





**Family Assistance Legislation  
Amendment (Child Care Financial  
Viability) Act 2011**

**No. 120, 2011**

**An Act to amend the law in relation to child care  
services, and for related purposes**



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**An Act to amend the law in relation to child care  
services, and for related purposes**

*[Assented to 14 October 2011]*

The Parliament of Australia enacts:

## **1 Short title**

This Act may be cited as the *Family Assistance Legislation  
Amendment (Child Care Financial Viability) Act 2011*.

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## **2 Commencement**

This Act commences on the day after this Act receives the Royal Assent.

## **3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Amendments**

### ***A New Tax System (Family Assistance) (Administration) Act 1999***

#### **1 Subsection 3(1)**

Insert:

*audit team*, in relation to an audit of an operator of an approved child care service, means the expert engaged to carry out the audit of the operator and any person (other than an authorised officer) assisting the expert.

#### **2 Subsection 3(1) (after paragraph (k) of the definition of *civil penalty provision*)**

Insert:

(ka) subsection 219GA(6);

#### **3 Subsection 3(1) (after paragraph (l) of the definition of *civil penalty provision*)**

Insert:

(la) subsection 219LA(2) or (5);

#### **4 Subsection 3(1)**

Insert:

*executive officer*, in relation to an operator of an approved centre based long day care service, means a person, by whatever name called and whether or not a director of the operator, who is concerned in, or takes part in, the management of the operator.

#### **5 Subsection 3(1)**

Insert:

*large long day care centre operator*, in relation to a financial year, means:

- (a) a person who operates, or proposes to operate, 25 or more approved centre based long day care services at any time during the financial year; or
- (b) 2 or more persons who, between them, operate, or propose to operate, 25 or more approved centre based long day care services during the financial year, so long as any of the following apply:
  - (i) one person has, at any time during the financial year, 25% or more of their executive officers in common with another person;
  - (ii) one person owns, at any time during the financial year, 15% or more of another person;
  - (iii) one person is entitled to receive, at any time during the financial year, 15% or more of the dividends paid by another person.

Note: See also subsection (4B).

### **6 Subsection 3(1)**

Insert:

*personal information* has the same meaning as in the *Privacy Act 1988*.

### **7 Before subsection 3(5)**

Insert:

- (4B) For the purposes of the definition of *large long day care centre operator*, the Minister may, by legislative instrument, vary the number of approved centre based long day care services specified in paragraph (a) or (b) of the definition.

### **8 Paragraph 111(2)(d)**

Omit “or 159A”, substitute “, 159A or 219GA”.

### **9 After paragraph 111(2)(f)**

Insert:

- (fa) a decision under section 219GB (Secretary engaging an expert to carry out an independent audit);

### **10 After paragraph 195(1)(b)**

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Insert:

- (ba) if the operator of the service is a large long day care centre operator—the operator is financially viable and is likely to remain so; and

**11 After subsection 195(1)**

Insert:

- (1A) For the purpose of paragraph (1)(ba), in determining whether the operator of the child care service is financially viable, and likely to remain so, the Secretary must have regard to any financial information provided under section 219GA in relation to the operator. The Secretary may take into account any other matters he or she considers relevant.

**12 Subsection 196(2A)**

Omit “and 219L”, substitute “, 219KA, 219L and 219LA”.

**13 After subsection 196(2A)**

Insert:

- (2B) It is a condition for the continued approval of an approved child care service that the operator of the service cooperate with a person exercising powers under section 219KA.

**14 After section 196**

Insert:

**196A Conditions for continued approval—financial viability**

It is a condition for the continued approval of an approved child care service that the operator of the service, if a large long day care centre operator, be likely to remain financially viable.

**15 After section 219G**

Insert:

**219GA Secretary may require financial information relating to large long day care centre operators**

- (1) For the purposes of determining whether a large long day care centre operator is financially viable, and likely to remain so, the Secretary may, by notice in writing, require a person mentioned in subsection (2) to provide financial information in relation to a financial year if the Secretary has reason to believe that the person is capable of giving the information.
- (2) For the purposes of subsection (1), the Secretary may give a notice to the following persons:
  - (a) the operator;
  - (b) a person who, at any time during the financial year, owns 15% or more of:
    - (i) the operator; or
    - (ii) if the operator consists of more than one person—any of those persons;
  - (c) a person who, at any time during the financial year, is entitled to receive 15% or more of the dividends paid by:
    - (i) the operator; or
    - (ii) if the operator consists of more than one person—any of those persons;
  - (d) a person who, at any time during the financial year, is owed a debt by the operator;
  - (e) a person who:
    - (i) acts, or is accustomed to act; or
    - (ii) under a contract or an arrangement or understanding (whether formal or informal) is intended or expected to act;  
in accordance with the directions, instructions or wishes of, or in concert with:
      - (iii) the operator; or
      - (iv) if the operator consists of more than one person—any of those persons;
  - (f) a person who directs or instructs:
    - (i) the operator; or
    - (ii) if the operator consists of more than one person—any of those persons;

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- to act in accordance with those directions or instructions;
- (g) a person, if:
- (i) the operator; or
  - (ii) if the operator consists of more than one person—any of those persons;
- acts, or is accustomed to act, so as to give effect to the first-mentioned person's wishes;
- (h) a person with whom:
- (i) the operator; or
  - (ii) if the operator consists of more than one person—any of those persons;
- acts, or is accustomed to act, in concert;
- (i) a person, if:
- (i) the operator; or
  - (ii) if the operator consists of more than one person—any of those persons;
- is intended or expected to act under a contract or an arrangement or understanding (whether formal or informal) so as to give effect to the first-mentioned person's directions, instructions or wishes;
- (j) a person with whom:
- (i) the operator; or
  - (ii) if the operator consists of more than one person—any of those persons;
- is intended or expected to act in concert under a contract or an arrangement or understanding (whether formal or informal).
- (3) The Secretary's notice must specify:
- (a) the financial information required; and
  - (b) the period within which, and the manner in which, the person must comply with the notice.
- (4) The Secretary may only require financial information that relates to any of the 5 financial years immediately preceding the date of the notice.
- (5) The period specified under paragraph (3)(b) must be reasonable in all the circumstances.

- (6) A person who is given a notice under this section must comply with the notice.

Note 1: This is a civil penalty provision. Part 8C provides for pecuniary penalties for breaches of civil penalty provisions.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (7) For the purposes of:

(a) paragraph (1)(d) of Information Privacy Principle 11 in section 14 of the *Privacy Act 1988*; and

(b) paragraph 2.1(g) of National Privacy Principle 2 in Schedule 3 to the *Privacy Act 1988*; and

(c) a provision of a law of a State or Territory that provides that information that is personal may be disclosed if the disclosure is authorised by law;

the disclosure of personal information by a person in response to a notice given under this section is taken to be a disclosure that is authorised by law.

### **219GB Audit of operator of approved child care service**

- (1) If, on the basis of information received under section 219GA, the Secretary has concerns about the financial viability of an operator of an approved child care service, the Secretary may engage an appropriately qualified and experienced expert to carry out an independent audit of the operator.

- (2) The expert may be assisted by members of an audit team.

### **16 Subdivision E of Division 1 of Part 8A (heading)**

Repeal the heading.

### **17 At the end of section 219H**

Add “and/or section 219KA”.

### **18 Subsections 219K(2) to (4)**

Repeal the subsections.

### **19 After section 219K**

Insert:

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**219KA Power to enter premises to carry out an audit**

- (1) For the purposes of carrying out an audit of an operator of an approved child care service, a member of an audit team may enter:
  - (a) the premises of the approved child care service at any time during the service's hours of operation; or
  - (b) any premises of the operator at any reasonable time of a day that is not a Saturday, a Sunday or a public holiday in the place concerned.
- (2) A member of an audit team must be accompanied by an authorised officer.

**219KB Report relating to an audit**

- (1) An expert who audits an operator of an approved child care service must prepare and give to the Secretary a report about the affairs of the operator.
- (2) The expert's report must deal with the following:
  - (a) whether the operator's financial statements are based on proper accounts and records;
  - (b) whether the statements are in agreement with the accounts and records and show fairly the financial transactions and the state of the operator;
  - (c) any matter specified by the expert's terms of engagement;
  - (d) such other matters arising out of the statements as the expert considers should be reported;
  - (e) any recommendations relating to maintaining or improving the financial viability of the operator that the expert considers desirable.

**219KC Responsibilities of authorised officers**

- (1) Entering premises under subsection 219K(1) or (1A) or section 219KA is not authorised unless:
  - (a) the occupier of the premises, or another person who apparently represents the occupier, has consented to the entry; and
  - (b) the authorised officer concerned has shown his or her identity card to the occupier or person.

- (2) An authorised officer must, before obtaining the consent of the occupier or another person in accordance with subsection (1), inform that occupier or person that he or she may refuse consent.
- (3) A consent has no effect unless the consent is voluntary.
- (4) A consent may be expressed to be limited to entry during a particular period. If so, the consent has effect for that period unless the consent is withdrawn before the end of that period.
- (5) A consent that is not limited as mentioned in subsection (4) has effect until the consent is withdrawn.
- (6) The authorised officer must leave the premises if the consent ceases to have effect.

*Cooperation*

- (7) Approved child care services have a responsibility under subsection 196(2A) to cooperate with a person exercising powers under section 219K or 219KA. An approved child care service that:
  - (a) refuses to consent to the entry of a person (after the person shows his or her identity card in the case of an authorised officer); or
  - (b) withdraws consent for the person to enter the premises; is not complying with the responsibility.
- (8) Operators of approved child care services have a responsibility under subsection 196(2B) to cooperate with a person exercising powers under section 219KA. An operator of an approved child care service that:
  - (a) refuses to consent to the entry of a person (after the person shows his or her identity card in the case of an authorised officer); or
  - (b) withdraws consent for the person to enter the premises; is not complying with the responsibility.
- (9) Failure to comply with the responsibility mentioned in subsection (7) or (8) can result in a sanction being imposed under section 200.

**20 After section 219L**

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Insert:

**219LA Occupier to provide audit team with access to records and assistance**

- (1) This section applies if a member of an audit team enters premises to carry out an audit.
- (2) The occupier of premises referred to in section 219KA, or another person who apparently represents the occupier, must produce to a member of the audit team, or an authorised officer accompanying the member, any documents, records or things required by the expert of the audit team for the purposes of the audit.

Note 1: This is a civil penalty provision. Part 8C provides for pecuniary penalties for breaches of civil penalty provisions.

Note 2: Section 137.2 of the *Criminal Code* creates an offence for providing false or misleading documents.

- (3) A person commits an offence if the person contravenes subsection (2).

Penalty: 60 penalty units.

- (4) Subsection (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (5) The occupier of premises referred to in section 219KA, or another person who apparently represents the occupier, must provide a member of the audit team, and an authorised officer accompanying the member, with all reasonable facilities and assistance for the effective exercise of powers under section 219KA.

Note: This is a civil penalty provision. Part 8C provides for pecuniary penalties for breaches of civil penalty provisions.

- (6) A person commits an offence if the person contravenes subsection (5).

Penalty: 10 penalty units.

- (7) Subsection (6) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (8) Approved child care services have a responsibility under subsection 196(2A) to cooperate with a member of an audit team and an authorised officer accompanying a member. An approved child care service that does not produce documents, records or things, or provide facilities and assistance, as provided for in subsections (2) and (5) is not complying with the responsibility.
- (9) Operators of approved child care services have a responsibility under subsection 196(2B) to cooperate with a member of an audit team and an authorised officer accompanying a member. An operator of an approved child care service that does not produce documents, records or things, or provide facilities and assistance, as provided for in subsections (2) and (5) is not complying with the responsibility.
- (10) Failure to comply with the responsibility mentioned in subsection (8) or (9) can result in a sanction being imposed under section 200.

### **Subdivision E—Obligations to provide information and reports**

#### **21 At the end of Division 1 of Part 8A**

Add:

### **Subdivision F—Miscellaneous**

#### **219PA Collection, use or disclosure of personal information for financial viability purposes—the *Privacy Act 1988***

The collection, use or disclosure of personal information about an individual is taken to be authorised by law for the purposes of the *Privacy Act 1988* if the collection, use or disclosure is reasonably necessary for the purposes of determining whether a large long day care centre operator is financially viable, and likely to remain so.

#### **22 At the end of subsection 221(1)**

Add “, other than the power to engage an expert to carry out an independent audit as mentioned in section 219GB”.

#### **23 Subsection 221(4)**

Repeal the subsection, substitute:

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- (4) The Secretary must not delegate to an officer, other than an SES employee or acting SES employee, the Secretary's powers under either of the following:
- (a) section 219GA (Secretary requiring information from person);
  - (b) Division 2 of Part 8C (infringement notices).

**24 Subsection 231(1)**

Omit "2 changes", substitute "3 changes".

**25 At the end of section 231**

Add:

*Contravention of civil penalty provisions*

- (4) The third change is that any contravention of a civil penalty provision that would otherwise be committed by the body is taken instead to have been committed by:
- (a) if the body is a partnership—any partner:
    - (i) who was knowingly concerned in, or party to, the relevant contravention; or
    - (ii) who aided, abetted, counselled or procured the relevant contravention; or
  - (b) in any other case—any member of the committee of management of the body:
    - (i) who was knowingly concerned in, or party to, the relevant contravention; or
    - (ii) who aided, abetted, counselled or procured the relevant contravention.

**26 Application**

The Secretary may only give a notice under section 219GA of the *A New Tax System (Family Assistance) (Administration) Act 1999* (as inserted by this Schedule) in respect of a financial year that begins on or after 1 July 2010.

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*[Minister's second reading speech made in—  
House of Representatives on 26 May 2011  
Senate on 16 June 2011]*

*(95/11)*

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*14 Family Assistance Legislation Amendment (Child Care Financial Viability) Act 2011  
No. 120, 2011*