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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PAID PARENTAL LEAVE AND OTHER LEGISLATION AMENDMENT
(CONSOLIDATION) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Families, Housing, Community Services and
Indigenous Affairs, the Hon Jenny Macklin MP)

PAID PARENTAL LEAVE AND OTHER LEGISLATION AMENDMENT (CONSOLIDATION) BILL 2011

OUTLINE

This Bill refines the legislation for the Paid Parental Leave scheme, including making amendments to improve clarity and consistency, and makes consequential amendments to the *Fair Work Act 2009*.

Paid Parental Leave Act 2010

The Bill makes minor refinements to the *Paid Parental Leave Act 2010* to improve clarity and consistency. The amendments include refining the provisions which permit 'keeping in touch days', and clarifying the operation of a number of provisions, including debt recovery provisions, notice provisions, and the provision relating to delegation of the Secretary's powers under the Act.

Fair Work Act 2009

The Bill also amends the *Fair Work Act 2009* to clarify unpaid parental leave arrangements where there is a stillbirth or infant death, to enable early commencement of unpaid parental leave, and to enable employees who are on unpaid parental leave to perform permissible paid work for short periods for the purposes of 'keeping in touch'.

Financial impact statement

This Bill is part of the legislation for the Paid Parental Leave scheme and has no additional financial impact.

Regulation impact statement

The regulation impact statement for the Paid Parental Leave scheme appears at the end of the explanatory memorandum for the Paid Parental Leave Bill 2010.

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NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

This explanatory memorandum uses the following abbreviations:

- ‘Fair Work Act’ means the *Fair Work Act 2009*; and
- ‘Paid Parental Leave Act’ means the *Paid Parental Leave Act 2010*.

Clause 1 sets out how the amending Act is to be cited, that is, as the *Paid Parental Leave and Other Legislation Amendment (Consolidation) Act 2011*.

Clause 2 provides a table that sets out the commencement dates of the various sections in, and Schedules to, the amending Act.

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

Schedule 1 – Paid Parental Leave Act 2010

Summary

The Bill makes minor refinements to the Paid Parental Leave Act to improve clarity and consistency. The amendments include refining the provisions which permit ‘keeping in touch days’, and clarifying the operation of a number of provisions, including debt recovery provisions, notice provisions, and the provision relating to delegation of the Secretary’s powers under the Act.

Background

The Paid Parental Leave Act commenced on 1 October 2010. This Schedule makes minor amendments to that Act, including clarification regarding debt recovery, the provision of notices, and the delegation of the Secretary’s powers under the Act.

The amendments in Part 1 of this Schedule are taken to have commenced at the same time as the commencement of the Paid Parental Leave Act. No person’s rights will be adversely affected by the retrospective commencement of the amendments in Part 1 of this Schedule. The amendments in Part 2 of this Schedule commence the day after Royal Assent.

Explanation of the changes

Part 1 – Amendments commencing at the same time as the Paid Parental Leave Act

Modification of the work test

Section 31 of the Paid Parental Leave Act deals with when a person is eligible for parental leave pay, including establishing through the ‘work test’ that they have a sufficient connection to the workforce. Subsection 31(4A) eases the work test to enable eligibility to be established where mothers do not meet the work test because the child was born prematurely or there were complications or illness relating to the pregnancy which prevented the person from performing paid work.

Subsection 31(4A) only deals with eligibility. However, there are other provisions in the Act under which the Secretary may make determinations referring specifically to the work test.

Items 1, 2, 3, 4, 5, 6 and 7 make amendments to allow the modification to the work test, as currently provided for in subsection 31(4A), to be considered wherever the work test applies in the Paid Parental Leave Act.

Item 1 makes a minor amendment to the definition of the work test to refer to Division 3 of Part 2-3.

Item 2 amends the Guide to Part 2-3, as set out in section 30 of the Paid Parental Leave Act, to indicate that, in relation to the work test, special rules apply in the case of premature birth or complications or illness related to the pregnancy.

Items 3 and 4 make minor consequential changes to paragraph 31(2)(a) and subparagraph 31(4)(a)(i) respectively, to remove the reference to subsection 31(4A). This is done because the amendments made by **items 5 and 7** of Schedule 1 will move the alternative to the work test (currently set out in subsection 31(4A)) into Division 3 of Part 2-3 as new section 36A.

Item 5 repeals subsection 31(4A), as the amendment made by **item 7** inserts the equivalent of this provision into Division 3 of Part 2-3, which deals with the work test, as new section 36A.

Item 6 adds a note at the end of section 32 to alert the reader to the fact that a person may also satisfy the work test if the child was born prematurely and if, while the person was pregnant with the child, they had complications or illness related to the pregnancy which prevented them from performing paid work. The note directs the reader to new section 36A.

Item 7 adds new section 36A at the end of Division 3 of Part 2-3. Division 3 of Part 2-3 deals with the work test for eligibility for parental leave pay. Section 32 sets out a method statement for when a person satisfies the work test. New section 36A sets out the alternative to the work test for premature births and pregnancy-related complications, which is the equivalent of current subsection 31(4A).

Notice of further review right and the validity of an SSAT decision

Part 5-2 of the Paid Parental Leave Act deals with review of decisions by the Social Security Appeals Tribunal (the SSAT). The procedures for review by the SSAT are set out in Part 5-3, and section 257 deals with the procedure following a decision of the SSAT. Subsection 257(6) provides that, when the SSAT determines a review in relation to an SSAT reviewable claimant decision, the Principal Member must give each party to the review a written notice that includes a statement to the effect that, if the party is dissatisfied with the SSAT decision, application may, subject to the *Administrative Appeals Tribunal Act 1975*, be made to the Administrative Appeals Tribunal for review of the decision.

Subsection 257(6) is the equivalent of subsection 141(2) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act). Subsection 141(3) of that Act specifically provides that a failure to comply with subsection 141(2) in relation to a decision of the SSAT does not affect the validity of the decision.

Item 8 inserts new subsection (7) into section 257. This new subsection is consistent with the approach taken in section 141 of the Family Assistance Administration Act. New subsection 257(7) provides that a failure to comply with subsection 257(6) in relation to a decision of the SSAT does not affect the validity of the decision.

Part 2 – Amendments commencing the day after Royal Assent

Definition of vocational placement

Item 9 inserts a new definition of ‘vocational placement’ into section 6 of the Paid Parental Leave Act. The new definition is consistent with the definition of this term in the Fair Work Act. The meaning of vocational placement is relevant to the definition of ‘employee’. A vocational placement means a placement that is: undertaken with an employer for which a person is not entitled to be paid any remuneration; and undertaken as a requirement of an education or training course; and authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

Keeping in touch days

Under section 48 of the Paid Parental Leave Act, a person is regarded as having returned to work on a day that is on or after the birth of their child if they perform one hour or more of paid work on that day (other than for a permissible purpose). Section 49 outlines when paid work is for a permissible purpose. Under subsection 49(1), work is for a permissible purpose if the person performs paid work for an entity as an employee, defence force member, or law enforcement officer, on a keeping in touch day which would otherwise be a day in a period of leave granted by that entity, and if the person has not already performed paid work on 10 keeping in touch days. Section 50 of the Paid Parental Leave Act sets out the conditions for when a day is a keeping in touch day, including that the purpose of performing the paid work is to enable the person to keep in touch with their employment or engagement in order to facilitate a return to that employment or engagement after the end of the period of leave. Another condition for a day to be a keeping in touch day, as set out in paragraph 50(c), is that the day is not within 14 days after the day the child was born.

Item 10 repeals and substitutes paragraph 50(c), providing the condition that the day is not within 42 days after the day the child was born. There is an exception to this, where the employee has suggested or requested that they perform the paid work on that day: in this case, the day must not be within 14 days after the child is born.

This will allow sufficient time after the birth of a child for the mother to recover physically and will enable an uninterrupted six-week period for the caring parent to bond with the child. This amendment is intended to support the primary objective of the scheme, which is to provide financial support to allow the primary carer to take time off work to care for their newborn or adopted child. The exception, that the day is not within 14 days after the day the child was born where the performance of work on a day is suggested or requested by the person, will retain flexibility for employees. In any case, where a keeping in touch day is requested, both the person and their employer must agree to the performance of paid work on a day that would otherwise be a leave day.

Item 11 adds several notes at the end of section 50 in relation to keeping in touch days. A number of these notes reference various provisions in the Fair Work Act which may be relevant to a person performing paid work on a keeping in touch day.

Note 1 refers the reader to new section 79A of the Fair Work Act, which sets out arrangements related to the performance of work on keeping in touch days while an employee is taking unpaid parental leave. Schedule 2 to this Bill makes consequential amendments to the Fair Work Act related to keeping in touch days for the purposes of unpaid parental leave, and **item 5 of Schedule 2** inserts new section 79A.

Note 2 advises the reader of an employer's obligation, under the relevant contract of employment or industrial instrument, to pay an employee for the performance of work on a keeping in touch day.

Notes 3 and 4 notify the reader of provisions in the Fair Work Act containing general protections against undue influence or pressure and coercion, which may be of assistance to a person in relation to the decision whether or not to consent to a keeping in touch day.

Note 3 informs the reader that section 344 of the Fair Work Act prohibits the exertion of undue influence or undue pressure on a person in relation to their decision whether to consent to performing work on a keeping in touch day. The note refers the reader to new subsection 79A(3), which is inserted by **item 5 of Schedule 2** to this Bill. Under paragraph 344(a) of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make or not make an agreement or arrangement under the National Employment Standards. New subsection 79A(3) provides that an employee's decision whether or not to consent to performing work on a keeping in touch day is taken, for the purposes of section 344, to be a decision to make, or not to make, an arrangement under the National Employment Standards.

Note 4 advises the reader that section 344, and section 343, of the Fair Work Act contain other prohibitions on coercion and undue influence or pressure.

Employer requirement to notify the Secretary if certain events happen

Subsection 82(1) of the Paid Parental Leave Act provides that, if an employer determination has been made, the employer is required to notify the Secretary if any of the events set out in paragraphs 82(1)(a) to (l) happen. Subsection 82(2) specifies when the notice must be given, and also requires that the notice be given in writing (paragraph 82(2)(c)). Subsection 82(2) is a civil penalty provision.

Items 12 and 13 amend the requirement in paragraph 82(2)(c) that notice be given in the manner set out in a written notice given to the employer. This would allow the Secretary to approve the manner of notification: for example, whether the notice could be given in writing, including by email, or verbally by telephone, or in person.

Item 12 repeals and substitutes paragraph 82(2)(c), providing the requirement that the notice be given in the manner set out in a written notice given to the employer under new subsection 82(2).

Item 13 inserts new subsections 82(2A) and (2B) after subsection 82(2). New subsection 82(2A) requires the Secretary to approve a manner of notification that an employer must use when notifying of an event under section 82, and new subsection 82(2B) then requires the Secretary to notify the employer, by written notice, of the approved manner of notification.

Item 14 is an application and transitional provision. This is intended to improve administrative processes during the transitional period.

Subitem 14(1) provides that the amendments made by **items 12 and 13** apply in relation to notices which must be given to the Secretary under subsection 82(1) on or after the commencement of this item.

Subitem 14(2) provides that the Secretary is taken to give an employer written notice under new subsection 82(2B) if the Secretary publishes a notice setting out the manner of notification on a PPL agency's website, or notifies the employer of that manner by another means the Secretary considers appropriate. (The term 'PPL agency' is defined in section 6 of the Paid Parental Leave Act and means the Department or the Human Services Department.) However, **subitem 14(3)** provides that **subitem 14(2)** does not apply if the Secretary made the employer determination later than six months after the commencement of this item.

Subitem 14(4) provides that the delegation provisions in subsections 303(1) and (2) of the Paid Parental Leave Act apply in relation to **item 14** in the same way as they apply in relation to section 82 of that Act.

Requirement for notice given to employer after review

Section 105 of the Paid Parental Leave Act deals with the requirement of an employer to give the Secretary a written notice containing bank account and pay cycle information after review of an employer determination. This applies where an employer applies for review and either the employer withdraws the application, or the determination has not been set aside or quashed and is no longer subject to review, and the person's PPL period has not ended. The Secretary must give the employer a written notice requiring the employer to give the Secretary a written notice containing: the employer's bank account details, pay cycle information, and any other information prescribed by the PPL rules. Subsection 105(3) then provides that the employer must give the notice within 14 days of the date of the notice given by the Secretary.

Item 15 inserts new subsection (2A) into section 105, which requires that the notice given to the employer be dated. The date must be the date the preparation of the notice was completed.

Item 16 makes a minor amendment to subsection 105(3) to clarify that the employer must give the notice 'to the Secretary'.

Section 131 of the Paid Parental Leave Act

Items 17 and 18 make minor technical amendments to section 131 of the Paid Parental Leave Act, which deals with the offence for soliciting the disclosure of protected information.

Item 17 omits the word 'protected' from paragraph 131(1)(a). The term is not required in paragraph 131(1)(a), as paragraph 131(1)(c) explicitly requires that the information be 'protected information'.

Division 3 of Part 4-1 of the Act deals with the confidentiality of protected information. Section 131 currently makes it an offence to solicit the disclosure of protected information if the disclosure would be in contravention of the 'Subdivision'. As the confidentiality provisions are contained in a Division, rather than a Subdivision, **item 18** omits the word 'Subdivision' from paragraph 131(1)(c) and substitutes the word 'Division'.

Debt recovery

Section 147 of the Paid Parental Leave Act provides for civil penalty orders in relation to a contravention of a civil penalty provision under the Paid Parental Leave Act. If, on an application of the Secretary or Fair Work Ombudsman, the Federal Court or Federal Magistrates Court is satisfied that a person has contravened a civil penalty provision, the court may order the person to pay a pecuniary penalty to the Commonwealth. The pecuniary penalty is a civil debt payable to the Commonwealth. The Commonwealth may enforce the order in the same way as a judgment debt.

Part 4-3 of the Paid Parental Leave Act deals with debt recovery. Several provisions relating to debt notices, debt recovery and write-off and waiver of debts extend the operation of Part 4-3 to debts due to the Commonwealth under the Paid Parental Leave Act.

Item 19 adds new section 201A at the end of Division 8 of Part 4-3. New section 201A clarifies that normal civil debt recovery procedures are to apply to the recovery of debts arising from a civil penalty order, rather than the debt recovery provisions in Part 4-3 of the Paid Parental Leave Act.

Amendment to the application of Division 2 of Part 5-2

Division 2 of Part 5-2 deals with review by the SSAT of claimant decisions. Subsection 215(2) sets out those decisions to which Division 2 does not apply. This includes decisions under certain provisions specified in paragraph 215(2)(a), which deal with the making, form and manner of claims, and the form and manner of notices.

Item 20 inserts new subparagraph (va) into paragraph 215(2)(a) to provide that Division 2 of Part 5-2 does not apply to decisions under new subsection 82(2A) (see **item 13** above).

Commonwealth employees and the requirement for 12 months' employment for an employer determination to be made

Section 278 of the Paid Parental Leave Act deals with how the Act applies to Commonwealth employment. The Paid Parental Leave Act applies in relation to a person engaged to perform functions in a Commonwealth agency as if: the employee were employed by the agency (rather than the Commonwealth); the agency were a body corporate; and the agency head has all the rights, duties and powers of an employer in relation to the employee. 'Commonwealth agency' is defined in section 6 of the Paid Parental Leave Act.

Subsection 101(1) of the Paid Parental Leave Act provides that the Secretary must make an employer determination for an employer and a person if satisfied of the conditions set out in paragraphs (a) to (f). It is a requirement under paragraph 101(1)(c) that the person has, or will have, been employed by the employer for at least 12 months immediately before the applicable date. As section 278 applies the Act to a Commonwealth employee as if the person were employed by the agency rather than the Commonwealth, this effectively means that a Commonwealth employee would, for the purposes of paragraph 101(1)(c), need to have been employed by the particular agency for at least 12 months before the applicable date.

Item 22 inserts new subsection (2) into section 278 to give effect to the intention that, for the purposes of working out for paragraph 101(1)(c) whether the person has, or will have, been employed by the Commonwealth agency for at least 12 months, the reference in paragraph 101(1)(c) to the employer is to be treated as being a reference to the Commonwealth, and subsection 278(1) is disregarded. **Item 21** makes a minor amendment to insert '(1)' before 'this Act' in section 278.

Appointment of payment nominees under section 280

Section 280 of the Paid Parental Leave Act provides the Secretary with the discretion to appoint a person (including a body corporate) to be the payment nominee of another person for the purposes of the Act, and to direct that the whole or part of an instalment payable to the nominee's principal be paid to the nominee. The intention is that a payment nominee only be appointed in respect of a person if instalments of parental leave pay are payable by the Secretary, rather than by the person's employer. Part 3-3 of the Act deals with payment of instalments of parental leave pay by the Secretary, and section 84 sets out when the Secretary is required to pay instalments.

Item 23 clarifies the intended operation of section 280 by amending paragraph 280(1)(b) so that instalments can only be paid to a payment nominee where the instalment is payable by the Secretary under Part 3-3.

Delegation of the Secretary's powers under the Paid Parental Leave Act

Section 303 of the Paid Parental Leave Act provides for the Secretary to delegate his or her powers under the Act. Subsection 303(1) allows the Secretary to delegate his or her powers, with some exceptions, to a person such as an officer or person engaged by an Agency or other Commonwealth authority. This does not include the Chief Executive Centrelink, the Chief Executive Medicare, or an APS employee in the Human Services Department, as subsection 303(2) expressly provides for the Secretary to delegate his or her powers under the Act (other than certain provisions) to the Chief Executive Centrelink, the Chief Executive Medicare, or an APS employee in the Human Services Department.

Items 24, 25, 26 and 27 make minor amendments in relation to subsection 303(1) for clarity.

Item 24 inserts the heading 'General powers' before subsection 303(1).

Item 25 substitutes 'Commonwealth;' with 'Commonwealth.'

Item 26 omits all words after subparagraph 303(1)(iii), as new subsection 303(1A) (see **item 27** below) now provides that paragraphs 303(1)(a) and (b) do not apply to the Chief Executive Centrelink, the Chief Executive Medicare, or an APS employee in the Human Services Department.

Item 27 inserts new subsection 303(1A), which provides that paragraphs 303(1)(a) and (b) do not apply to the Chief Executive Centrelink, the Chief Executive Medicare, or an APS employee in the Human Services Department.

Subsection 303(3) of the Paid Parental Leave Act provides for the delegation of the Secretary's powers under Division 3 or 5 of Part 4-2 of the Act (which deal with civil penalty orders and infringement notices) to the Chief Executive Centrelink, the Chief Executive Medicare, or an SES employee or acting SES employee.

Item 28 inserts the heading 'Powers under Division 3 or 5 of Part 4-2' before subsection 303(3).

It is intended that the Secretary's powers in relation to infringement notices and civil penalty orders, if delegated under the Paid Parental Leave Act, may only be exercised by the Chief Executive Centrelink, the Chief Executive Medicare, or an SES or acting SES employee.

Item 29 inserts new subsections (3A) and (3B) into section 303 to clarify this intention. New subsection 303(3A) provides that, if the Secretary delegates any of his or her powers under Division 3 or 5 of Part 4-2 to the Chief Executive Centrelink, the Chief Executive Centrelink cannot, despite any provision in the *Human Services (Centrelink) Act 1997*, delegate the power to a Departmental employee (within the meaning of that Act) who is not an SES employee or an acting SES employee.

Similarly, if the Secretary delegates any of his or her powers under Division 3 or 5 of Part 4-2 to the Chief Executive Medicare, new subsection 303(3B) provides that the Chief Executive Medicare cannot, despite any provision of the *Human Services (Medicare) Act 1973*, delegate the power to a Departmental employee (within the meaning of that Act) who is not an SES employee or an acting SES employee.

Item 29 also inserts the heading 'Power under paragraph 128(1)(b)'.

Subsection 303(4) of the Paid Parental Leave Act prevents the Secretary from delegating to anyone, other than the Chief Executive Centrelink or the Chief Executive Medicare, the Secretary's power under paragraph 128(1)(b) to disclose information to an Agency Head (within the meaning of the *Public Service Act 1999*). Subsection 303(5) provides that, if the Secretary delegates the power mentioned in subsection 303(4) to the Chief Executive Centrelink, the Chief Executive Centrelink cannot, despite any other provision in the *Human Services (Centrelink) Act 1997*, delegate that power to a Departmental employee (within the meaning of the *Human Services (Centrelink) Act 1997*). Similarly, subsection 303(6) provides that, if the Secretary delegates the power mentioned in subsection 303(4) to the Chief Executive Medicare, the Chief Executive Medicare cannot, despite any other provision in the *Human Services (Medicare) Act 1973*, delegate that power to a Departmental employee (within the meaning of *Human Services (Medicare) Act 1973*).

Item 30 makes a minor amendment to subsection 303(5) for clarity. The words 'the power mentioned in subsection (4)' are omitted and substituted with 'his or her power under paragraph 128(1)(b)' to make clear that subsection 303(5) is limiting the Chief Executive Centrelink's ability to delegate further the Secretary's power under paragraph 128(1)(b) to disclose information to an Agency head.

Item 31 omits the word 'other' from subsection 303(5).

Item 32 omits the second occurrence of 'the *Human Services (Centrelink) Act 1997*' from subsection 303(5) and substitutes 'that Act'.

Items 33, 34 and 35 make similar amendments to subsection 303(6) for clarity.

Item 33 omits 'the power mentioned in subsection (4)' from subsection 303(6), and substitutes 'his or her power under paragraph 128(1)(b)'.

Item 34 omits the word 'other' from subsection 303(6).

Item 35 omits the second occurrence of 'the *Human Services (Medicare) Act 1973*' from subsection 303(6) and substitutes 'that Act'.

Schedule 2 – Fair Work Act 2009

Summary

This Schedule amends the Fair Work Act, to clarify unpaid parental leave arrangements where there is a stillbirth or infant death, to enable early commencement of unpaid parental leave, and to enable employees who are on unpaid parental leave to perform permissible paid work for short periods for the purposes of ‘keeping in touch’.

Background

The amendments in this Schedule will ensure that the capacity to perform permissible paid work for the purposes of ‘keeping in touch’ will be available for employees on unpaid parental leave under the Fair Work Act. It will also ensure that the arrangements under the Fair Work Act align with the keeping in touch arrangements for those who are entitled to receive parental leave pay under the Paid Parental Leave Act.

The amendments will enable pregnant female employees, if they wish, to start unpaid parental leave more than 6 weeks before the expected date of birth where the employer agrees. The amendments also provide that, where unpaid parental leave has started and there is a stillbirth or infant death, the employee is entitled to return to work within four weeks of notifying the employer that they wish to return to work; if the employer wishes the employee to return to work, they must give the employee at least six weeks’ notice. The amendments also clarify that, where an employer engages a replacement employee to perform the work of another employee who is taking unpaid parental leave, the replacement employee must be notified that the engagement is temporary and of the rights of the employer and the employee who is taking, or will take, unpaid parental leave.

This Schedule also inserts notes to relevant provisions of the Fair Work Act to explain the operation of certain provisions and to refer readers to relevant provisions of the Paid Parental Leave Act.

The amendments made by this Schedule commence on the day after Royal Assent.

Explanation of the changes

Item 1 inserts a signpost definition of *keeping in touch day* into the dictionary in section 12 of the Fair Work Act. The definition refers readers to subsections 79A(2) and (3).

Item 2 amends Note 1 to section 70 of the Fair Work Act to alert readers to the operation of subsection 77A(3), which deals with the situation in which there is a stillbirth or infant death and the unpaid parental leave has not yet started.

Items 3 and 5 add an identical note to each of subsections 71(2) and 72(2) to clarify that periods of unpaid parental leave can include keeping in touch days on which an employee performs work, as provided for by section 79A.

Item 4 amends subsection 71(3) of the Fair Work Act to provide that, for a pregnant female employee, unpaid parental leave may start earlier than six weeks before the expected date of birth of her child if the employee and employer agree, but otherwise may start up to six weeks before the expected date of birth and must not start later than the date of birth of the child.

A note to subsection 71(3) reminds the reader that, if the female employee is not fit for work, then she may be entitled to paid personal leave under Subdivision A of Division 7 of Part 2-2 of the Fair Work Act or unpaid special maternity leave under section 80.

A second note alerts the reader to section 81 of the Fair Work Act, which may operate to entitle the female employee to transfer to an appropriate safe job or to paid no safe job leave.

A third note reminds readers that section 344 of the Fair Work Act operates to prohibit the exertion of undue influence on an employee to agree to early commencement of unpaid parental leave under paragraph 71(3)(b).

Item 6 amends subparagraph 72(3)(a)(i) to provide that, for a pregnant female employee, unpaid parental leave may start earlier than six weeks before the expected date of birth of the child, if the employer and employee so agree.

Item 7 adds a similar note (to the notes in **items 3 and 5**) to subsection 76(1) to clarify that extended periods of unpaid leave can include keeping in touch days.

Item 8 inserts new section 77A into Subdivision B of Division 5 of Part 2-2 of the Fair Work Act. Subsection 77A(1) provides that the new section applies to unpaid parental leave if the leave is birth-related (birth-related leave is defined at subsection 67(4) of the Fair Work Act) and there is either a still birth or an infant death.

Subsections 77A(2) and (3) provide that, if, before the unpaid parental leave starts, the employee or employer gives written notice cancelling the leave, then the employee is not entitled to unpaid parental leave. Subsections (2) and (3) will not apply in any circumstance in which the leave has already started, whether or not the employee taking the leave is the female employee who gave birth to the child.

An example below new subsection 77A(3) will make clear to the reader that subsections 77A(2) and (3) will not apply if the child dies after being born, and the employee is the female employee who gave birth to the child, because subsection 71(3) provides that unpaid parental leave cannot start later than the date of birth of the child.

A note to subsection (3) reminds the reader that, if the employee is a female employee who was pregnant with the child and who is not fit for work, then she may be entitled to paid personal leave under Subdivision A of Division 7 of Part 2-2 of the Fair Work Act or unpaid special maternity leave under section 80.

Subsections 77A(4) to (7) provide that, where unpaid parental leave has started and there is a stillbirth or infant death, the employee may, by giving notice to the employer, return to work within four weeks of giving such notice, or the employer may, by giving notice to the employee, require the employee to return to work at least six weeks after that notice is given. The subsections provide that the employee's entitlement to unpaid parental leave ends immediately before the return to work. Subsection 77(8) clarifies that these provisions do not limit the capacity of parties to agree to reduce the period of parental leave under section 77.

Item 9 inserts a new subsection 78(1A), providing that section 78, which applies where an employee who has taken unpaid parental leave ceases to have responsibility for care of a child, does not apply where the pregnancy ends with a stillbirth or where there is an infant death (these circumstances are dealt with by new section 77A).

Item 10 inserts new sections 79A and 79B at the end of Subdivision B of Division 5 of Part 2-2 of the Fair Work Act.

New subsection 79A(1) provides that Subdivision B of Division 5 of Part 2-2 does not prevent an employee from performing work on a keeping in touch day while he or she is taking unpaid parental leave. In addition, this provision clarifies that performing work on a keeping in touch day does not break the continuity of the period of unpaid parental leave. This ensures that, as indicated by the new notes to subsections 71(2) and 72(2), inserted by **items 5 and 7** of this Schedule, the performance of work on a keeping in touch day will not break the single continuous period of unpaid parental leave.

New subsection 79A(2) sets out the circumstances in which a day (or part of a day) on which the employee performs work for the employer is a keeping in touch day. Such a day (or part of a day) will be a keeping in touch day if:

- the purpose of performing the work is to enable the employee to keep in touch with his or her employment so as to assist with the employee's return to employment once the period of leave has ended; and
- both the employee and the employer consent to the employee performing that work on that day; and
- the day is not within 42 days of the date of birth or day of placement of the child to which the period of leave relates, or, if the keeping in touch day was suggested or requested by the employee, is not within 14 days of the date of birth or day of placement of the child; and

- the employee has not already performed work on 10 days during the period of leave that were keeping in touch days.

New subsection 79A(2) provides that the duration of the work that the employee performs on the keeping in touch day is not relevant for the purposes of this subsection. An employee does not have to work a full day for it to constitute a keeping in touch day.

The note to new subsection 79A(2) informs readers that an employee who performs work on a keeping in touch day under new section 79A is entitled to payment from their employer in relation to the performance of that work in accordance with the relevant contract of employment or industrial instrument.

New subsection 79A(3) provides that a decision whether to give consent to perform work on a keeping in touch day is taken to be a decision to make or not make an arrangement under the National Employment Standards for the purposes of section 344 of the Fair Work Act (which prohibits an employer from exerting undue influence or pressure on an employee in relation to a decision to make or not to make an arrangement under the National Employment Standards). This will ensure that there is no ambiguity about the application of section 344 to keeping in touch days.

New subsection 79A(4) clarifies that, for the purposes of new paragraph 79A(2)(d), a period of unpaid leave taken during the employee's available parental leave period and an extension of the available parental leave period are to be treated as two separate periods of unpaid parental leave.

The note to new subsection 79A(4) refers readers to the keeping in touch provisions of the Paid Parental Leave Act, which set out when paid work is for a permissible purpose and conditions for when a day is a keeping in touch day.

Section 79 of the Fair Work Act provides that an employee may take paid leave while he or she is taking unpaid parental leave, and that the taking of that paid leave does not break the continuity of the period of unpaid parental leave. New section 79A provides the same in respect of employees performing work on keeping in touch days. New section 79B clarifies that, if an employee takes paid leave, or performs work on a keeping in touch day during a period of unpaid parental leave, then that will not extend the period of unpaid parental leave.

Item 11 inserts new section 84A, which requires an employer, before engaging an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, to notify the replacement employee that the engagement is temporary and that the employee and employer have particular rights under the Fair Work Act. The employer must specifically notify the replacement employee of rights under subsections 77A(2) and (3), which apply in the case of a stillbirth or infant death, under subsections 77A(4) to (6) or section 84 in relation to an employee's entitlement to return to work, and section 78, which enables an employer to require an employee to return to work where the employee ceases to have responsibility for the care of the child.

This new section 84A is intended to apply to cases where a replacement employee is engaged to perform the work of another employee who is going to take or is taking unpaid parental leave, as well as where the replacement employee is performing the work of an employee who, in turn, is performing the work of another employee who is going to take or is taking unpaid parental leave

Item 12 inserts a note to section 344 of the Fair Work Act to remind readers that this section can apply to decisions about whether to consent to performing work on keeping in touch days under subsection 79A(3).

Item 13 inserts a note to subsection 536(1) of the Fair Work Act (which imposes an obligation on employers to provide pay slips to each employee) to refer readers to section 80 of the Paid Parental Leave Act, which imposes an obligation on employers to provide information to each employee in respect of instalments paid under that Act.