



## Family Assistance Legislation Amendment (Child Care) Bill 2009

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## Family Assistance Legislation Amendment (Child Care) Bill 2009

**Date introduced:** 14 May 2009

**House:** House of Representatives

**Portfolio:** Education, Employment and Workplace Relations

**Commencement:** Sections 1 to 3, Schedules 1, 2 and 3, and Parts 1–3 of Schedule 5 on the day of Royal Assent; Part 1 of Schedule 4 on the day after Royal Assent; Part 4 of Schedule 5 on the 28<sup>th</sup> day after Royal Assent; and Part 2 of Schedule 4 on a day to be fixed by Proclamation or, if any provision does not commence within six months from the day of Royal Assent, it commences on the day after that.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The purpose of the Family Assistance Legislation Amendment (Child Care) Bill 2009 (the Bill) is to make a number of technical and administrative amendments which will:

- change the name of the child care tax rebate to ‘child care rebate’ (CCR)
- extend eligibility to those who take over the guardianship of a child whose parent or carer has died
- reduce the number of overpayments and underpayments of the CCR
- amend the debt recovery provisions
- provide for the imposition of civil penalties on child care services that fail to comply with regulations made under the *A New Tax System (Family Assistance) (Administration) Act 1999* (FAAA) and which fail to provide adequate notice of their intention to cease operating the service, and
- provide a right of review of a decision to pay a zero rate of child care benefit if that review is requested within two years.

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## Background

The Bill involves technical and administrative changes following on from provisions introduced by the *Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Act 2008*.<sup>1</sup>

### Child care tax rebate

The child care tax rebate (CCTR) was introduced in 2004 by the Howard Government to provide additional assistance to cover the cost of child care for families who were already in receipt of the main child care subsidy known as the child care benefit (CCB).<sup>2</sup> Families could claim 30 per cent of their out-of-pocket costs of child care as a rebate if they:

- were in receipt of the CCB<sup>3</sup>
- used approved child care, and
- met the CCB work/study/training test (or were otherwise eligible for up to 50 hours of CCB per week).<sup>4</sup>

In its original form, the CCTR could only be claimed at the end of the financial year after the year the costs were incurred (as CCB entitlements were not finalised until October of each year). The CCTR was also considered a non-refundable tax offset and thus could only reduce a person's tax liability to zero. Once zero liability was reached, any excess

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1. For further information see D Daniels, *Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008*, Bills Digest, no. 139, 2007–08, Parliamentary Library, Canberra, 2008, viewed 3 June 2009,  
<http://www.aph.gov.au/library/pubs/bd/2007-08/08bd139.htm>

2. Liberal Party of Australia and The Nationals, *The Howard Government Election 2004 Policy: Extra Assistance for Families*, Canberra, 26 September 2004, p. 3, viewed 12 June 2009,  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2F1TWD6%22>

See also M Davis, 'Rich pickings in the new nanny state', *Australian Financial Review*, 28 September 2004, p. 7, viewed 15 June 2009

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F99XD6%22>

3. CCB family assistance arrangements were introduced from 1 July 2000 as part of the Government's A New Tax System arrangements. The CCB payments were introduced with the passage of the *A New Tax System (Family Assistance) Act 1999*. Detailed information about the change is contained in the relevant Bills Digest, viewed 15 June 2009,  
<http://www.aph.gov.au/library/pubs/bd/1998-99/99bd175.htm>

4. Liberal Party of Australia and The Nationals.

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rebate had to be transferred to a spouse or be lost. Low income earners with no tax liability did not benefit from the CCTR.

These problems were addressed in the 2007–08 Budget. The CCTR became a direct payment administered by Centrelink, paid at the end of the year in which costs were incurred once CCB entitlement was finalised. This meant that the CCTR was no longer a tax rebate at all and claimants could receive the full payment regardless of their tax liability.

The Rudd Government, through the *Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Act 2008*, made further changes to the CCTR. The amount of the rebate was increased to 50 per cent of out-of-pocket child care expenses for eligible claimants and the payment of the rebate was to be made quarterly. The maximum amount that could be claimed for the rebate was also increased from \$4354 to \$7500 per annum for each child in care.

### **Name change**

The name change provisions in this Bill reflect that the CCTR has not technically been a tax rebate since 2007. The rebate is not a tax offset under taxation law but is a benefit paid under family assistance law. The CCTR will be renamed the ‘child care rebate’ (CCR).

### **Eligibility for those substituting for the care of children of deceased persons**

The proposals in this Bill in regard to eligibility to receive CCR of those taking over the guardianship of a deceased person’s child, are consistent with the provisions for payment of CCB in similar situations. The proposals extend CCR payment eligibility to those providing care in substitution for the deceased, by allowing for those substitute carers to be considered eligible for the period in which they have been given guardianship of the deceased’s child if they meet the other conditions for payment of the rebate.

### **Calculation of fourth quarter entitlements**

The Bill also proposes a number of amendments in regard to how entitlement for CCR can be calculated. Currently, the entitlement for the fourth quarter of an income year and the entitlement for the entire year are calculated separately. This can result in a payment for the fourth quarter being considered part of an overpayment or underpayment following the calculation of the income year’s entitlement, even though these separate calculations can be made at around the same time. Proposed amendments in the Bill allow for the calculation of the fourth quarter entitlement to be withheld until the annual entitlement has been calculated, thus allowing for any overpayment or underpayment to be partly or fully addressed through the fourth quarter payment.

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## Debt recovery

The introduction of quarterly payments for the CCTR in 2008 affected a number of sections of the FAAA related to debt creation and recovery and the periods for which an entitlement or no entitlement is assessed. The Bill proposes amendments to allow for the correct identification of any CCR debt amount by clarifying the periods for CCR entitlement determinations. Proposed amendments aim to effectively cover any problems in identifying periods of CCR entitlement (particularly when tied to CCB entitlement) as a result of the 2008 changes to when determinations and payment of the rebate are made.

## Civil penalties

Concern over the regulation of the child care industry has grown considerably in the last few years, particularly in regards to issues arising from the market dominance of the ABC Learning child care company (ABC Learning) and the collapse of that company in 2008. The *Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Act 2008* introduced a range of new civil penalties for failure to comply with different child care service obligations. These penalties were introduced to ‘regulate approved child care services and former approved child care services, to ensure they comply with a range of obligations under the family assistance law’.<sup>5</sup>

Prior to that amending Act, civil penalties in regard to the child care compliance program only applied to an approved child care service provider’s obligation to report information to the Child Care Access Hotline.<sup>6</sup> The penalties introduced in 2008 related to situations that had previously only being covered by criminal offences.<sup>7</sup> Courts need only be satisfied on the ‘balance of probabilities’ that a civil penalty provision has been contravened in order to issue a penalty, rather than the more rigorous ‘beyond reasonable doubt’ standard of proof under criminal law.<sup>8</sup>

In the second reading speech for this Bill, the Parliamentary Secretary for Early Childhood Education and Childcare, Maxine McKew, explained the Government’s rationale for further amendments to the civil penalties provisions:

Given the events of last year with the collapse of ABC Learning, we are especially mindful that Australian families need to have the greatest possible certainty around continuity of care ... We acknowledge of course that the majority of child care

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5. Explanatory Memorandum, Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008, p. 3.
  6. Explanatory Memorandum, Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008, p. 3.
  7. D Daniels.
  8. D Daniels.

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providers are doing the right thing when it comes to compliance. But we want to ensure that those who are negligent are pressed to do the right thing.<sup>9</sup>

### Collapse of ABC Learning

The downfall of ABC Learning can be traced back to February 2008 with the release of revised earnings figures leading to margin calls on the shares of the directors. ABC Learning's share price spiralled down in the ensuing months and trading in its shares was halted in August 2008.<sup>10</sup> DEEWR had established a 'Child Care Industry Taskforce' on 24 September 2008 'to manage the Department's inquiries into what was occurring at ABC Learning and to undertake contingency planning for child care centres closing and/or the company's insolvency'.<sup>11</sup>

Although there was ongoing speculation as to the financial viability of ABC Learning throughout 2008, the company did not officially advise the Department of Education, Employment and Workplace Relations (DEEWR) that it would enter voluntary administration until 2 November 2008.<sup>12</sup> Following ABC Learning's advice to DEEWR as to its insolvency and prior to the appointment of the voluntary receivers on 6 November 2008, it became clear that a large number of the centres may have to cease operation.<sup>13</sup> In response, on 7 November 2008 the Government announced that interim funding would be made available to maintain operations at around 400 centres.<sup>14</sup>

At the time of ABC Learning's insolvency, there was a legislative requirement that a child care service operator who intended to cease operating that service was to notify of that

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9. M McKew, 'Second reading speech: Family Assistance Legislation Amendment (Child Care) Bill 2009', House of Representatives, *Debates*, 14 May 2009, p. 6, viewed 15 June 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-05-14%2F0029%22>
  10. 'ABC childcare centres unlikely to close says union', *ABC News*, 5 November 2008, viewed 15 June 2009, <http://www.abc.net.au/news/stories/2008/11/05/2410822.htm>
  11. Department of Education, Employment and Workplace Relations (DEEWR), Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the provision of childcare*, 2009, p. 4, viewed 5 June 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=68ee49d9-77be-4d53-aca9-a52e972a3f83>
  12. DEEWR, p. 4.
  13. DEEWR, p. 5.
  14. J Gillard (Minister for Education, Employment and Workplace Relations), *Government delivers \$22m to ensure child care centres remain open*, media release, 7 November 2008, viewed 5 June 2009, [http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article\\_081128\\_080648.aspx](http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_081128_080648.aspx)

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intention 30 days or more before the date that the service ceased.<sup>15</sup> However, this requirement is somewhat at odds with the prohibitions against insolvent trading which are contained in the *Corporations Act 2001*.<sup>16</sup> Whilst the ‘Child Care Industry Taskforce’ had notice of ABC Learning’s financial difficulties more than 30 days before the company’s eventual insolvency, it could not be said that this equated to a formal notice of an intention to cease operating a child care service. In the case of ABC Learning, it appears that the intention to cease operating was not formed before the time that the insolvency became known.

The proposed amendments in this Bill will allow for an expansion in civil penalties under family assistance law by enabling the imposition of civil penalties in regulations made under the FAAA. At the time of writing this Bills Digest, the content of the proposed regulations is unknown.

## Reconsideration of zero CCB entitlement

The *Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Act 2008* removed the minimum rate of CCB. This has meant that, since July 2008, some individuals have been determined to have no entitlement to CCB for a particular period. The Bill proposes to amend currently inoperative sections of the FAAA so, where certain information was not provided to the Family Assistance Office before the zero entitlement was determined, this determination can be appealed. A claimant must appeal within two years and provide the missing information in order for any possible change in their entitlement to be assessed.

## Financial implications

According to the Explanatory Memorandum, there are no financial implications arising from the Bill.<sup>17</sup>

## Main provisions

There are five schedules to the Bill.

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15. Section 219M A New Tax System (Family Assistance) (Administration) Act 1999.

16. Section 95A of the *Corporations Act 2001* provides that a person is solvent if, and only if, the person is able to pay all the person’s debts, as and when they become due and payable. Section 588G of the *Corporations Act 2001* sets out a director’s duties to prevent insolvent trading by a company.

17. Explanatory Memorandum, Family Assistance Legislation Amendment (Child Care) Bill 2009, p. 3.

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## Schedule 1

**Item 1** of Part 1 of Schedule 1 of the Bill inserts a new definition of **'child care rebate'** into the *A New Tax System (Family Assistance) Act 1999* (NTS (FA) Act). **Items 2–10** make amendments to important headings in the NTS (FA) Act to reflect the change of name from 'child care tax rebate' to 'child care rebate'. Similarly, **items 11–14** make amendments to important headings in the FAAA to reflect the change of name from 'child care tax rebate' to 'child care rebate'.

**Items 15–41** in Part 2 of Schedule 1 of the Bill makes bulk changes to the NTS (FA) Act, the FAAA, the *Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Act 2008* and the *Income Tax Assessment Act 1997* (ITAA 1997), so that the words **'child care tax rebate'** are substituted with the words **'child care rebate'** wherever they occur.

## Schedule 2

In a situation where the parent or carer entitled to the CCR dies, the amendments in Schedule 2 would allow the person taking over the child's guardianship to become entitled to the CCR in substitution of the deceased person.

**Items 1-5** of Schedule 2 amend various parts of section 57F of the NTS (FA) Act so that a substituted person can be eligible for CCR in respect of a child.

**Item 6** repeals existing subsection 84B(2) of the NTS (FA) Act and substitutes **proposed subsection 84B(2)**, which provides a special rule for calculating approved child care fees in a base week where an individual and their partner might be eligible for the rebate in his or her own right. According to the Explanatory Memorandum, the proposed subsection has been inserted to cater for the circumstance where a member of a couple has died and the surviving member has an entitlement in their own right, as well as an entitlement in substitution.<sup>18</sup>

**Item 7** inserts **proposed sections 84DA–84DD** into the NTS (FA) Act, setting out the formula to be applied in calculating the amount of CCR payable by a substitute individual.

**Items 11–19** amend the FAAA. In particular, **item 11** inserts **proposed section 65ECA** which applies where the Secretary has determined that a person is entitled, or not entitled, to be paid child care benefit in substitution because of the death of another person.

**Items 13** inserts **proposed subsections 65EF(2D) and 65EF(2E)**. **Proposed subsection 65EF(2D)** provides that where a determination has been made that an individual will be

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18. Explanatory Memorandum, Family Assistance Legislation Amendment (Child Care) Bill 2009, p. 10.

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paid CCR in substitution, the amount must be paid to a bank account nominated and maintained by the person.

**Item 18** repeals existing section 152A and substitutes **proposed sections 152A and 152B**. These proposed provisions relate to reviews of CCR decisions in situations where there has been an application for review of the CCR decision.

### Schedule 3

The amendments in Schedule 3 relate to the recovery of debts.

**Item 1** substitutes **proposed sections 65EA–65EC** into the FAAA. The amended sections require the Secretary to make determinations about whether an individual is entitled to be paid child care benefit, either by fee reduction or lump sum payment; and whether there is an entitlement or no entitlement to CCR during a particular period in an income year.

**Item 3** repeals existing sections 71CAA and 71CAB of the FAAA and substitutes **proposed sections 71CAA–71CAC**. **Proposed section 71CAA** generally provides that where a CCR is paid to a person who is subsequently determined to have no entitlement to the payment the amount paid is a debt due to the Commonwealth. Similarly, **proposed section 71CAB** generally provides that where an amount of CCR paid to a person is greater than the correct amount that should have been paid, the difference between the amount paid and the correct amount is a debt due to the Commonwealth. In particular, **proposed subsections 71CAA(5) and 71CAB(4)** relate to incorrect payments in situations involving payments in substitution.

**Proposed section 71CAC** relates to debts arising where a CCR payment has been made to an incorrect account. In that case, the person, or jointly and severally the persons in whose name or names the incorrect account is kept, owes a debt due to the Commonwealth for the amount incorrectly paid.

### Schedule 4

Amendments to the FAAA proposed in Schedule 4 relate to civil penalties in regulations.

**Item 1** amends existing subsection 3(1) of the FAAA to expand the definition of ‘*civil penalty provision*’ to include a provision of the regulations that is declared to be a civil penalty provision in accordance with **proposed paragraph 235(1A)(b)**.<sup>19</sup>

Subsection 219TSD(1) currently provides that the pecuniary penalty payable by a person, in respect of the person’s contravention of a civil penalty provision, must not exceed:

- if the person is not a body corporate—200 penalty units, or

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19. Subsection 235(1A) is inserted by item 9 of Schedule 4 of the Bill.

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- if the person is a body corporate—400 penalty units.<sup>20</sup>

**Item 2** substitutes **proposed subsection 219TSD(2)** for the existing subsection so that there are three exceptions to the general pecuniary penalty provision in subsection 219TSD(1), being subsections 219EA(2) and 219L(3) and a provision of the regulations declared to be a civil penalty provision are exceptions.<sup>21</sup>

**Items 3** and **4** amend the existing table items in subsection 219TSK(1) of the FAAA which lists the pecuniary penalties to be specified in an infringement notice given to a body corporate for alleged contravention/s of a civil penalty provision.<sup>22</sup> The effect of the proposed amendment in **item 4** is that for a single contravention of a declared civil penalty provision in the regulations, the pecuniary penalty to be specified is 24 penalty units.<sup>23</sup> For multiple contraventions of a declared civil penalty provision in the regulation, the pecuniary penalty is worked out by multiplying the number of contraventions by 24. If the number of contraventions is eight or more, the pecuniary penalty is worked out by multiplying 24 by eight.<sup>24</sup>

**Items 5** and **6** amend the existing table at subsection 219TSK(2) of the FAAA, which lists the pecuniary penalties to be specified in an infringement notice given to a person **other than** a body corporate for alleged contravention/s of a civil penalty provision. The effect of the proposed amendment in **item 6** is that for a single contravention of a declared civil penalty provision in the regulations, the pecuniary penalty to be specified is 12 penalty units.<sup>25</sup> For multiple contraventions of a declared civil penalty provision in the regulation, where the number of alleged contraventions is less than eight, the pecuniary penalty is worked out by multiplying the number of contraventions by 12. If the number of contraventions is eight or more, the pecuniary penalty is worked out by multiplying 12 by eight.<sup>26</sup>

**Item 9** inserts **proposed subsection 235(1A)**, which provides that the regulations:

- may prescribe penalties for offences against the regulations that do not exceed a fine of 10 penalty units, and

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20. Under section 4AA of the *Crimes Act 1914*, ‘**penalty unit**’ means \$110.

21. See **item 9** of the Bill for the relevant penalty.

22. Section 219TSI of the *A New Tax System (Family Assistance) (Administration) Act 1999* sets out when an infringement notice can be given.

23. This is equivalent to \$2640.

24. This means that the maximum financial penalty is \$18 720.

25. This is equivalent to \$1320.

26. This means that the maximum financial penalty is \$10 560.

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- declare that specified provisions of the regulations are civil penalty provisions—in that case the penalties must not exceed:
  - for a body corporate—250 penalty units,<sup>27</sup> and
  - in any other case—50 penalty units.<sup>28</sup>

**Items 10–14** are consequential amendments to the FAAA.

## Schedule 5

**Item 2** inserts **proposed subsection 65EAA(1A)** into the FAAA so that the Secretary may decide not to calculate an amount of CCR for the last quarter of the income year from 2008 onwards.

**Item 6** substitutes sections 60 and 60A of the FAAA so that the Secretary must vary a determination made that a person had no entitlement to CCB if certain conditions are satisfied. These conditions include if the person who is the subject of the determination provides information to the Secretary, which was not previously provided, such as an estimate of income or the number of children the person had in their care at a specific time. The time limit for providing the required information is within two years after the end of the income year during which the determination was made.

**Item 9** inserts **proposed section 195A** into the FAAA so that, for the purposes of family assistance law, an obligation imposed on or permission granted to, an approved child care service, it is taken to be imposed on or granted to the person operating the service.

**Items 13–16** relate to the obligation in existing section 219M of the FAAA that a child care service operator who intends to cease operating that service is to notify of that intention 30 days or more before the date that the service ceases. **Item 14** substitutes **proposed subsection 219M(2)** which requires that the notice of intention to cease operating the child care service must be given in a specific manner and form.

**Item 16** inserts **proposed subsections 219M(4)–(6)**. **Proposed subsection 219M(4)** provides that an operator of an approved child care service contravenes the subsection if, once the operator has notified of an intention to cease operating a child care service, the operator is requested to give specific information about the intended cessation and the operator fails to do so within seven days.

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27. This is equivalent to \$27 500.

28. This is equivalent to \$5500.

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