

25 October 2022

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600



Re: REQUEST FOR ADDENDUM

FDCA submission to the Senate Education and Employment Legislation Committee inquiry into Family Assistance Legislation (Cheaper Child Care) Bill 2022 – Part 2

Dear Committee Secretary

I write today to provide an addendum to the submission made to the inquiry by Family Day Care Australia (FDCA) on 17 October 2022.

While I realise that the timeframe for making submissions to the inquiry officially closed on 21 October 2022, I ask that this submission be accepted as the issue to which I refer herein relates specifically to the Explanatory Memorandum (EM) of the Family Assistance Legislation (Cheaper Child Care) Bill 2022 ("the Bill") and is an unresolved and important matter of ongoing consultation with senior representatives of the Department of Education ("the Department") regarding inclusion of Section 161 of the EM.

Section 161 of the EM provides unintended intent behind the amendment to subsection 201B(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, which, in summary, simply seeks to enforce a rule that payment of the non-Child Care Subsidy (CCS) component of the full fee charged for approved child care service delivery to families (i.e. the "gap fee") is paid by electronic funds transfer. Please see Part 2, Section 6 of the Bill for reference.

Section 161 of the EM states that *"for family day care services, this will involve gap fees being paid directly to the provider via electronic funds transfer"*.

On September 7, 2022, FDCA and the Department met to consult on the practice of family day care educators collecting gap fees and it was confirmed in the legal advice of both parties that the practice was permitted under the current legislation and would remain so under the proposed legislative amendments. It was also explicitly stated that there would be no amendments to the wording of the legislation that would impact this legal and policy position.

Throughout ongoing consultation with the Department we can confirm that the legal position of both parties remains that the proposed amendment to subsection 201B(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* allows the gap fee to be paid to the provider, though may be collected by family day care educators (registered with the provider as independent contractors) if the provider has nominated that those educators are acting as agents of the provider.

However, FDCA's concern is that section 161 of the EM is inconsistent with this agreed legal and policy position and creates unintended intent contrary to this agreed practice.

In ongoing correspondence, the Department has confirmed to FDCA, in writing, that section 161 of the EM does create some confusion around the intent of this amendment. The Department has confirmed in writing that despite the inclusion of Section 161 of the EM, their policy position remains that the practice of educators collecting gap fees will continue to be

permitted. They have also advised in writing, that their legal advice suggests that the inclusion of Section 161 of the EM, would not give rise to a future challenge to the practice of educators collecting the gap fee.

While we appreciate that current senior representatives of the Department have clearly outlined the Department's current position and future policy intent, our concern (and our own legal advice) is that given the wording of Section 161, particularly the specific reference to family day care, and, the specific reference to "direct" payments to providers, could, in the event of a change in position (and/or personnel) of the Department in the future, be used to support an alternate view or, worst case, an attempt to enforce that interpretation retrospectively.

The implications of a potential change of position on the practice of family day care educators collecting gap fees would not be insignificant for many providers, and furthermore, would undermine the Government's objectives under the Bill, that being it would negatively impact the affordability and accessibility of early childhood education and care, especially in family day care.

As stated to us by one of our NSW, not for profit community-based Service members (in response to section 161 of the EM):

"I am very concerned at the hugely increased burden this is going to put on services ... We would need to look at employing extra admin people to do nothing other than collect fees from 700+ families."

"Our educators are sole traders. They are responsible for the collection of their fees, and they do this very well".

"We are extremely concerned at this, and we can only see it having the knock-on effect of more small community based services closing. This will be unaffordable for them in terms of staffing and will be the final straw for providers".

FDCA makes this submission in order to have this matter noted on public record. The Committee and Parliament must be aware of the intent of the legislative amendment and we believe that Section 161 of the EM may have the potential to undermine this in the future, given the EM would be deemed to reflect the intent of law makers at that time. As such, FDCA requests that the Committee include acknowledgement of this in the inquiry's final report and/or recommended the omission of section 161 of the EM.

I appreciate that this matter is complex, so please don't hesitate to contact me on 0408 447 139 or at andrew.paterson@fdca.com.au if more information of clarification is required. Thank you for your consideration of this matter and the request to have it noted on the public record outlined herein.

Yours faithfully



Andrew Paterson
Chief Executive Officer
Family Day Care Australia