement staff.
106. The requirement not to increase the hourly session fee for a session of care is intended to prevent services from artificially inflating their fees so they receive increased CCS as well as COVID-19 viability support payments. Services will be waiving gap fees during this period, so a fee increase would not affect parents of children not attending care, but would increase the amount of CCS payable to the service, even if children are not attending care.