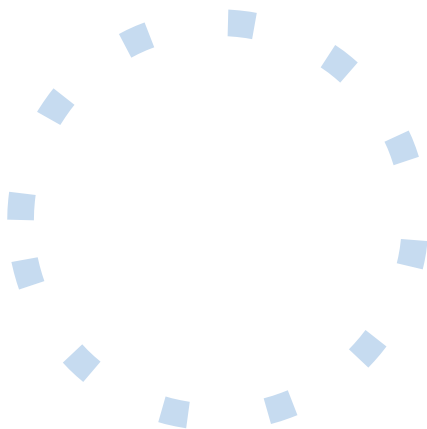
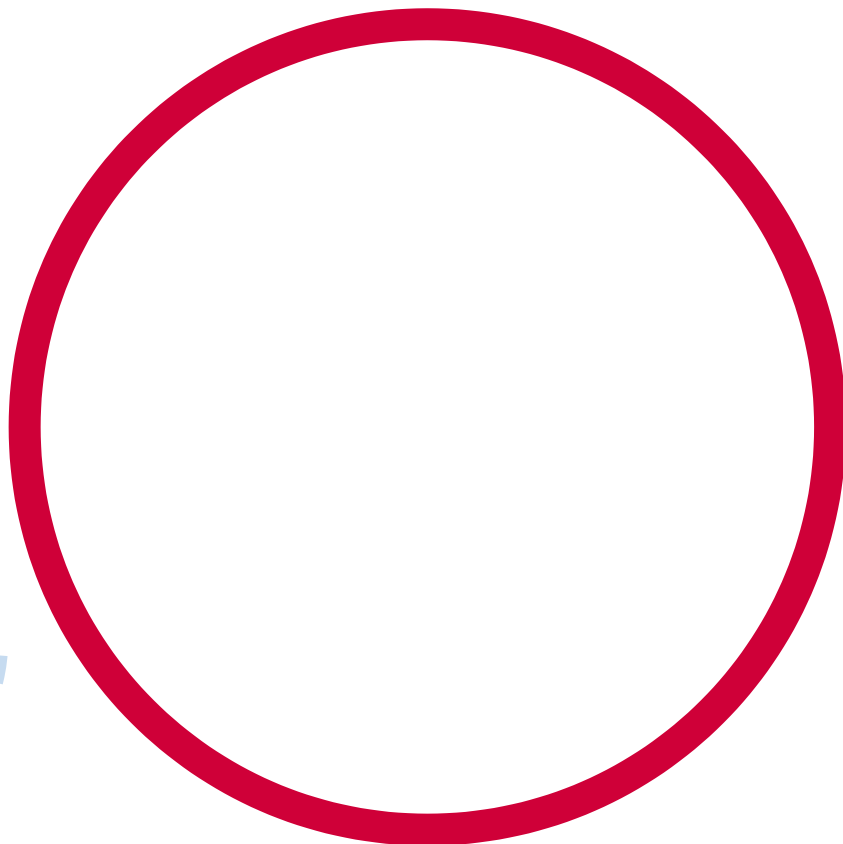
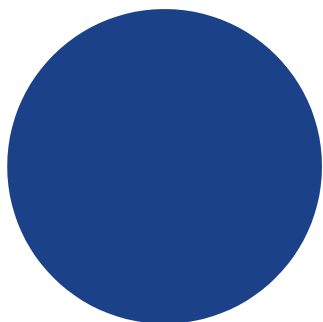


Conditions on Approvals and Waivers Policy

Early Childhood Education
Quality Assurance and Regulatory
Services Directorate



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1. Purpose

This policy outlines how the Regulatory Authority exercises its functions to impose conditions on approvals or waivers under the *Children (Education and Care Services) National Law (NSW) 2010* (National Law), and under the *Education and Care Services National Regulations (NSW)* (National Regulations).

The policy outlines how and when the Regulatory Authority will apply, vary or remove a condition on a service or provider approval, or on a waiver, and the types of conditions that may be applied.

The Regulatory Authority imposes conditions on approvals and waivers with the primary objective to ensure the safety, health and wellbeing of children attending education and care services.

The information in this policy is intended to clarify:

- the circumstances under which the Regulatory Authority will exercise its discretion in respect to conditions, and the considerations it must and/or may take into account when exercising that discretion.

2. Scope

This Policy applies to both in scope and out of scope providers and services in NSW.

In scope services are regulated under the National Quality Framework (NQF) which consists of the National Law, the National Regulations, and the National Quality Standard. In scope services include centre-based services, such as long day care, out of school hours care and preschools, and family day care services.

Out-of-scope services (or State regulated services) are regulated under the *Children (Education and Care Services) Supplementary Provisions Act 2011* (the State Law). Mobile and occasional care services are the only service types regulated under the State Law. Following changes to the State Law, the National Law provisions apply to out of scope services, with certain modifications. Where the National Law applies, the provisions are referred to as the “National Law Alignment Provisions.”

3. Guiding principles

The Regulatory Authority’s over-arching principles for implementing its functions are set out in the Guiding Principles Policy. Specific principles that apply to the Regulatory Authority’s use of conditions include the following:

- The Regulatory Authority may impose, vary or remove a condition on an approval or waiver at any time.
- The Regulatory Authority may apply conditions on an approval or waiver to enhance the safety, health and wellbeing of children attending education and care services; improve the educational and developmental outcomes for children attending education and care services; and/or promote continuous improvement in the provision of quality education and care services.
- Where applicable, a condition will address the apprehension of risk and be targeted towards an outcome that minimises or eliminates the particular risk to children attending an education and care service.
- Conditions will be clear and enforceable, so as to allow the approved provider to comply with the condition.
- A condition cannot waive a requirement of the National Law or National Regulations.
- The Regulatory Authority will take a risk based approach to the imposition of conditions and will only take into account relevant considerations.

4. Policy

4.1 General Information

A condition is a legal constraint or requirement imposed on a provider approval (Section 19 of the National Law), service approval (Section 51 of the National Law) or waiver, and is intended to ensure compliance with the National Law and National Regulations.

- A condition may be imposed upon the grant of an approval or, alternatively, the Regulatory Authority may also impose conditions on an approval at any time. While the National Law does not place any specific limitation on the Regulatory Authority's power to impose a condition on a provider or service approval, the Regulatory Authority may consider imposing conditions to promote continuous quality improvement and compliance; and
- to address risks associated with:
 - the safety, health and wellbeing of children in an education and care service;
 - the management capacity of the approved provider;
 - potential and actual non-compliance with regulatory requirements;

- the transfer of a service to another approved provider; or
- the quality of services provided to children.

When imposing a condition, the Regulatory Authority will take a risk based approach and will ensure:

- conditions are expressly stated to be conditions on a provider or service approval, or on a waiver;
- the condition is enforceable;
- the condition does not:
 - replicate an existing provision of the National Law or National Regulations;
 - waive a current requirement of the National Law or National Regulations;
 - impose an unreasonable requirement;
 - refer to people’s names or other identifying information.
- the condition will be consistent with the National Law and National Regulations; and
- conditions take into account relevant considerations, including, for example, the:
 - quality rating of the service;
 - compliance history of the service and approved provider;
 - nature and type of service;
 - number of staff and their skills and qualifications;
 - education programs offered by the service; or
 - service practice, policies and procedures.

The types of conditions that the Regulatory Authority may consider imposing include, but are not limited to, the following examples:

Conditions on Provider Approvals	Conditions on Service Approvals	Conditions on Waivers
Limiting the number of services or size of services a provider can operate	Limiting the number of children attending the service, including by age group (setting the maximum number of children)	Requiring certain action to comply with waiver requirements, for example: Requirements to address Early Childhood Teacher

Conditions on Provider Approvals	Conditions on Service Approvals	Conditions on Waivers
		(ECT) staffing requirements Requiring a service to maintain a best practice simulated environment where outdoor space is not available
Limiting types of services a provider may operate	Setting the number of Family Day Care (FDC) Educators or Co-ordinators	
Applying certain requirements as to the operation of each of the approved provider's services	Setting the date a service transfer will take place	
Requiring a certain action by an approved provider or persons with management or control	Requiring a certain action by a service. For example, relevant staff completing professional development training	
	Limiting or placing a requirement on how a service may operate	

Unless the duration of the condition is expressly stated, it will remain in force until the Regulatory Authority removes it. The Regulatory Authority can remove or vary a condition at any time. Alternatively, an approved provider can apply to vary or remove a condition.

In some circumstances, the Regulatory Authority may extend a time-limited condition to allow the approved provider more time to comply with the condition. The Regulatory Authority will assess each case on its own merits.

4.2 Conditions on Provider Approvals

Imposing or varying a Condition

Section 19 of the National Law states that a provider approval may be granted subject to any conditions that are prescribed in the National Regulations or that are determined by the Regulatory Authority. Conditions may be imposed either at the time of provider approval, or after the approval has been granted.

A condition on a provider approval addresses risks that affect, or potentially affect, all of the provider's services. For instance, the Regulatory Authority may impose a condition limiting the type of services a provider may operate, such as centre-based or family day care services.

A provider approval is granted subject to the standard condition in section 19(2) that the approved provider must comply with the National Law. This includes compliance with the National Regulations.

A provider approval under the Supplementary Provisions is generally subject to the same conditions as prescribed in the National Law. However, a provider approval for a mobile education and care service is also subject to the following conditions:

- the approved provider must keep a register of the address of each of the premises at which the service is provided and the name of the proprietor of each of those premises;
- the approved provider must ensure that the premises of the service comply with the venue management plan for those premises.

Section 23 of the National Law provides that the Regulatory Authority may amend a provider approval at any time. This includes imposing a new condition, or varying an existing condition, on the approval. The Regulatory Authority will impose or vary a condition in accordance with the general principles outlined in section 4.1 above.

If the Regulatory Authority imposes or varies a condition, it will give notice in writing of its decision to the approved provider. The notice will include a copy of the amended provider approval certificate. The amendment will take effect 14 days after the Regulatory Authority gives notice of the amendment or, if another period is specified by the Regulatory Authority, at the end of that period.

The approved provider may apply at any time to the Regulatory Authority to amend a provider approval, including to vary a condition (Section 22 of the National Law). For example, a provider may apply to extend the duration of a time-limited condition to enable them to have more time to comply with the requirements of the condition. For further information, see the Provider Approvals Policy.

Removing a condition

Section 23 of the National Law provides that the Regulatory Authority may amend a provider approval at any time. This includes removing a condition on the approval. The Regulatory Authority may remove a condition where it is no longer required, for example, the condition was time-limited and the approved provider has complied with the condition within the specified timeframe.

The approved provider may apply at any time to the Regulatory Authority to amend a provider approval, including to remove a condition (Section 22 of the National Law). For further information, see the [Provider Approvals Policy](#).

If the approved provider has applied to vary or remove a condition on a provider approval, as soon as they are aware of any adverse or serious matters they are obligated to disclose this during the application process. The Regulatory Authority will undertake inquiries in relation to these matters and may ask the applicant to provide further information.

4.3 Conditions on Service Approvals

A condition on a service approval addresses risks that affect, or potentially affect, a specific service. For instance, if the Regulatory Authority has concerns that the environment at a particular service may not be safe for infants, it may impose a condition preventing the service from providing education and care to children under 12 months of age.

Standard conditions on service approvals under the National Law

The standard conditions that apply to service approvals are contained in Section 51 of the National Law, which provides that a service approval is granted subject to the conditions set out in that section and in regulations 29-32A of the National Regulations.

The standard conditions on service approvals are listed in the table below. They may apply to centre-based services, family day care services and out of scope services.

Standard conditions on service approvals under the National Law				
Sector/Regulation	Condition	Centre-based service	Family day care service	Out of scope service
S51(1)	The service is operated in a way that ensures the safety, health and wellbeing of children educated and cared for by the service, and meets children's educational and developmental needs.	✓	✓	✓
S51(2)	Each family day care educator is adequately monitored and supported by a family day care co-ordinator.		✓	

S51(2A)	Each family day care residence, and any approved family day care venue of the service, is located in the jurisdiction that granted the service approval.		✓	
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Standard conditions on service approvals under the National Law

S51(3)	The service commences ongoing operation within six months after the approval is granted, unless the Regulatory Authority agrees to an extension.	✓	✓	✓
S51(4) Reg 29	The approved provider has: <ul style="list-style-type: none"> a current insurance policy providing adequate cover for the service against public liability, with a minimum cover of \$10 million; or an insurance policy or indemnity against public liability provided for the service by a state or territory government. 	✓	✓	✓
S51(4) Reg 30	Each family day care educator engaged by or registered with the service holds public liability insurance with a minimum cover of \$10 million.		✓	
S51(4A)	The number of children educated and cared for by the service at any one time does not exceed the maximum number of children specified by the service approval.	✓		✓
Reg 31(a)	The service's quality improvement plan is kept up to date at the service premises (the principle office for family day care).	✓	✓	✓
Reg 31(b)	The service's quality improvement plan is made available for inspection by the Regulatory Authority or an authorised officer.	✓	✓	✓
Reg 31(c)	The service's quality improvement plan is made available on request to parents of children enrolled, or seeking enrolment, at the service.	✓	✓	

Reg 32	The service continues to be entitled to occupy the education and care service premises.	✓		
Standard conditions on service approvals under the National Law				
Reg 32A	The number of family day care educators providing education and care as part of the service does not exceed the maximum number of family day care educators determined by the Regulatory Authority in the service approval.		✓	
Reg 14(2)(a) Supplementary Provisions Regulation	The approved provider of the education and care service must develop, maintain and implement procedures to ensure that the nominated supervisor and all other members of staff of the education and care service comply with the conditions of the service approval that apply to them.			✓
Reg 14(2)(b)	The approved provider of the education and care service must have the right to occupy the premises at which the service is provided under the approval.			✓

Where the conditions in the above table relate to insurance, note that Regulation 180 of the National Regulations specifies the evidence that should be kept of insurance policies that are required under the National Law.

Imposing or varying a Condition

Section 51(5) of the National Law states that a service approval may be granted subject to any conditions that are imposed by the National Law, prescribed in the National Regulations or that are determined by the Regulatory Authority.

Conditions may be imposed either at the time of service approval, or after the approval has been granted.

A service approval for an out of scope service is generally subject to the same conditions as prescribed under the National Law. However, specific variations, as outlined in the table above, also apply.

Section 55 of the National Law provides that the Regulatory Authority may amend a

service approval at any time. This includes imposing a new condition, or varying an existing condition, on the approval. The Regulatory Authority will impose or vary a condition in accordance with the general principles outlined in section 4.1 above.

If the Regulatory Authority imposes or varies a condition, it will give notice in writing of its decision to the approved provider. The notice will include a copy of the amended service approval certificate. The amendment will take effect 14 days after the Regulatory Authority gives notice of the amendment or, if another period is specified by the Regulatory Authority, at the end of that period.

The approved provider may apply at any time to the Regulatory Authority to amend a service approval, including to vary a condition (section 54 of the National Law). For further information, see the [Service Approvals Policy](#).

Service Specific Conditions

Conditions on the transfer of a service approval

The Regulatory Authority may impose conditions on a transfer of a service approval to achieve outcomes including:

- ensuring the receiving approved provider is ready and able to operate the transferred service;
- ensuring the transferring approved provider has sufficient time to undertake all of their obligations in relation to the transfer of the approval;
- ensuring any changes in service conditions, including staffing, are in place for the service transfer date;
- ensuring the safety, health and wellbeing of children attending education and care services.

Conditions that the Regulatory Authority may impose on a service transfer to achieve these outcomes include:

- the date on which the transfer will take effect (the service transfer date);
- any condition that will ensure the provider can adhere to their obligations under the National Law and National Regulations.

Under Section 67(b) of the National Law the transfer of a service approval is void if it is made in contravention of the conditions imposed by the Regulatory Authority on the consent to the transfer.

Removing a Condition

Section 55 of the National Law provides that the Regulatory Authority may amend a

service approval at any time. This includes removing a condition on the approval. The Regulatory Authority may remove a condition where it is no longer required, for example, the condition was time-limited and the approved provider has complied with the condition within the specified timeframe.

The approved provider may apply at any time to the Regulatory Authority to amend a service approval, including to remove a condition (Section [54 of the National Law](#)). For further information, see the [Provider Approvals Policy](#).

If an approved provider has applied to amend or remove a condition on a service approval, as soon as they are aware of any adverse or serious matters they are obligated to disclose this during the application process. The Regulatory Authority will undertake inquiries in relation to these matters and may ask the applicant to provide further information under Section 54(3) of the National Law. The time taken to make these inquiries will not be considered in the legislated period of time within which the Regulatory Authority must make a decision.

4.4 Conditions on Waivers

Conditions on waivers operate in a similar way to conditions on provider or service approvals.

A waiver enables a service that is non-compliant with the National Regulations or an element of the National Quality Standard to be taken to be compliant, or not required to comply, during the period that the waiver is in force. When assessing a waiver, the Regulatory Authority may impose conditions to refine and clarify the scope of the waiver.

The conditions applied to a service or temporary waiver are limited to the operation of the waiver. For example, a condition on an Early Childhood Teacher (ECT) waiver may require a provider to undertake ongoing activity to recruit an ECT, or a condition on a space waiver may require a provider to conduct two excursions each week to a natural outdoor environment. Conditions placed on a waiver may also limit its use, for example, to particular times or circumstances.

A condition on a waiver will remain in place until the Regulatory Authority removes the condition.

The Regulatory Authority has the authority to place a condition on a waiver or service approval. When a condition is enforced the Regulatory Authority will re-issue the service approval certificate specifying the element or elements that have been waived and the conditions placed on the service. If the approved provider does not comply with the conditions on a waiver, then the Regulatory Authority may consider revoking the waiver.

4.5 Enforcement of Conditions

Breach of a condition on a provider or service approval

It is an offence under the National Law (or the Supplementary Provisions for out of scope services) for an approved provider to fail to comply with the conditions on a provider or service approval.

If an approved provider breaches a condition of a provider or service approval, the Regulatory Authority may take appropriate compliance action in accordance with its Compliance Policy.

The Regulatory Authority may publish information about the imposition of a condition as part of a compliance action ([Regulation 227 of the National Regulations](#)).

Breach of a condition on a waiver

Where an approved provider has failed to comply with a condition on a waiver in respect to the operation of an education and care service, the Regulatory Authority may decide to revoke the waiver. For more information see the [Waivers Policy](#).

4.6 Review

A person affected by the Regulatory Authority's decision regarding a condition on a provider or service approval may be able to challenge that decision by applying to have it reviewed.

There are two types of review:

- Internal review by the Regulatory Authority,
- External review by a relevant tribunal, court or the NSW Ombudsman.

For more information on rights of review, including application processes, the types of review available and the principles that apply to conducting reviews, see the [Review of Decisions Policy](#).

5. Version Control

Policy Owner	Version	Approved by	Date last reviewed
Director, Regulatory Strategy and Performance	1.0	Executive Director, Quality Assurance and Regulatory Services	24 August 2020
Director, Regulatory Strategy, Policy and Practice	2.0	Executive Director, Quality Assurance and Regulatory Services	17 March 2021