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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PAID PARENTAL LEAVE BILL 2010

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 BILL 2010

OUTLINE

This bill introduces Australia's first national, Government-funded Paid Parental Leave scheme (the scheme) from 1 January 2011. Parental leave pay of up to 18 weeks at the national minimum wage will be paid to eligible primary carers who have or adopt a child on or after 1 January 2011 and who can satisfy work, income and residency tests. In most cases, the mother will be the primary carer, but allowance is also made for transfers of all or part of the payment to the other parent, or to another carer, in exceptional circumstances.

From 1 October 2010, parental leave pay may be claimed through the Family Assistance Office, along with other family assistance payments, up to three months before the birth or adoption. The Government will fund employers to pay their eligible long-term employees as part of the scheme.

The participation of employers in the scheme is being phased in. Employers may opt to provide any eligible employee with parental leave pay from 1 January 2011. The requirement for employers to pay parental leave pay to their employees will take effect from 1 July 2011. Eligible claimants who are not paid by their employers will be paid by the Family Assistance Office.

This bill also contains integrity provisions, such as compliance rules for employers and right of review for employees to ensure that parental leave pay is paid to eligible parents in a timely manner. Any delays, disputes or debts that may arise in the payment process will be managed appropriately by the Family Assistance Office and the Fair Work Ombudsman.

Other family payments such as the baby bonus and family tax benefit will remain available for families not eligible for the scheme, and for those who choose not to participate in the scheme. An eligible parent could also receive family tax benefit Part A while participating in the scheme.

This bill is part of a package of bills which includes consequential amendments to related legislation, including family assistance, income tax and child support.

Financial impact statement

The Paid Parental Leave scheme will have a net cost to the Government of $1.042 billion ($1,042.4 million) over five years.

Total net cost

2009-10	2010-11	2011-12	2012-13	2013-14
$13.6 m	$196.7 m	$269.8 m	$279.0 m	$283.3 m

REGULATION IMPACT STATEMENT

The regulation impact statement appears at the end of this explanatory memorandum.

PAID PARENTAL LEAVE BILL 2010

NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

- 'Child Support Registration and Collection Act' means the *Child Support (Registration and Collection) Act 1988*;
- 'Fair Work Act' means the *Fair Work Act 2009*;
- 'Legislative Instruments Act' means the *Legislative Instruments Act 2003*; and
- 'Privacy Act' means the *Privacy Act 1988*.

Background

Overview of the Paid Parental Leave scheme

This bill introduces a Paid Parental Leave scheme (the scheme) for parents who are primary carers of a child born or adopted on or after 1 January 2011. The scheme will be funded by the Government and is the culmination of over two years of policy development and public consultation to develop a scheme to respond to Australia's social and economic circumstances. The scheme will provide working mothers, and the initial primary carers of adopted children, with access to up to 18 weeks' parental leave pay at the national minimum wage, while they stay at home to look after their baby or adopted child.

Parental leave pay will complement parents' entitlements to unpaid leave such as unpaid parental leave under the National Employment Standards. It can be received before, after, or at the same time as existing entitlements such as employer-provided paid leave such as recreation, annual and employer-provided maternity leave.

Parents will be able to lodge their claims up to three months prior to the expected date of the birth or adoption. Families will be able choose whether to participate in the scheme depending on their individual circumstances.

Families electing to participate in the scheme will not receive baby bonus (except in multiple birth cases) or family tax benefit Part B while they are receiving parental leave pay. The dependent spouse, child housekeeper and housekeeper tax offsets also will not be available during this period. Interactions between the new and existing entitlements, such as the matters described here, will generally be covered by consequential amendments to be introduced in separate bills.

Eligibility

To be eligible for parental leave pay, claimants will need to meet the work test, income test and residency requirements. A primary claimant parent will not be able to work from the date of birth until ceasing to receive parental leave pay, but may 'keep in touch' with the workplace for up to 10 days during this period while receiving parental leave pay.

To be eligible for the payment, the primary carer (usually the mother) must have:

- been engaged in work for a total period spanning at least 10 of the 13 months prior to the expected birth or adoption of the child with a break of no greater than eight weeks between any two consecutive work days; and

- have undertaken at least 330 hours of paid work during the 10-month period (an average of around one day of paid work a week).

An income limit of $150,000 (indexed in line with the baby bonus) will apply based on the primary carer's adjusted taxable income in the previous full financial year before the claim or birth, whichever is the earlier.

Parents generally will need to be living in Australia and an Australian citizen or resident from the date of birth of the child and remain so for the parental leave pay period.

Full-time and part-time employees, as well as casual workers, contractors and the self-employed, may be eligible.

If a primary carer returns to work before they have received all of their parental leave pay entitlement, the person's partner (usually the father) may receive the unused part of their parental leave pay, provided the partner meets the eligibility criteria and is the primary carer of the child.

People may become eligible in exceptional circumstances, where the mother or both parents are unable to care for the baby, based upon criteria prescribed by subordinate legislation, the PPL rules.

Level and period of pay

Eligible working mothers will receive parental leave pay for up to 18 weeks at the national minimum wage, which is currently $543.78 a week. In most cases, the person will receive the payment through their employer and it will be taxable, like salary and wages. The only other deductions allowed from parental leave pay will be for child support obligations and deductions authorised by the recipient.

Parents can nominate the period over which they wish to receive their parental leave pay. The start date cannot be before the child's birth or date of placement for adoption. Parental leave pay must be taken in one continuous 18 week period. All of the parental leave pay must be received before the child's first birthday, or within 12 months of the date of placement for adoption.

How will parental leave pay be paid?

In most cases, parental leave pay will be paid by the employer. The role of employers is being phased in over the first six months of the scheme, to help employers transition to the new arrangements. Employers can choose to provide parental leave pay to their employees from the commencement of the scheme with their employees' agreement. Employers may be required to provide parental leave pay to eligible employees from 1 July 2011.

Employers will only be required to pay their long-term employees, that is, people who will have been their employee for 12 months or more prior to the expected date of birth or placement in the case of adoption, or the actual date of birth or placement, depending on when the claim is made.

In other cases, the Family Assistance Office will make the payment directly to the parent.

How will Paid Parental Leave funding be provided to employers to enable them to pay eligible employees?

The Family Assistance Office will advise an employer if they are required to provide parental leave pay to an employee. Employers will have a right of review of the decision that they pay parental leave pay.

Paid Parental Leave funding will be provided to employers before the employer is required to pay their employee. There will be no obligation on employers to provide parental leave pay to their employees until they have received a sufficient funding amount from the Family Assistance Office.

Funding amounts will be paid to employers before the cut-off day for any changes to an employee's pay for that pay period.

Parental leave pay will be funded by the Australian Government out of Consolidated Revenue. It is expected that the cost of the scheme will be offset by increases in tax revenue and by reductions in baby bonus and family tax benefit Part B outlays and tax offsets for people receiving parental leave pay.

Chapter 1 – Introduction

Part 1-1 – Introduction

Division 1 – Preliminary

Clause 1 – Short title

This clause sets out how the new Act is to be cited, that is, as the *Paid Parental Leave Act 2010.*

Clause 2 – Commencement

This clause provides that the new Act will commence on 1 October 2010.

Clause 3 – Act binds the Crown

This clause states that the new Act binds the Crown in each of its capacities.

However, the new Act does not make the Crown liable for an offence. This does not prevent the Crown from being ordered to pay a pecuniary penalty for contravention of a civil penalty provision (new section 147 refers) or to pay a pecuniary penalty under an infringement notice (new section 159 refers).

Division 2 – Guide to this Act

Clause 4 – Guide to this Act

This clause provides a Guide to the new Act. It sets out the broad structure of the Act and a summary of how the Paid Parental Leave scheme works.

Part 1-2 – Definitions

Division 1 – Guide to this Part

Clause 5 – Guide to this Part

This clause gives the reader a brief outline of the matters dealt with in Part 1-2. Part 1-2 is about the terms used in the new Act and provides a Dictionary of those terms. The terms are either defined in the Dictionary or the Dictionary provides a signpost to the provision that defines the term.

Division 2 – The Dictionary

Clause 6 – The Dictionary

This clause defines the terms that are used in the new Act. In this explanatory memorandum, the defined terms will be addressed in the context in which they appear.

Chapter 2 – When parental leave pay is payable to a person

Background

This Chapter sets out when parental leave pay is payable to a person. If a person makes an effective claim for parental leave pay, meets the required eligibility criteria, and meets various other criteria (including verifying and, if required, demonstrating that they have sought registration of the child's birth), the Secretary may make a payability determination that parental leave pay is payable to the person. If the Secretary is not satisfied that the person meets the eligibility criteria, the Secretary will make a payability determination that parental leave pay is not payable to the person. A determination that parental leave pay is payable will establish the period for which parental leave pay is payable. Whether parental leave pay is to be paid to the person by the person's employer or by the Secretary is dealt with in Chapter 3.

This Chapter sets out how an effective claim for parental leave pay is made, and how the Secretary will determine the claim in both normal and exceptional circumstances. It covers the eligibility criteria and situations in which parental leave pay is to be shared between the primary claimant and partner, as a secondary claimant, or, in exceptional circumstances, with a subsequent claimant. Claims for parental leave pay by adoptive parents are also included. More unusual cases of claims for parental leave pay by people other than a child's birth mother, and sharing of the parental leave pay with someone other than the birth mother's partner, will generally be dealt with under legislative instruments subordinate to the Act, known as the PPL rules.

Critical to the determination provisions is whether or not a particular claimant is a primary claimant, secondary or tertiary claimant for parental leave pay for a particular child. The primary claimant's claim will generally be the first claim for parental leave pay for the child, and will generally be made by the child's birth mother or adoptive parent. If a determination is made that parental leave pay is payable to the primary claimant, and then care arrangements for the child change such that the primary claimant is not able to be paid the full 18 weeks of parental leave pay for the child, a secondary claimant may claim and a determination may be made that the balance of the 18 weeks' parental leave pay under the primary claim to which the secondary claim relates is payable to the secondary claimant.

A secondary claim relates to a particular primary claim by virtue of claiming eligibility for a period of time that would otherwise be, or fall within, the 18 week period of parental leave pay established by the primary claim. In exceptional circumstances, a tertiary claim may relate to a particular primary and secondary claim by claiming eligibility in relation to a period of time within the 18 weeks that remains after other claimants have been paid.

Part 2-1 – Key provisions

Division 1 – Guide to this Part

This new Division sets out a Guide to this Part.

Division 2 – When parental leave pay is payable to a person

Clause 8 – A determination must be made for parental leave pay to be payable to a person

Clause 9 – For the determination to be made, the person must be eligible

Clause 10 – For the determination to be made, the person must claim

Clause 11 – The determination must specify the person's PPL period

Clause 8 provides that parental leave pay is payable to a person for a child for a period if a determination of the Secretary that parental leave pay is payable to the person for that period is in force under new section 13, 14, 15, 16 or 17. The determination cannot be made unless the person is eligible for parental leave pay during the period (clause 9). (Eligibility for parental leave pay is dealt with at Division 2 – when a person is eligible for parental leave pay.) New sections 13, 14, 15, 16 and 17 also provide for a determination to be made by the Secretary that parental leave pay is not payable.

The period for which parental leave pay is payable must be specified in the determination. This period is set under clause 11. That period is the person's ***PPL period***. The person's PPL period must be the same as, or inside, the maximum PPL period for the child (subclause (2)). The maximum PPL period for the child is established by the primary claimant claim for parental leave pay for the child. The maximum PPL period for a child is the period that starts on the maximum PPL period start day, and ends on the maximum PPL period end day (subclause (3)).

In order for the determination to be made, the person must make a claim for parental leave pay (clause 10). If the person has made an effective primary claim for the child, the person is the primary claimant (paragraph (a)). If the person makes an effective secondary claim for the child, the person is the secondary claimant (paragraph (b)). If the person makes an effective tertiary claim for the child, the person is the tertiary claimant (paragraph (c)). 'Primary claim', 'secondary claim' and 'tertiary claim' are all defined in the Dictionary by reference to new section 53. Similarly, 'primary claimant', 'secondary claimant' and 'tertiary claimant' are defined in the Dictionary in each case as a person who has made an effective claim of that type for parental leave pay for a child.

New Division 2 of Part 2-4 deals with claims for parental leave pay, and when they are effective. It requires that, to be effective, a primary claim nominate a start date (see sections 55 and 57). As a result, only a primary claim can establish a maximum PPL period for a child, such that amounts of parental leave pay may potentially be available to the primary, and subsequent secondary or tertiary, claimants.

The maximum PPL period start day for a child is defined by subclause 11(4). The start day, and whether the claimant's nominated start date will have effect depends upon whether or not various things have happened by the day that is 28 days after the birth of the child (the 'relevant day'). If both an effective primary claimant claim was made and the child's birth was verified by the primary claimant on or before the relevant day, the start day can be the date of the child's birth, or a later date nominated by the primary claimant. If the claim is made before the relevant day, but the child's birth is not verified by this day, the earliest start day available is the date upon which the birth was verified. If the claimant has nominated a start date that is after the date the birth was verified, then the start day will be the nominated date. If the claim is made after the relevant day, then the start day can be no earlier than the date of claim. If the claimant has nominated a start date that is later than the date of claim, then this date can have effect as the start day.

The maximum PPL period end day for a child (subclause 11(5)) depends upon whether there are 125 days remaining after the maximum PPL period start day before the child's first birthday (which is 18 weeks from that start day, once the start day is included). If there are 125 days remaining, then the end day will be the day that is 125 days after the start day, that is, the full 18 weeks. If not, the maximum PPL period will end on the day before the child's first birthday. In this case, a full 18 weeks of parental leave pay cannot be paid to the claimant.

Part 2-2 – Determinations about whether parental leave pay is payable to a person

Division 1 – Guide to this Part

Clause 12 – Guide to this Part

Clause 12 sets out a guide to this Part.

Division 2 – Determinations about whether parental leave pay is payable to a person

This new Division provides for determinations to be made on claims, depending upon whether they are a primary, secondary or tertiary claim, and depending upon whether the claim is a primary claim made at the same time as a secondary claim. A determination under this new Division that parental leave pay is payable to a claimant will set the PPL period for that claimant. Parental leave pay may then be paid to the claimant for the days in their PPL period either by their employer, or by the Secretary, under new Chapter 3.

Determinations that parental leave pay is not payable are also made under these provisions.

Notes to each section refer the reader to new Division 3, which may prevent the Secretary from making a determination until additional matters are satisfied.

Clause 13 – Determination on a primary claim made alone

Clause 13 deals with determinations on a primary claim made alone. Subclause (1) provides that the Secretary must make a determination under this section if a primary claimant has made an effective primary claim for parental leave pay for a child and another person has not made an effective secondary claim for parental leave pay for the child at the same time.

Under subclause (2), if the Secretary is satisfied that the primary claimant was or will be eligible for parental leave pay for each day in the period that starts on the day the child was born, and ends on the last day of the primary claimant's PPL period, then the Secretary must determine that parental leave pay is payable to the primary claimant for this period. If the Secretary is not satisfied that the primary claimant was or will be eligible for each day from the child's birth until the start of the maximum PPL period for the child, then the Secretary must determine that parental leave pay is not payable to the primary claimant (subclause 13(4)). If the Secretary is satisfied that the primary claimant will be eligible from birth until at least the start day of the maximum PPL period for the child, then the Secretary must specify the primary claimant's PPL period under subclause 13(3).

The primary claimant's PPL period must start on the maximum PPL period start day for the child (for 'maximum PPL period start day' see new subsection 11(4)). The Secretary must then specify that the primary claimant's PPL period will end on the last day of the child's maximum PPL period, if the Secretary is satisfied that the primary claimant was or will be eligible for parental leave pay on each day in that period. If not satisfied, the Secretary must specify a period that is shorter than the child's maximum PPL period, ending on the last day in the child's maximum PPL period that the primary claimant was or will be eligible for parental leave pay for the child.

Clause 14 – Determination on primary and secondary claims made jointly – claimants sharing parental leave pay

Clause 14 deals with determinations on primary and secondary claims made jointly, where the claimants are to share parental leave pay. It applies (subclause 14(1)) where a primary claimant has made an effective primary claim and a secondary claimant has made an effective secondary claim at the same time, and the primary claimant has requested that parental leave pay that is or may be payable for the child be shared between the primary claimant and the secondary claimant. In this case, the Secretary must determine the primary claim and the secondary claim under this clause.

First, the Secretary must make a determination in relation to the primary claimant's claim. The Secretary must determine that parental leave pay is payable to the primary claimant (subclause 14(2)), if the Secretary is satisfied that the primary claimant was or will be eligible for parental leave pay on each day in the period that starts the day the child was born and ends on the last day of the primary claimant's PPL period. The Secretary will do this by applying the same approach as set out above at new section 13.

However, in the case of a primary and secondary claim made jointly, the Secretary will have been advised the date from which the secondary claimant will take over the primary care of the child and start being eligible for parental leave pay. If this occurs, the primary claimant will cease to be eligible for parental leave pay on that day. If the Secretary is satisfied that the primary claimant will cease to be eligible on a particular day, the Secretary must determine that the primary claimant's PPL period ends on the last day on which the primary claimant will be eligible for parental leave pay (subclause 14(3)).

Provided the Secretary has made a determination that parental leave pay is payable to the primary claimant, the Secretary will then consider the eligibility of the secondary claimant. It cannot be determined that parental leave pay is payable to the secondary claimant if it has not previously been determined that parental leave pay is payable to the primary claimant. In order to be eligible as a secondary claimant, the secondary claimant must be eligible on each day in their PPL period, which must start on the first day after the end of the primary claimant's PPL period (subclause 14(6)). This ensures that parental leave payments for a child are paid in an unbroken block of up to 18 weeks.

If the Secretary is satisfied that the secondary claimant was or will be eligible for parental leave pay for the child on each day that remains in the child's maximum PPL period, the end day of the secondary claimant's PPL period is the maximum PPL period end day. Otherwise, the end day of the secondary claimant's PPL period is the last day in the maximum PPL period for the child that the Secretary is satisfied that the secondary claimant was or will be eligible for parental leave pay for the child (subclause 14(6)).

For both the primary and secondary claimant, the Secretary must determine that parental leave pay is not payable if the Secretary is not satisfied of their eligibility as set out above (subclauses 14(4) and (7)).

Clause 15 – Determination on primary and secondary claims made jointly – secondary claimant to get all the parental leave pay

Clause 15 applies where the primary claimant and secondary claimant seek payment of all 18 weeks of parental leave pay to the secondary claimant, that is, the primary claimant is to receive nothing. The primary claimant must still have made a primary claim for parental leave pay for the child, but will have requested, in the claim, that the full amount of parental leave pay that is or may be payable for the child be paid to the secondary claimant (subclause 15(1)). Because of this, the Secretary must first determine that parental leave pay is not payable to the primary claimant. However, the Secretary must be satisfied of some particular aspects of the primary claimant's eligibility before the Secretary may determine that parental leave pay is payable to the secondary claimant.

The Secretary must be satisfied that the primary claimant satisfies the work test and income test on the day the determination is being made (subparagraph 15(3)(a)(i)). He or she must also be satisfied the primary claimant satisfied the Australian residency test on the day the child was born (subparagraph 15(3)(a)(ii)). The Secretary must be satisfied the secondary claimant is eligible for parental leave pay on each day in the secondary claimant's PPL period (paragraph 15(3)(b)).

The secondary claimant's PPL period must start on the maximum PPL period start day for the child and may end either on the maximum PPL period end day for the child, if the Secretary is satisfied that the secondary claimant is eligible for all days in that period, or, otherwise, on the last day in the maximum PPL period for the child that the Secretary is satisfied the secondary claimant was or will be eligible for parental leave pay for the child (subclause 15(5)).

The Secretary must consider the eligibility for parental leave pay of the primary and secondary claimant during any period between the day the child was born and the maximum PPL period start day for the child (established by new subsection 11(4)). During this period, either the primary or secondary claimant must be eligible for parental leave pay for the whole period, or it must be the case that the primary claimant was or will be eligible for parental leave pay on each day in the first part of the period, and the secondary claimant was or will be eligible for parental leave pay on each day in the last part of the period. This provides flexibility where the secondary claimant has other paid leave available, to allow them to start receiving parental leave pay from a day after they became the child's primary carer.

Clause 16 – Determinations on a secondary claim made after the primary claim

Clause 16 covers a situation where a secondary claimant makes a claim for parental leave pay for a child other than jointly with the primary claimant (subclause 16(1)). This may apply in situations where, for example, the primary claimant claims and intends to take the full amount of parental leave pay, but 12 weeks into her PPL period decides to go back to work and give primary care of the child to her partner. The secondary claimant cannot be eligible unless the Secretary has first made a determination on the primary claimant's claim (subclause 16(2)) and is satisfied that parental leave pay is payable to the primary claimant for a PPL period that ends on the day before the day the secondary claimant's PPL period starts (subclause 16(4)). In a case where the primary claimant's PPL period does not already end on the required day, if the Secretary is satisfied that the primary claimant has ceased to be eligible on the day prior to the first day the secondary claimant is eligible for parental leave pay, the Secretary may review and vary the PPL period set by the primary claimant's determination under new Chapter 5.

If the Secretary is satisfied that the secondary claimant will be eligible for parental leave pay for each day in their PPL period, the Secretary must determine that parental leave pay is payable to the secondary claimant (subclause 16(3)). The secondary claimant's PPL period must start on the day in the maximum PPL period for the child that is the first day after the day the primary claimant's PPL period ends. The secondary claimant's PPL period must then end on the last day of the maximum PPL period for the child, or such earlier day that the Secretary is satisfied is the last day that the secondary claimant will be eligible for parental leave pay (subclause 16(4)).

If the Secretary is not satisfied as set out above, then the Secretary must determine that parental leave pay is not payable to the secondary claimant (subclause 16(5)).

Clause 17 – Determination on a tertiary claim

Tertiary claims may only be considered when determinations have been made that parental leave pay is payable to both a primary and a secondary claimant in respect of a particular child and of a particular maximum PPL period for the child. Tertiary claims may only be made in circumstances that are exceptional, by virtue of new subsection 54(3).

A claim is made in 'exceptional circumstances', according to the Dictionary (section 6) if it is made by a person who satisfies paragraph 54(1)(c) (which deals with primary claims), paragraph 54(2)(d) (which deals with secondary claims), or subsection 54(3) (which deals with tertiary claims). These paragraphs allow the PPL rules to prescribe circumstances as exceptional circumstances in which a claim may be made.

If the Secretary is satisfied that a determination that parental leave pay is payable to the secondary claimant was or will be in force on the day before the start of the tertiary claimant's PPL period (which can only arise under new sections 14, 15 and 16 where a secondary claim has been made and determined), then the Secretary may determine that parental leave pay is payable to the tertiary claimant where the Secretary is satisfied that the tertiary claimant is eligible for each day of the tertiary claimant's PPL period. New Part 2-3, at paragraph 31(4)(b), allows a person to be eligible for parental leave pay if they satisfy the conditions prescribed by the PPL rules. This will allow for the prescription of conditions in relation to cases which are unusual and exceptional, to allow the Secretary to determine that parental leave pay is payable to such claimants.

The tertiary claimant's PPL period must start on the day after the end of the secondary claimant's PPL period. If the Secretary is satisfied that the tertiary claimant is eligible for all remaining days in the child's maximum PPL period, then the tertiary claimant's PPL period ends on the child's maximum PPL period end day. Otherwise, the tertiary claimant's PPL period ends on the last day in the child's maximum PPL period for which the Secretary is satisfied that the tertiary claimant was or will be eligible (subclause 17(3)).

If not so satisfied, the Secretary must determine that parental leave pay is not payable to the tertiary claimant (subclause 17(4)).

Division 3 – When the Secretary cannot make a determination that parental leave pay is payable

Because an effective claim may be made prior to the birth of the child to whom the claim relates, the claimant may be required to provide additional information before the Secretary may determine that parental leave pay is payable. In other circumstances, the Secretary should not determine that parental leave pay is payable to the person because they have already been paid parental leave pay for the child or another related child. This new Division sets out these restrictions.

Clause 18 – The child's birth has not been verified

Subclause 18(1) restricts the Secretary from making a payability determination that parental leave pay is payable to a person for a child unless the primary claimant has verified the child's birth. An effective claim for parental leave pay may be made prior to or shortly after the birth of the child when the claimant has not provided, or cannot at that time provide, verification of the birth. This section requires that the Secretary wait until verification of the birth has been provided before making a payability determination that parental leave pay is payable for the child. This does not restrict the Secretary from determining earlier than verification is provided that parental leave pay is <u>not</u> payable to the claimant for the child.

Subclause 18(2) provides that a person verifies a child's birth if the person gives the Secretary a completed birth verification form for the child, and, if applicable, gives the Secretary information showing that the child's birth has been registered under the law, or that the person has applied to have the birth of the child registered under the law.

The provision of information about the registration of the birth is only required if the claimant is a parent, other than an adoptive parent, of the child, the child is not a stillborn child, and the claimant is, under a law of a State or Territory, responsible (whether alone or jointly) for registering the birth of the child under the law.

'Parent' is defined in the Dictionary, new section 6, to have its ordinary meaning except in particular circumstances. When used in relation to a child who has been adopted, it means an adoptive parent of the child. When used in relation to a child born because of the carrying out of an artificial conception procedure – it means a person who is a parent of the child under section 60H of the *Family Law Act 1975*. When used in relation to a child born because of a surrogacy arrangement – includes a person who is a parent of the child under section 60HB of that Act.

A 'stillborn' child is defined in the Dictionary, section 6, to mean a child who weighs at least 400 grams at delivery or whose period of gestation was at least 20 weeks, and who has not breathed since delivery, and whose heart has not beaten since delivery. This definition mirrors the definition of stillborn child in the family assistance law. The requirement for registration of birth is the same as, and applies to the same people as, the equivalent requirement for baby bonus under the family assistance law.

The effect of this section is modified by new section 275 in respect of adopted children, to provide that reference to a birth verification form for a child is a reference to information required by the Secretary about the adoption of the child (paragraph 275(d)). The Secretary may approve a birth verification form for the purposes of verifying the birth of a child, and, as the result of new section 275, may decide what information may be required about the adoption of a child to satisfy the requirements of this new section.

Clause 19 – The child was born before 1 January 2011

This clause restricts the Secretary from making a payability determination that parental leave pay is payable to a person for a child if the child was born before 1 January 2011, when the Paid Parental Leave scheme is to commence. The effect of this new section is varied in relation to an adopted child by new section 275, such that parental leave pay may still be paid in respect of an adopted child born prior to 1 January 2011 but placed with the adoptive parents of the child on or after 1 January.

Clause 20 – Multiple births

This clause provides that the Secretary must not make a payability determination that parental leave pay is payable to a person for a child if the child and another child are born during the same multiple birth, and parental leave pay is or was payable to the person or another person for the other child. This restriction applies even if children born during the same multiple birth are being cared for within different families, for example, as the result of their parents separating. Baby bonus may be available for other children born during the same multiple birth.

New section 275 modifies the operation of this new section in the case of an adopted child, where the child was adopted during the same multiple adoption as other children. This will restrict the Secretary such that parental leave pay may only ever be payable in respect of one of the adopted children adopted during the same multiple adoption. Baby bonus may be available for other children adopted during the same multiple adoption.

Clause 21 – The person etc. has already been paid parental leave pay

This clause prevents the Secretary from determining that parental leave pay is payable to a person for a child if the person has been paid parental leave pay for the child under a different claim, whether a primary or secondary claim.

Further, the Secretary cannot determine that parental leave pay is payable to a person for a child if the person is the primary claimant, and either the person's current partner has been paid parental leave pay for the child, or a former partner was paid parental leave pay for the child when he or she was the person's partner.

If the person is the secondary claimant, the person's partner has been paid parental leave pay for the child (other than as the primary claimant to which the person's secondary claim relates), or a former partner of the person was paid parental leave pay for the child (other than as the primary claimant to which the person's secondary claim relates).

The limitations in this new section do not apply to a claim made in exceptional circumstances. For these cases, limitations will be established by the PPL rules.

Division 4 – General provisions applying to determinations about whether parental leave is payable

Clause 22 – Assumptions when making the determination

This clause provides that, in deciding whether to make a payability determination, the Secretary may act on the assumption that the state of affairs known to the Secretary when making the determination will remain unchanged. This would not prevent the Secretary from reviewing the determination if the Secretary becomes aware that the state of affairs has changed or was different.

Clause 23 – When the determination is in force

This clause provides that a payability determination comes into force on the day it is made and continues in force unless it is revoked or set aside. Revocation of a determination may occur under new section 25, or the determination may be set aside under new Part 5-2 when a decision is being reviewed.

Clause 24 – Notice of the determination

This clause requires the Secretary, if he or she makes a payability determination, to give notice of the determination to the claimant, stating whether parental leave pay is payable; and, if parental leave pay is payable – the claimant's PPL period, and that the claimant may apply for review of the determination in the manner set out in new Part 5-2.

However, in all such cases, new subsection 306(4) provides that the determination is not ineffective just because this notice requirement has not been complied with.

Clause 25 – Revoking the determination on request

This clause allows a claimant to request a revocation of their payability determination that parental leave pay is payable, where, for example, the claimant has decided that they would prefer to receive baby bonus for their child. Subclause (1) provides that, if a payability determination has been made that parental leave pay is payable to a person and the person requests the Secretary to revoke the determination before the start of the person's PPL period, then the Secretary must revoke the determination. The revocation must be in the form approved by the Secretary.

The revocation is taken to have come into force on the day the person requested the Secretary to revoke the determination (subclause (2)).

Division 5 – Initial eligibility determinations

Initial eligibility determinations may be made where an effective claim for parental leave pay has been made, but the Secretary cannot yet make a determination that parental leave pay is payable to the claimant, for example, because the child has not yet been born and hence the birth verified as required by new Subdivision 3. The Secretary may determine that parental leave pay is not payable to the claimant if the Secretary is not satisfied of the matters required for the claimant to be eligible for parental leave pay for the required period at that time.

However, if the claimant appears likely to be eligible and parental leave pay likely to be payable, the Secretary may make an initial eligibility determination in order to allow the Secretary to make an employer determination under new Chapter 3, and start engaging the claimant's employer. An initial eligibility determination will also allow the person to know early on that they are likely to be eligible, to allow them to plan ahead financially.

The establishment of eligibility criteria by the making of an initial eligibility determination does not remove the requirement that these criteria be reconsidered when the Secretary is making a payability determination.

Clause 26 – Initial eligibility determinations

This clause allows the Secretary to make an initial eligibility determination. Subclause (1) deals with initial eligibility determinations for primary claimants. The Secretary may determine that the person is initially eligible for parental leave pay for a child if, when making the determination, the Secretary is satisfied that the person satisfies the work test, the income test and the Australian residency test.

Subclause (2) deals with initial eligibility determinations for secondary claimants. The Secretary may determine that a person is initially eligible for parental leave pay for a child if, when making the determination, the Secretary is satisfied that the person satisfies the work test, the income test and the Australian residency test, or will satisfy those tests on the day the person becomes the child's primary carer. This is a more generous timeframe over which the person may meet these eligibility criteria because, in general, the time at which the Secretary may be considering an initial eligibility determination may be well in advance of the day upon which the secondary claimant will become the child's primary carer. It will also allow the primary and secondary claimants to claim at the same time and receive notification that they are both likely to be eligible for parental leave pay. This will help them to plan in advance how they will organise their caring and work arrangements.

Clause 27 – Assumptions when making the initial eligibility determination

This clause provides that, in deciding whether to make an initial determination, the Secretary may act on the assumption that the state of affairs known to the Secretary when making the determination will remain unchanged. This does not prevent the actual state of affairs being looked at again when a payability determination is being made.

Clause 28 – When the initial eligibility determination comes into force

This clause provides that an initial eligibility determination comes into force on the day it is made.

Clause 29 – Notice of the initial eligibility determination

This clause provides that, if the Secretary makes an initial eligibility determination under new section 26, the Secretary must give a notice of the determination to the claimant. However, new subsection 306(4) provides that the determination is not ineffective just because this requirement has not been complied with.

Part 2-3 – Eligibility for parental leave pay

Division 1 – Guide to this Part

Clause 30 – Guide to this Part

This clause sets out a Guide to this Part.

Division 2 – When a person is eligible for parental leave pay

Clause 31 – when a person is eligible for parental leave pay

This clause deals with when a person is eligible for parental leave pay for a child on a day.

Subclause (2) deals with the most common case, when the child is not stillborn, and the circumstances are not otherwise exceptional. In this case, a person is eligible for parental leave pay on a day if, on that day, the person satisfies the following tests:

- the work test;
- the income test;
- the Australian residency test;
- the person is the primary carer of the child;

- the person has not returned to work;

- the person and the person's partner are not entitled to baby bonus for the child, and a former partner of the person was not entitled to baby bonus for the child when he or she was the person's partner.

Each of these tests is set out in subsequent Divisions of this new Part.

Subclause (3) provides that a person is eligible for parental leave pay for a child who was stillborn, or has died before that day if, on that day, the person would be eligible for parental leave pay for child under new subsection (2), disregarding whether the person has returned to work, and, instead of considering whether the person is the primary carer for the child, considering whether the person would have been the child's primary carer on that day had the child not been stillborn or died.

Subclause (4) provides that a person is eligible for parental leave pay for a child on a day if, on that day, the person satisfies the conditions prescribed by the PPL rules (although, for a primary claimant, the person must still satisfy the work test, the income test and the Australian residency test). This gives flexibility to allow tailored eligibility criteria to be determined for exceptional situations. For example, a navy officer claims PPL, is found eligible and her PPL period starts on the date of birth. Ten weeks into her PPL period she is recalled to active duty. In this situation, as she is unable to refuse to return to duty, PPL rules could be made to enable the Secretary to disregard her return to work and continue to pay her parental leave pay for the remaining eight weeks.

Subclause (5) makes it clear that, despite subsections (2), (3) and (4), a person is not eligible for parental leave pay for a child on a day if, on that day, the person is deceased. If the primary carer is deceased, a secondary carer may be eligible.

Division 3 – The work test

Clause 32 – When a person satisfies the work test

This clause sets out a method statement for working out whether a person satisfies the work test on a day. The work test applies by reference to work performed prior to the birth of the child. Hence, the result of the work test in relation to a particular day will be the same result for all days in the person's PPL period.

Step 1 is to work out the person's work test period under new section 33.

Clause 33 – The work test period

Subclause (1) provides that a primary claimant's work test period is the 392 days (which is broadly equivalent to 13 months) immediately before a specified date that is either the expected or actual date of birth of the child. When this test is being applied prior to the birth of the child for the purposes of an initial eligibility determination, the expected date of birth of the child will be used (subclause (2)). If the test is being applied for the purposes of a payability determination after the birth of the child, the period is immediately prior to:

- if the child is born on or before the expected date of birth of the child, the day the child is born;

- if the child is born after the expected date of birth of the child, either the day the child is born or, if the person does not satisfy the work test on this basis, the day that is the expected date of birth of the child.

This is to ensure that claimants don't go back to work after the birth in order to meet the work test, but to provide the most flexible test options where the claimant has left work and the baby is born late. For example, a woman who leaves work three months before the expected date of birth, having met the work test, may no longer be eligible if the baby was born two weeks after the expected date of birth and that date was used as the reference date for the work test.

Subclause (3) provides that the work test period for a secondary claimant is the 392-day (broadly, 13-month) period immediately before the person becomes the child's primary carer. Where the claim is in relation to an adopted child, new section 275 substitutes reference to the day the child is placed during the process of adoption for the child's date of birth. Similarly, where the claim is made in exceptional circumstances, new section 276 substitutes reference to the day the claimant became the child's primary carer for the date of birth of the child.

Step 2 in the method statement in clause 32 requires working out the days in the work test period on which the person has and has not performed qualifying work. A note advises the reader that 'qualifying work' is defined in new section 34.

Clause 34 – When a person performs qualifying work

This clause provides that a person performs qualifying work if the person either performs at least one hour of paid work on a day or the person takes a period of paid leave of at least one hour on a day. New section 35 sets out when a person performs 'paid work'.

Paid leave has its ordinary meaning, and would generally include paid recreation, carer's or sick leave, or leave while receiving worker's compensation payments. Subclause (2) provides that the PPL rules may prescribe what is, or is not, paid leave. The PPL rules may vary the ordinary meaning of 'paid leave'.

Clause 35 – When a person performs paid work

This clause provides for when a person performs paid work. The term includes work as a self-employed person or work as the result of engagement, for example as a defence force member or law enforcement officer. Subclause (1) provides that a person performs paid work on a day if, on that day, the person performs work (whether as an employee, a contractor or otherwise and whether or not in Australia) for another entity for remuneration or other financial benefit.

Other financial benefit includes non-financial remuneration. As a result, for example, work performed on a family farm for remuneration in the form of housing and food etc, would be included.

An 'entity' is defined in the Dictionary at new section 6 to mean any of:

- an individual;
- a body corporate;
- a body politic;
- a partnership;
- any other unincorporated association or body of persons;
- a trust.

Paid work would include jury service, or paid work performed in prison.

Subclause (2) makes it clear that a person is taken not to perform paid work for the purposes of subclause (1) if the other entity is controlled by the person (whether alone or with others). These cases are people who are regarded as self-employed, and are covered by subclause (3) below.

Subclause (3) provides that a person performs paid work on a day if the person performs work for the purpose of a business that is carried on (whether in or outside of Australia) by the person (whether alone or with others) or an entity that is controlled by the person (whether alone or with others). The business must be carried on for profit, that is, not entirely for a charitable purpose.

A person 'controls' an entity if the person has the capacity to determine the outcome of decisions about the entity's financial and operating policies (subclause (4)).

Subclause (5) provides that the PPL rules may prescribe what is or is not taken to be paid work.

Step 3 in the method statement in clause 32 involves working out whether any days on which the person has not performed qualifying work during the work test period fall within a permissible break. A note directs the reader to new section 36 for the definition of 'permissible break'.

Clause 36 – When there is a permissible break

This clause provides both for permissible breaks between two work days in the work test period, and for permissible breaks at the beginning of the work test period.

Subclause (2) provides that a break between two days on which the person performed qualifying work (work days) in the work test period is a permissible break if there were no more than 56 consecutive days (equivalent to 8 weeks) between those two work days.

For example, if a woman works for three months, takes unpaid leave for six weeks for a holiday, then returns to work for another six months before having the baby, the holiday would be a permissible break because it was only around 42 days in length.

Subclause (3) provides for permissible breaks where the person has performed work on a day before the start of the work test period. Where the work day occurs no more than 56 consecutive days prior to the first day of work within the work test period, then the period from the beginning of the work test period until the first work day in the work test period are days falling within a permissible break.

For example, a woman's work test period starts on 1 February. She worked up until 15 January, went on unpaid leave and returned to work on 15 February. She could count 15 February as the first day in her work test period because she had a permissible break (31 days) between this day and the previous work day even though that day was outside the work test period.

Step 4 of the method statement in clause 32 then requires working out whether there is a period (a 'qualifying period') of 295 days (or approximately 10 months) in the work test period that are days on which the person has performed qualifying work, or that fall within a permissible break.

The 10-month rule makes it easier for mothers to qualify for PPL for second and subsequent children. The rule is also more flexible than the more common '12 months' continuous service' to allow for time not worked as a result of illness or pregnancy complications prior to the birth of the child. It provides more flexibility for casual employees and contractors.

Step 5 of the method statement in clause 32 provides that if the person has performed at least 330 hours of qualifying work in the qualifying period then the person satisfies the work test.

If a person works for an hour on a day, but is required under their relevant award or similar to be paid for a greater minimum period of hours of work, for example, three hours of work, they are still only regarded as having performed an hour of paid work for the purposes of this test. Similarly, if they have worked for a larger number of hours than the hours for which they have been paid, only the hours of paid work apply for the purposes of this test.

Division 4 – The income test

The income limit (initially $150,000) will be indexed under new Subdivision B.

Subdivision A – The income test

Clause 37 – When a person satisfies the income test

This clause provides that a person satisfies the income test if the person's adjusted taxable income for the reference income year is not more than the relevant PPL income limit.

Clause 38 – A person's adjusted taxable income

This clause provides a definition of adjusted taxable income. Adjusted taxable income is to be worked out in accordance with Schedule 3 to the Family Assistance Act (defined in the Dictionary to mean the *A New Tax System (Family Assistance) Act 1999*), disregarding subclause 2(2) and clauses 3 and 3A of that Schedule. The disregarded clauses relate to factoring in a partner's income for family assistance purposes, which is not relevant for the purposes of paid parental leave. Adjusted taxable income for family assistance purposes (including for the purposes of baby bonus) broadly includes:

- taxable income;
- foreign income;
- some tax free pensions and benefits;
- adjusted fringe benefits;
- deductible child maintenance;

- total net investment loss;
- reportable superannuation contributions.

Clause 39 – The reference income year

This clause sets out the reference income year. If the person is a primary claimant, the reference income year is the income year which ended before the earlier of the day the person made the claim, and the day the child was born. If the person is a secondary claimant, the reference income year is the income year which ended before the earlier of the day the person made the claim, and the day the person became the child's primary carer.

Where the claim is in relation to an adopted child, new section 275 substitutes reference to the day the child is placed during the process of adoption for the child's date of birth. Similarly, where the claim is made in exceptional circumstances, new section 276 substitutes reference to the day the claimant became the child's primary carer for the date of birth of the child.

Clause 40 – The relevant PPL income limit

This clause provides for the relevant PPL income limit. If the person is a primary claimant, the relevant PPL income limit is the income limit which applied on the earlier of the day the person made the claim, and the day the child was born. If the person is a secondary claimant, the relevant PPL income limit is the income limit which applied on the earlier of the day the person made the claim, and the day the person became the child's primary carer.

Similarly, new sections 275 and 276 may change references to the child's date of birth to either the date of placement of an adopted child, or the day a person became a child's primary carer in exceptional circumstances.

Clause 41 – The PPL income limit

This clause provides that the PPL income limit that applies on a day is, if the day is on or after 1 October 2010 but before 1 July 2012 – $150,000; and, if the day is on or after an indexation day (the relevant index day) but before the next indexation day – the indexed amount worked out under new Subdivision B on the relevant indexation day.

<u>Subdivision B – Indexation of the PPL income limit</u>

Clause 42 – Indexation of the PPL income limit

This clause provides for indexation of the PPL income limit on 1 July in each year (the indexation day) starting on 1 July 2012.

Subclause (2) sets out a method statement for working out the indexed amount for the PPL income limit on the indexation day. **Step 1** involves working out the amount (the previous amount) for the PPL income limit that applied in the day immediately before the indexation day.

Step 2 uses new section 43 to work out the indexation factor on the indexation day.

Clause 43 – The indexation factor

This clause uses a formula, namely:

$$\frac{\text{Index number for the reference December quarter}}{\text{Index number for the base December quarter}}$$

Each of these terms is then separately defined.

Base December quarter means the December quarter that has the highest index number of the December quarters before the reference December quarter (but not earlier than the December quarter 2007). This earliest quarter was chosen in order to maintain parity with baby bonus.

Index number, for a quarter, means the All Groups Consumer Price Index number that is the weighted average of the eight capital cities and is published by the Australian Statistician in relation to that quarter.

Reference December quarter means the last December quarter before the indexation day.

Subclause (2) provides that the indexation factor is to be worked out to three decimal places, but increased by 0.001 if the fourth decimal place is more than 4.

Subclause (3) provides that, if the indexation factor worked out under subclauses (1) and (2) would be less than 1, that indexation factor is to be increased to 1. This prevents the indexation factor reducing the income limit at any stage.

Subclause (4) provides that amounts are to be worked out under this clause using only the index numbers published in terms of the most recently published reference base for the Consumer Price Index, and disregarding index numbers published in substitution for previously published index numbers (except where the substituted numbers are published to take account of changes in the reference base).

Step 3 of the method statement in clause 42 involves multiplying the previous amount by the indexation factor, to produce the provisional indexed amount. **Step 4** then rounds the provisional indexed amount to produce the indexed amount, by reference to new section 44.

Clause 44 – Rounding off indexed amounts

This clause rounds the final indexed amount to the nearest dollar, rounding 50 cents up to the nearest dollar.

Division 5 – The Australian residency test

The particulars of this test are the same as the residency requirement for eligibility for baby bonus under the family assistance law, which is closely based upon the residency requirement in the Social Security Act (defined in the Dictionary to mean the *Social Security Act 1991*). However, unlike for baby bonus, the test applies on a daily basis, and must continue to be met in order for the person to remain eligible for parental leave pay. A limit of three years upon remaining an Australian resident while overseas applies.

Clause 45 – When a person satisfies the Australian residency test

This clause provides that a person satisfies the Australian residency test on a day if, on that day, the person is an Australian resident. The Dictionary, new section 6, provides that 'Australian resident' has the same meaning as in the Social Security Act. A person can be an Australian resident even if they are physically located outside Australia if they meet a range of factors set out in that Act.

Alternatively, the test will be met if the person is a special category visa holder residing in Australia. The Dictionary, new section 6, provides that a special category visa has the same meaning as in the *Migration Act 1958*. These visas are generally held by New Zealand citizens. The Dictionary, new section 6, provides that 'resides in Australia' has the same meaning as in the Social Security Act.

Additionally, the test will be met if the person (subclause (2)) is the holder of a visa determined by the Minister for the purposes of subparagraph 729(2)(f)(v) of the Social Security Act and either the person is in Australia, or the person is temporarily absent from Australia for not more than 13 weeks, and the absence is an allowable absence in relation to special benefit within the meaning of Part 4.2 of that Act.

Clause 46 – Effect of absence from Australian on Australian residency test

This clause provides an exception to new section 45. Despite that new section, a person does not satisfy the Australian residency test on a day if, before the relevant day, the person left Australia and, on the relevant day, the person has been absent from Australia for more than three years since the day the person left Australia.

Subclause (2) provides that, if the person has been absent from Australia for more than 13 weeks but less than three years, and then returns to Australia but leaves Australia again less than 13 weeks later, the person is taken not to have returned to Australia for the purposes of this new section.

Subclause (3) provides that, if the person returns to Australia after having been absent for three years (but would have continued to satisfy the Australian residency test while the person was absent from Australia but for the three-year limitation), but then leaves again less than 13 weeks later, the person does not satisfy the residency test at any time during their return to Australia of less than 13 weeks, or the time following their departure.

Division 6 – Primary carer

Clause 47 – When a person is the primary carer of a child

This clause provides that a person is a primary carer of a child on a day by looking at care arrangements during the person's reference period. The person (subclause (1)) is the primary carer of a child if the child is in the person's care in that period and the person meets the child's physical needs more than anyone else in that period. The reference period (subclause (2)) is the period that is determined by the Secretary for the purposes of making a payability determination on the person's claim. The Secretary will generally choose a period during which the care arrangements for the child remain stable. PPL rules for eligibility may be made for special circumstances, for example, where the mother of a child is hospitalised for a time and hence unable to meet this definition of 'primary carer'.

Only one person can be a child's primary carer on a particular day (subclause (3)).

Subclause (4) provides that, despite subsection (1), a person is not the primary carer of a child on a day if, before that day, the child has died. However, new subsection 36(3) provides for the eligibility of a claimant in these circumstances.

Division 7 – Return to work

This new Division is relevant to deciding whether a person has returned to work for the purposes of the eligibility test.

Clause 48 – When a person returns to work

This clause provides that a person 'returns to work' on a day if, on that day, the person performs an hour or more of paid work other than for a permissible purpose. 'Paid work' is set out in new section 40, as it is relevant both to the work test and the restriction on return to work. If a person is performing voluntary work and not being paid, they will not have performed paid work.

Clause 49 – When paid work is for a permissible purpose

This clause sets out when paid work is for a permissible purpose. It deals with people who are self-employed, in a broad sense, and with people who are not.

Subclause (1) applies to the general category of a person who performs work for another. 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 with the entity on a day that would otherwise be a day of leave in a period of leave granted by that entity, and the person has not already performed paid work on 10 keeping in touch days (whether with the entity or another entity). 'Entity' is defined in the Dictionary, new section 6, to mean any of:

- an individual;
- a body corporate;
- a body politic;
- a partnership;
- any other unincorporated association or body of persons;
- a trust.

Performing work on a 'keeping in touch day' is defined in new section 50.

Subclause (2) applies to people covered by new subsection 35(3), who are broadly classified as self-employed. New subsection 35(3) covers people who perform work for the purposes of a business that is carried on by the person, whether alone or with others, or an entity that is controlled by the person (whether alone or with others). A person who is employed by, or is a managing director of a company which they control, and through which they operate their business, would fall within this definition. This would include a person who runs a farm which is owned by a trust or other entity, as long as the person controls that trust or entity (either on their own or with others).

For people within this category, paid work is for a permissible purpose if it consists of overseeing the business or is an occasional administrative task. This reflects the reality that a small business person may still need to oversee their business and perform administrative tasks during the first year of their baby's life.

Clause 50 – Performing paid work on a keeping in touch day

This clause provides for when a person performs work for an entity on a keeping in touch day. It applies to work on a day that would otherwise be a day of leave in a period of leave granted by that entity. This applies to people who are employees of an entity or have been engaged by an entity as a defence force member or law enforcement officer, while they are on leave granted by that entity. It does not cover other categories of worker including independent contractors, appointed position-holders such as judges or office-holders.

For people covered, a day of work is a keeping in touch day if performing the work is to enable the person to keep in touch with his or her employment or engagement in order to facilitate a return to that employment or engagement after the period of leave. Activities such as training days, planning days and conferences would meet this requirement.

Additionally, both the person and the entity must have consented to the person performing work for the entity on that day. Consent must be freely given, and does not include agreement extracted as the result of threats or coercion by any person or entity.

Additionally, the day must not be within 14 days after the day the child was born. New sections 275 and 276 may change references to the child's date of birth to either the date of placement of an adopted child, or the day a person became a child's primary carer in exceptional circumstances.

Similar changes to the Fair Work Act are expected to be made in a separate bill, which would enable a person to return to work for the purposes of keeping in touch without breaking the continuity of their period of unpaid parental leave under that Act.

Part 2-4 – Claims for parental leave pay

Division 1 – Guide to this Part

Clause 51 – Guide to this Part

This clause sets out a guide to this Part.

Division 2 – Claims for parental leave pay

As provided by new section 10 above, the Secretary cannot make a determination that parental leave pay is payable to a person for a child for a period unless the person has made an effective primary claim, an effective secondary claim or an effective tertiary claim.

Clause 52 – Who can claim

This clause provides that only a natural person can make a claim.

Clause 53 – Types of claim

This clause provides that there are three types of claim: a primary claim, a secondary claim and a tertiary claim.

Subclause (2) provides that a primary claim is a claim in the form approved by the Secretary for primary claims. Subclause (3) provides that a secondary claim is a claim in the form approved by the Secretary for secondary claims. Subclause (4) provides that a tertiary claim is a claim in the form approved by the Secretary for tertiary claims. These clauses allow the Secretary to determine different forms of claim for each of the three categories, but do not require the Secretary to do so. The Secretary may approve a single form of claim covering all three claim types.

Clause 54 – Who can make a primary claim, secondary claim or tertiary claim

Subclause (1) provides that a primary claim may only be made by the child's birth mother, an adoptive parent of the child or a person who satisfies the circumstances prescribed by the PPL rules as being exceptional circumstances in which a primary claim can be made.

Subclause (2) provides that a secondary claim may only be made by the partner of a primary claimant, a person who is a parent of the child and is not the primary claimant, the partner of a person who is a parent of the child and not a primary claimant, or a person who satisfies the circumstances prescribed by the PPL rules as being exceptional circumstances in which a secondary claim can be made.

Subclause (3) provides that a tertiary claim may only be made by a person who satisfies the circumstances prescribed by the PPL rules as being exceptional circumstances in which a tertiary claim can be made.

Clause 55 – How to make an effective claim

This clause provides that a claim is not effective unless the requirements of new sections 56, 57, 58, 59 and 60, as applicable, are satisfied.

Subclause (2) provides that a claim is also not effective if it is made by a person who is not a person who can make that type of claim under new section 54.

Clause 56 – Requirements of the claim

This clause provides that the claim must be made in the form approved and the manner required by the Secretary for that type of claim, contain any information required by the Secretary, and be accompanied by any documents required by the Secretary. In particular, the Secretary may require that the claim contain information about the claimant's employer or the claimant's employment with that employer, in order to allow the Secretary to consider making an employer determination requiring that the parental leave pay be paid by the person's employer (see new Chapter 3). It would also be expected that the Secretary would require that essential information to determine the claim, such as the actual birth-date of the child where known, be included in the claim.

Subclause (2) provides that the Secretary may require that different information be contained in, and different documents accompany, different types of claims or different claims of the same type of claim.

Clause 57 – Nominated start date

This clause requires that a claim, if it is a primary claim, state a specified date (the nominated start day) as the date on which the primary claimant wants parental leave pay to start being paid. A note makes it clear that the date of birth of the child is a specified date for this purpose, although '6 months after the birth of the child' is not a specific date. A further note makes it clear that even though a primary claimant nominates a specific date, parental leave pay may not be payable from the date because, for example, the primary claimant has not verified the child's birth before that date: see new subsection 11(4).

Subclause (2) provides that, before a payability determination is made on the primary claim, the person may change his or her nominated start day by notifying the Secretary of a new nominated start day. However, subclause (3) provides that, after a payability determination is made on the primary claim, the primary claimant may only change his or her nominated start day by notifying the Secretary, before the old date, of the new nominated start day The new nominated start date cannot be a date that is on or after the day the person notifies the Secretary of the change.

Clause 58 - Expected date of birth and expected date of primary care

This clause provides that, if the claim is a primary claim, and is made before the child's birth, the claim must specify the child's expected date of birth. Subclause (2) provides that, if the claim is a secondary claim and it is made before the day the secondary claimant expects to become the child's primary carer, the claim must specify that day.

Clause 59 – Tax file number statement

This clause provides that the claim must contain a tax file number statement. This provision is identical to the provision required by the family assistance law for claims for baby bonus. The claimant must provide either:-

- their tax file number, or
- authorisation to the Commissioner of Taxation to provide the claimant's tax file number (if any) to the Secretary, or
- authorisation to the Commissioner of Taxation to advise the Secretary of the outcome of the claimant's pending application for a tax file number.

Tax file number information is required both to ensure that income eligibility is correctly assessed, and to allow the remission of tax withholdings to the Commissioner of Taxation for claimants not paid parental leave pay by their employer.

Clause 60 – When to claim

This clause provides that the claim must be made in the period that starts on the day that is 97 days before the expected date of birth of the child. This is a generous three-month period, and is the earliest date from which the claimant could satisfy the work test.

Clause 61 – Claim may be withdrawn or varied

This clause allows a claimant who has made an effective claim to withdraw or vary the claim before the claim is determined. Subclause (2) provides that the claimant may only do so in the manner approved by the Secretary. Subclause (3) provides that, if a claim is withdrawn, it is taken never to have been made.

Chapter 3 – Payment of parental leave pay

Part 3-1 – Instalments of parental leave pay

Division 1 – Guide to this Part

Clause 62– Guide to this Part

This clause gives the reader a brief outline of the matters dealt with in Part 3-1.

Division 2 – Instalments of parental leave pay

Clause 63 – Instalments of parental leave pay

Subclause 63(1) provides that parental leave pay must be paid to a person in instalments.

Subclause 63(2) provides that an instalment can be payable to the person by their employer or by the Secretary. New section 72 sets out the circumstances in which the employer pays an instalment while new sections 84 to 87 inclusive outline when the Secretary is required to pay an instalment.

Under subclause 63(3), an instalment is payable to a person if there are one or more days (***PPL days***) in the instalment period that fall within the person's PPL period. The Dictionary defines PPL period by reference to new section 11. Under new section 11, where the Secretary makes a payability determination for a person, the Secretary is required to specify the period for which parental leave pay is payable to the person. That period is the person's PPL period.

An instalment is payable on the payday for the instalment and more than one instalment can be paid on a particular day. The relevant rules are in subclauses 63(4) and (5).

Clause 64 – A person's *instalment period* and the *payday* for an instalment

This clause gives meaning to the concepts of ***instalment period*** and ***payday***.

A note directs the reader to new sections 93 and 94, which affect when an instalment period begins and ends in certain circumstances where the Secretary takes over payment of an instalment.

If an instalment period is to be paid by an employer and there is a regular period for which the person is usually paid in relation to their performance of work, then subclause 64(2) provides that the person's instalment period is that regular period and the payday for the instalment is the day on which the person is usually paid. A payday could be before, during or after the instalment period to which the instalment relates, depending on when the employer would usually pay the person for their work.

If there isn't a regular pay period, then the instalment period is each calendar month and the payday for the instalment is the first day after the end of the relevant calendar month (subclause 64(3) refers).

If an instalment is to be paid by the Secretary, then the person's instalment period is the period of 14 days starting on the day the Secretary considers appropriate and each successive 14-day period, and the payday is a day after the end of the instalment period considered appropriate by the Secretary (subclause 64(4) refers).

Clause 65 – The amount of an instalment

The amount of an instalment is the total of the daily national minimum wage amounts for each week day in the relevant instalment period that is also a PPL day.

The Dictionary defines a ***week day*** to mean a day that is not a Saturday or Sunday (but includes any public holiday that is not a Saturday or a Sunday).

The ***daily national minimum wage amount*** for a day is defined as 7.6 times the amount of the national minimum wage (expressed as a monetary amount per hour) set by a national minimum wage order that is in operation on that day, irrespective or whether it takes effect on that day. This clause would provide that the daily national minimum wage amount for a PPL day is adjusted from the day of operation of the order (that is, 1 July) and not the day of effect.

The Dictionary defines ***national minimum wage order*** as having the meaning given by the Fair Work Act.

A note informs the reader that the national minimum wage order comes into operation under section 287 of the Fair Work Act. Subsection 287(5) of the Fair Work Act provides that the national minimum wage order comes into operation on 1 July, but does not take effect in relation to a particular employee until the employee's next payday.

For the purposes of this definition, the national minimum wage is taken to be the wage set by the national minimum wage order for employees in relation to whom no exceptional circumstances exist.

To clarify, the national minimum wage amount for a PPL day is the same for all people and is not affected by section 294 of the Fair Work Act, which provides for special national minimum wages for junior employees, employees to whom training arrangements apply and employees with disability.

If a determination is made to vary a national minimum wage order and the determination comes into operation on a day that is earlier than the day the determination is made, the determination is taken to come into operation on the day the determination is made. Any such variation would therefore not affect the daily national minimum wage amount retrospectively, regardless of the date of operation specified in the order.

Clause 66 – Protection of instalment

This clause protects an instalment from sale, assignment, charge, execution, bankruptcy or otherwise by making it inalienable. A note at the end of this provision directs the reader to a related provision, which also provides protection from garnishee for an account into which an instalment is paid.

However, this protection is subject to new sections 67 (deductions authorised by the person), 68 (deductions for PAYG withholding) and 69 (deductions relating to child support). There are no other amounts that can be deducted by the Secretary or employer from an instalment that is payable to the person (new section 70 refers).

Clause 67 – Deductions authorised by person

This clause enables the employer or the Secretary to deduct an amount from an instalment if the deduction is authorised in writing by the person and is principally for their benefit (subclause 67(1) refers).

A note at the end of this provision makes it clear that a deduction by an employer in accordance with a salary sacrifice or other arrangement is permitted if made in accordance with this provision.

The Secretary may also deduct an amount from an instalment that is payable to a secondary claimant to repay a debt owed by a primary claimant relating to an instalment for the same child, provided the deduction is authorised by the secondary claimant (subclause 67(2) refers).

An authorisation must be written and specify the amount of the deduction, and may be withdrawn in writing by the person. The amount to be deducted can also be varied by written authorisation by the person. Subclauses 67(3) and (4) are relevant.

Clause 68 – Deductions for PAYG withholding

Under this clause, an employer or the Secretary may also deduct an amount from an instalment if required under section 12-110 in Schedule 1 to the *Taxation Administration Act 1953* (PAYG withholdings).

Clause 69 – Deductions relating to child support

Under subclause 69(1), an employer may deduct an amount from an instalment if required under section 46 or 72A of the Child Support Registration and Collection Act.

Subclause 69(2) requires the Secretary to make deductions from an instalment payable to a person in accordance with a notice given to the Secretary under section 72AD of the Child Support Registration and Collection Act.

In this way, the Child Support Registrar will be able to collect amounts due to the Commonwealth under a maintenance liability and child support debts through deductions from instalments.

Clause 70 – No other deductions

Subclause 70(1) provides that an amount cannot be deducted from an instalment except in accordance with new section 67, 68 or 69, despite any other law of the Commonwealth, a State or a Territory.

Under subclause 70(2), an employer must comply with subclause 70(1). A note states that this provision is a civil penalty provision.

Part 3-2 – Payment of instalments by employer

Division 1 – Guide to this Part

Clause 71 – Guide to this Part

This clause gives the reader a brief outline of the matters dealt with in Part 3-2.

Division 2 – Payment of instalments by employer

Clause 72 – When an employer pays instalments

This clause sets out the only circumstances in which an employer must pay an instalment to a person on a payday.

The first circumstance, set out in subclause 72(1), is where an instalment is payable (there are one or more PPL days in the instalment period for the instalment), an employer determination is in force on a day during the instalment period and the employer has been paid enough to fund the instalment as at the payroll cut-off day.

The Dictionary defines ***payroll cut-off*** as the last day the employer can reasonably make changes to the instalment to be paid to, or in relation to, the person on the person's payday for the instalment.

Subclause 72(2) deals with the situation where an employer becomes required to pay an instalment after the start of a person's PPL period, where neither the Secretary nor the employer was required to pay an earlier instalment but would have been if one or more instalments were payable from the start of the person's PPL period. In this situation, the instalments are taken to have become payable under new section 91 and, provided the employer has been paid enough to fund the earlier instalments, the employer must also pay them with the later instalment.

Under subclause 72(3), if the employer has not been paid enough to fund an instalment at the payroll cut-off for the instalment and this is rectified at the payroll cut-off for a later instalment, then the employer must pay the instalment to the person on the payday for the later instalment period.

An employer is taken to have complied with a requirement to pay an instalment on a payday if the instalment is paid before the payday or, if the employer cannot pay on the day, as soon as practicable after that day. Several notes in this clause refer to new section 96, which is the relevant provision.

These provisions are civil penalty provisions.

Subclause 72(4) makes it clear that an employer is not required to pay an instalment to a person except in accordance with this provision.

Clause 73 – When an employer has been *paid enough* to fund an instalment

This clause sets out when an employer has been paid enough to fund an instalment for a person for a child. An employer has been paid enough if the total of PPL funding amounts paid to the employer for the person is at least the sum of the amount of instalments previous paid to the person, the amount of the instalment and the amount of any earlier instalment that is to be paid to the person on the payday for the instalment.

Clause 74 – Method of payment of instalment payable by employer

An instalment payable by an employer must be paid in cash, by cheque, money order, postal order or similar order payable to the person or by electronic funds transfer to credit an account held by the person. This is a civil penalty provision.

Division 3 – PPL funding amounts

Clause 75 – Payment of PPL funding amounts

Under this clause, the Secretary must pay one or more PPL funding amounts to a person's employer where satisfied that an instalment is or is likely to be payable to the person and the employer is or is likely to be required to pay the instalment to the person. However, this does not require the Secretary to pay a PPL funding amount earlier than a reasonable period before the payroll cut-off for the instalment.

These rules ensure that PPL funding amounts are paid to employers who have agreed to pay parental leave pay to a person (there is an employer determination in force for the employer and the person) in advance of the payroll cut-off for the payday for the instalment, thereby enabling the employer to pay the instalment in accordance with the employer's usual pay cycle. In practice, employers are likely to receive PPL funding amounts a day or two before their payroll cut-off, to ensure that instalments are able to be paid on the next available payday.

However, if the employer has not been paid enough to fund an instalment as at the payroll cut-off for an instalment, there will be a positive obligation on the Secretary to pay the required PPL funding amount to the employer before the next payroll cut-off for an instalment for the person. The failure of the Secretary to pay a PPL funding amount to the employer by the required time would be a matter that can be the subject of review under new Chapter 5.

Clause 76 – Rules affecting the amount of a PPL funding amount

This clause sets some limits around the amount of a PPL funding amount.

A PPL funding amount must not be less than the sum of the amounts of instalments that will have become payable to the person on the next payday after the PPL funding amount is paid that do not relate to days in the person's PPL period for which the employer has already been paid a PPL funding amount. This is the minimum amount for a PPL funding amount.

A PPL funding amount for a person cannot exceed the sum of the minimum amount plus the equivalent of six weeks' advance of the person's instalments. This rule would enable an employer to be paid three PPL funding amounts to cover the maximum 18-week PPL period, rather than being paid PPL funding amounts on a more regular payment cycle. While payments of PPL funding amounts would generally follow the employer's pay cycle, the employer could ask for their PPL funding amounts to be made in three six-weekly payments if that would be simpler for them administratively and would give them more flexibility.

However, the sum of PPL funding amounts paid to the employer cannot exceed the amounts of the instalments that would be payable to the person for the person's PPL period.

Clause 77 – Notice Requirements relating to PPL funding amounts

This clause requires the Secretary to provide written notice to the employer each time the Secretary pays the employer a PPL funding amount. The notice must contain the name of the person for whom the PPL funding amount has been paid, the amount of the PPL funding amount, the PPL days for which the PPL funding amount has been paid, the daily national minimum wage amount for each of those days and any information prescribed by the PPL rules.

Clause 78 – PPL funding amounts not public money

This clause makes it clear that a PPL funding amount paid by the Secretary to an employer, other than an FMA Agency, is not public money for the purposes of the *Financial Management and Accountability Act 1997*.

PPL funding amounts, once paid to the employer are legally and beneficially the property of the employer, to do with as they wish. The employer has a separate obligation to pay an equivalent amount to a person as instalments. PPL funding amounts paid to an employer are not held in trust for the Commonwealth or the person.

Clause 79 – Protection of PPL funding amounts

This clause protects a PPL funding amount against sale, assignment, charge, execution, bankruptcy or otherwise until paid to the employer. The PPL funding amount then becomes the employer's property to do with as they wish. However, the employer would have a separate obligation to pay an equivalent amount as instalments of parental leave pay on the relevant payday.

Division 4 – Obligations of employer relating to paying instalments

Clause 80 – Giving person record of payment

This clause requires the employer, before the end of the next working day after paying an instalment to a person, to give the person information prescribed by the PPL rules in the form (if any) prescribed. This information might include the amount of the instalment, any PAYG withholdings and other deductions from the instalment and other matters relating to the instalment.

The Dictionary defines ***working day*** as a day that is not a Saturday, Sunday or a public holiday.

This is a civil penalty provision.

Clause 81 – Keeping records

Subclause 81(1) requires the employer to make, and keep for seven years, records in relation to each person for whom an employer determination for the employer comes into force. Under subclause 81(2), the PPL rules can prescribe the form of, and information to be included in, those records.

These are civil penalty provisions.

Clause 82 – Notifying Secretary if certain events happen

If the Secretary makes an employer determination for a person and employer, then this clause requires the employer to notify the Secretary if one of the events listed in the provision occurs. These events are relevant to whether the employer is required to pay an instalment, to the payment of PPL funding amounts, to the payment by the employer of instalments, and to whether an instalment is payable to the person. The events listed include a change in the employer's bank details, a change in the instalment period or payday cut-off for the instalment, the employer being paid too little or too much of a PPL funding amount, whether the employer ceases to carry on a business and other matters.

The employer must notify in accordance with the timeframes in subclause 82(2). Written notice must be given as soon as practicable after the employer becomes aware that the event has happened and, in the case of ceasing to carry on a business, not more than 30 days before the event. A note states that this provision is a civil penalty provision.

This clause also provides some rules around when particular notification obligations cease to apply that link, as appropriate, to the day a decision is made that parental leave pay is not payable or the status of the employer determination.

Part 3-3 – Payment of instalments by Secretary

Division 1 – Guide to this Part

Section 83 – Guide to this Part

This clause gives the reader a brief outline of the matters dealt with in Part 3-3.

Division 2 – Payment of instalments by Secretary

Clause 84 – When the Secretary pays instalments

This clause sets out the circumstances in which the Secretary is required to pay an instalment to a person on the payday for the instalment.

The first circumstance, covered by subclause 84(2), is where the Secretary never made an employer determination for the person and the person's employer in accordance with new section 101.

The second circumstance, covered by subclause 84(3), is where the employer has applied for review of the decision to make an employer determination and the determination has not come into force before the 28th day after the start of the person's PPL period. Where this happens, the Secretary is required to pay the instalment that includes the 28th day and later instalments until the instalment period that starts before the day on which the employer determination comes into force. An employer determination comes into force in accordance with new section 107.

The Secretary must also pay the person instalments payable for any earlier instalment periods by virtue of new section 85 (Note 1 refers). Note 2 makes it clear that, if the employer determination never comes into force, the Secretary will pay all instalments to the person.

The third circumstance, covered by subclause 84(4), is where the Secretary revokes the employer determination. Where this happens, the Secretary must pay the instalments from the instalment period that begins on or after the day the revocation comes into force.

A note refers the reader to new sections 85 and 86, which also require the Secretary to pay arrears for earlier instalment periods in certain circumstances.

The revocation rules are set out in new section 108.

The fourth circumstance, covered by subclause 84(5), is where the Secretary has referred a matter to the Fair Work Ombudsman because the employer has allegedly not paid an instalment as required. Where this happens, the Secretary must pay instalments from the instalment period that begins on or after the day after the last PPL day for which the employer was paid a PPL funding amount, if the Secretary is satisfied that it is appropriate to do so, and provided the Fair Work Ombudsman has not notified the Secretary that the employer has not complied with a compliance notice given for the failure to pay.

Where the Fair Work Ombudsman has notified the Secretary that the employer has not complied with a compliance notice given for the failure to pay one or more instalments as required, new section 108 provides for revocation of the employer determination and subclause 84(4) applies because the employer determination has been revoked.

If both subclauses 84(4) and (5) apply, then the provision where the transfer day occurs first is taken to apply. This will be the provision that allows the Secretary to take over payment of instalments earlier.

Clause 85 – Payment of arrears – employer determination reviewed or revoked before coming into force

This clause enables the Secretary to pay arrears in two situations.

The first is where the Secretary is required to pay instalments to a person in circumstances where the employer has applied for review of an employer determination made for the employer and person.

The second is where the Secretary is required to pay instalments to a person because an employer determination that has never come into force has been revoked. (The circumstances in which an employer determination comes into force are set out in new section 107.) An example might be where a payability determination and employer determination have been made for a person who subsequently resigns, before the employer determination has come into force.

In these situations, the Secretary must pay the person instalments payable from the start of the person's PPL period (by virtue of new section 91) on the payday for the first instalment period that the Secretary is required to pay under this clause.

Clause 86 – Payment of arrears – employer determination revoked after coming into force

This clause deals with payment of arrears by the Secretary where an employer determination that has come into force is revoked as a result of the Fair Work Ombudsman notifying the Secretary that the employer has not complied with a compliance notice given for a failure to pay an instalment as required or because the employer is insolvent and where the employer has not paid part or all of an instalment as required. In these circumstances, the Secretary must pay what the employer has failed to pay on the payday that the Secretary is required to pay an instalment to the person under new subsection 84(4). If the Secretary is not required to pay an instalment under new subsection 84(4), then the arrears would need to be paid on the day that would have been the payday for the later instalment period (new section 95 refers).

The exception is if all or part of the instalment has already been recovered by the person from their employer through legal proceedings.

The Dictionary provides a definition of ***insolvent***.

Clause 87 – Payment of arrears – extending PPL period after review

This clause requires the Secretary to pay instalments that become payable under new section 92 as soon as practicable after becoming required to do so. New section 92 deals with the situation where a person's PPL period is extended by an additional period.

Clause 88 – Method of payment of instalment payable by Secretary

This clause requires the Secretary to pay an instalment or part of an instalment to the credit of a bank account nominated and maintained by the person (subclause 88(1) refers).

The Dictionary defines ***bank account*** as including, but not being limited to, an account held with an ***ADI*** (an authorised deposit-taking institution).

However, subclause 88(2) allows the Secretary to direct that an instalment or part of an instalment be paid in another way. A direction made under this provision is merely declaratory, included to assist the reader as the direction is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 89 – Giving person record of payment

Where the Secretary pays an instalment or part of an instalment, this clause requires the Secretary to give the person information prescribed by the PPL rules relating to that payment.

Part 3-4 – General rules relevant to paying instalments

Division 1 – Guide to this Part

Clause 90 – Guide to this Part

This clause gives the reader a brief outline of the matters dealt with in Part 3-4.

Division 2 – General rules relevant to paying instalments

Clause 91 – Effect of the Secretary or employer becoming required to pay instalments after start of PPL period

This clause deals with the situation where the Secretary or an employer becomes required to pay an instalment after the start of a person's PPL period where neither was required to pay an earlier instalment but would have been if required to pay from the start of the PPL period. This might occur where a person claims parental leave pay and verifies the birth of their child within 28 days of the birth, the Secretary makes a payability determination and the person's PPL period starts from the date of birth.

In these circumstances, the earlier instalments that would have been payable are taken to have become payable on the respective paydays for the instalments.

Clause 92 – Effect of extending PPL period after review

This clause deals with the situation where a person's PPL period is extended by an additional period. If one or more instalments would have been payable in relation to the additional period assuming the payability determination had always included the additional period and the Secretary had been required to pay the instalments and the Secretary is not otherwise required to pay the instalments, then the instalments are taken to be payable on the respective paydays for the instalments. Under new section 87, the Secretary is required to pay these instalments.

Clause 93 – Effect on instalment periods of employer determination coming into force after review

This clause deals with the situation where the Secretary is required to pay instalments because an employer has sought review of an employer determination and the employer determination subsequently comes into force.

In this situation, the instalment period for the last instalment payable by the Secretary ends on the day before the employer determination comes into force (the transfer day). This rule is in subclause 93(2).

For the employer, subclause 93(3) provides that the person's first instalment period payable by the employer starts on the transfer day.

A note indicates to the reader that subclause 93(3) does not affect when the instalment period ends.

These rules ensure continuity of payment for the person but also make clear when the Secretary's responsibility for paying an instalment stops and the employer's starts, by reference to a transfer day.

Clause 94 – Effect on instalment periods of revocation etc.

This clause deals with the situation where an employer determination has come into force but the Secretary has been required to take on payment of instalments to a person for an instalment period that began on or after the transfer day because the employer determination has been revoked or because the Secretary has referred a matter to the Fair Work Ombudsman relating to a failure by the employer to pay an instalment as required. The Secretary is required to pay instalments in these circumstances under new subsections 84(4) and (5) respectively.

In this situation, the instalment period for the last instalment payable by the employer ends on the day before the transfer day. This rule is in subclause 94(2).

For the Secretary, the person's first instalment period payable by the Secretary starts on the transfer day (subclause 94(3) refers).

A note indicates to the reader that subclause 94(3) does not affect when the instalment period ends.

Clause 95 – Paying instalment on payday for later instalment – no later instalment

This clause deals with the situation where the Secretary or employer is required to pay an instalment on a payday for a later instalment period but there is no later instalment period. An example might be where the Secretary is required to pay arrears to a person but the person does not have a subsequent instalment period.

In this situation the Secretary or employer must pay the instalment on the payday that would have been the payday for the later instalment period if it were payable.

Clause 96 – Paying instalment on particular day – complying with obligation

There are numerous provisions in Chapter 3 that require the employer or the Secretary to pay an instalment on a particular day.

This clause provides that the employer or Secretary is taken to have complied with a requirement to pay an instalment on a particular day if the instalment is paid before that day (as might happen if the payday is a public holiday and the usual practice is to pay before the holiday) or, if payments cannot be made on the required day, as soon as practicable after that day. This might happen if the employer has incorrect bank account details for the employee and therefore cannot make the payment at the required time.

Clause 97 – Effect of garnishee etc. order

The rule against inalienability (provided for in new section 66) ceases to apply once an instalment has been paid into a bank account because the payment loses its character as an instalment at that point.

This clause provides some further protection for an instalment that has been paid into an account from the effect of a court order in the nature of a garnishee order. The court order does not apply to a saved amount, worked out under the method statement in this clause. There is a definition of ***saved amount*** in the Dictionary that references this provision.

Clause 98 – Exemption from operation of workers' compensation and accident compensation laws

Clause 98 clarifies that the payment of an instalment of parental leave pay is not relevant for the purposes of the provisions of any Commonwealth, State or Territory law dealing with workers' compensation or accident compensation.. Similarly, the payment would not be taken into account for the purposes of laws, or provisions of laws, prescribed by the PPL rules to the extent that they deal with workers' compensation or accident compensation. The PPL rules would be able to exclude particular laws or provisions of laws from the operation of this clause.

This clause would ensure that compensation recipients would not have their compensation payments reduced because they are receiving parental leave pay from their employer during the same period and would also mean that parental leave payments would not affect premiums or other contributions required in relation to compensation arrangements.

Clause 99 – PPL period is not a period of paid leave

This clause makes clear that, merely because an employee receives instalments of parental leave pay for all or part of a period that the employee is taking unpaid leave from the employer, it should not be treated as if that is a period (or part period) of paid leave. Whether an employee is taking unpaid or paid leave affects whether the employee is entitled to accrue certain entitlements, such as annual leave, notice of termination or redundancy pay, during that period.

Part 3-5 – Employer determinations

Division 1 – Guide to this Part

Clause 100 – Guide to this Part

This clause gives the reader a brief outline of the matters dealt with in Part 3-5.

Division 2 – Making employer determinations

The Dictionary defines ***employer*** and ***employee***. These terms are used in various provisions in the new Act and have their ordinary, or common law, meanings. They are relevant in determining when the Secretary will make an employer determination under Chapter 3. There are certain obligations that arise for employers once an employer determination has been made.

The definition of employee provides that a reference to an employee has its ordinary meaning and includes a reference to a person who is usually such an employee, but does not include a person on a vocational placement.

The definition of employer has its ordinary meaning and includes a reference to a person who is usually such an employer.

The concepts of 'usually employed' and 'usually employs' were considered by the Federal Court in *Australian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910;126 IR 165.

Clause 101 – Making employer determination

Subclause 101(1) requires the Secretary to make an employer determination (that the person's employer is required to pay instalments) if the Secretary is satisfied of the matters listed. These are as follows.

The Secretary must be satisfied a payability determination that parental leave pay is payable to the person or an initial eligibility determination for the person is in force. The Dictionary defines a ***payability determination*** by reference to specified provisions in new Chapter 2 while an ***initial eligibility determination*** is defined by reference to new section 26.

The Secretary must be satisfied that instalments are likely, if the determination is made, to be payable by the employer for at least 40 consecutive PPL days that are week days.

The Secretary must be satisfied that the person has, or will have been, employed by the employer for at least 12 months immediately before:

- the expected date of birth of the person's child where the person claims before the birth; or

- the later of the expected date of birth and the day the child was born where the person claims after the birth.

The Secretary must be satisfied that the person is likely to be an Australian-based employee of the employer for the person's PPL period where a payability determination has been made or the period of days for which instalments are likely to be payable in any other case.

The Dictionary defines ***Australian-based employee*** as an employee whose primary place of work is in Australia or who is employed by an Australian Government employer.

Australia includes the Territory of Cocos (Keeling) Islands and the Territory of Christmas Island.

An ***Australian Government employer*** means the Commonwealth, a State, a Territory, a body corporate established for a public purpose by or under a law of the Commonwealth, State or Territory or a body corporate that is incorporated under a law of the Commonwealth, State or Territory in which the Commonwealth, a State or a Territory has a controlling interest.

The employer must also have an ***ABN*** (defined in the Dictionary by reference to the *A New Tax System (Australian Business Number) Act 1999*).

If the person has more than one employer who satisfies the required criteria, then the person must nominate in their claim the employer they would like to pay their instalments.

Where the person's employer has elected, under new section 109, to pay the person their instalments and the person has consented in the claim to the employer paying their instalments, the employer is not required to satisfy the requirement that parental leave pay is payable by the employer for at least 40 consecutive PPL days or the requirement relating to previous employment. The relevant provision is subclause 101(2).

Under subclause 101(3), the Secretary cannot make an employer determination unless the Secretary is satisfied of the matters referred to in subclause 101(1) and the employer determination is made on or before the day the payability determination is made.

A note refers the reader to the exception which applies where the payability determination is made following a review and is set out in new section 106.

Subclause 101(4) sets out the circumstances in which the Secretary may decide not to make an employer determination. These are if the person's PPL period has ended, the person is a tertiary claimant, the child in respect of whom parental leave pay is payable is stillborn or has died, if a primary claimant owes a debt in relation to an instalment paid in relation to a child and the person is a secondary claimant for the same child, and where the employer is not a fit and proper person. The terms ***primary claimant***, ***secondary claimant***, ***tertiary claimant*** and ***stillborn*** are defined in the Dictionary.

Subclause 101(5) sets out the matters that the Secretary can take into account in determining whether an employer is a fit and proper person. These include whether the employer has, or is alleged to have, contravened a civil penalty provision of this new Act, whether a matter relating to a contravention by the employer has been referred to the Fair Work Ombudsman, whether the employer has been convicted of certain criminal offences involving fraud or dishonesty, misapplication of money and other specified matters and any other matter the Secretary considers relevant.

Subclause 101(6) states that, in deciding whether to make an employer determination, the Secretary may assume that the state of affairs known at that time will remain unchanged.

Clause 102 – Secretary must give notice of employer determination

This clause provides that, if the Secretary makes an employer determination, the Secretary must give the employer and the person written notice of that decision.

The notice given to the person must identify the employer and also contain any information prescribed by the PPL rules.

The notice give to the employer must contain the information listed. This information will identify the person and whether they have a payability determination and give the employer enough information to know when the employer is likely to have to pay instalments to the person. The notice given to the employer must also be dated, the date being the date the preparation of the notice was completed.

If the Secretary decides not to make an employer determination, the Secretary must give the person written notice advising of the decision. The notice must contain the information, if any, prescribed by the PPL rules.

Clause 103 – Employer must respond to notice of employer determination

This clause requires the employer to either give the Secretary an acceptance notice or to seek review of the employer determination within 14 days after the date of the notice given under new section 102.

This is a civil penalty provision.

Clause 104 – Requirements for an acceptance notice

This clause sets out the requirements for an acceptance notice.

The acceptance notice must contain:

- a declaration to the effect that the employer accepts their obligation to pay instalments to the person;
- bank account information for the employer which will identify an account held and maintained by the employer with a ***financial institution*** (as defined in the Dictionary) into which PPL funding amounts can be paid by the Secretary;
- the relevant pay cycle information for the person; and
- any other information prescribed by the PPL rules.

However, an employer will not be required to include the employer's bank account information if the employer has made an election that applies to the person and the acceptance notice contains a declaration to the effect that the bank account information already provided by the employer in the context of the election is correct for the person.

Clause 105 – Giving bank account and pay cycle information etc. after review

This clause deals with the situation where an employer has applied for review of a decision to make an employer determination, either the application is withdrawn or the employer determination has not been set aside and is no longer subject to review, and the person's PPL period has not ended. Where this happens, the Secretary must give the employer written notice requiring the employer to provide the Secretary a written notice containing the employer's bank account details, pay cycle information for the person and any other information prescribed by the PPL rules.

Subclause 105(3) requires the employer to provide the information within 14 days of the date of the Secretary's notice. This is a civil penalty provision.

Clause 106 – Effect of decision on review that parental leave pay is payable

This clause allows the Secretary to make an employer determination on a day that is after the day on which a payability determination is made where:

- a decision is made to the effect that parental leave pay is not payable to the person (including where a payability determination is not made because the claim was ineffective); and

- a decision is subsequently made to the effect that parental leave pay is payable to the person; and

- the Secretary is satisfied that the conditions for making an employer determination (as set out in new subsection 101(1)) are met.

Division 3 – When employer determination is in force

Clause 107 – When employer determination comes into force

An employer determination can only come into force in the circumstances set out in subclauses 107(2) or (3). Otherwise the determination does not come into force at all.

An employer determination comes into force under subclause 107(2) if the employer gives the Secretary an acceptance notice in accordance with a requirement under new section 103 or a compliance notice under new section 157.

An employer determination comes into force under subclause 107(3) if the employer gives the Secretary a notice in accordance with new section 105 (providing the employer's bank account and pay cycle details etc. after review of an employer determination) and the person's PPL period has not ended.

Subclause 107(4) provides that an employer determination stays in force unless it is revoked.

Clause 108 – Revocation of an employer determination

This clause contains a table that lists the circumstances in which the Secretary must revoke an employer determination and the day the revocation comes into force. These circumstances include where the employer is ***insolvent*** (a term that is defined in the Dictionary), where the person has ceased to be employed by the employer, where the Fair Work Ombudsman has notified the Secretary that the employer has not complied with a compliance notice relating to payment of an instalment and other specified matters.

Subclause 108(2) sets out other circumstances in which the Secretary may decide to revoke an employer determination. The Secretary may revoke where the employer is not a fit and proper person (new subsection 101(5) sets out the matters that the Secretary may take into account in making this decision) or if the child in relation to whom parental leave pay is payable is stillborn or has died . The Secretary may also revoke for any other reason if considered appropriate. This discretion would cover unforeseen or unusual circumstances where it would not be appropriate to continue to pay PPL funding amounts to the employer and would enable particular situations to be managed efficiently or appropriately. The discretion would be exercised on delegation by an officer at the appropriate level, having regard to the nature of the discretion.

A revocation under subclause 108(2) comes into force on the day of the revocation (subclause 108(4) refers).

If the Secretary revokes an employer determination for a person and employer, the Secretary must give them a written notice advising of the decision. The notice must contain any information prescribed in the PPL rules.

If, when the Secretary revokes an employer determination, the employer has applied to the SSAT for review of a decision relating to the employer determination and the SSAT has not determined the review, the Secretary would also be required to notify the SSAT of the revocation.

Division 4 – Election by employer to pay instalments

Clause 109 – Election by employer to pay instalments

This clause allows an employer to elect to pay instalments to one or more of their employees. The election must be by written notice in an approved form and must contain the employer's bank account information (as defined in new subsection 104(2)). An election must be expressed to apply to one or more specified employees of the employer, one or more specified classes of employees of the employer or all employees of the employer.

Clause 110 – Employer may withdraw election

This clause enables the employer to withdraw an election by written notice given to the Secretary in a form approved by the Secretary. However, withdrawal does not affect an employer determination that has already been made.

Clause 111 – Secretary may cancel an election

This clause allows the Secretary to cancel an employer's election if satisfied that the employer is no longer a fit and proper person (having regard to the matters set out in new subsection 101(5)).

However, a cancellation does not affect an employer determination that has already been made. A note informs the reader that an employer determination can be revoked under new subsection 108(2). One of the grounds for revocation under this provision is that the employer is not a fit and proper person.

If the Secretary cancels an election, the Secretary must advise the employer of the cancellation. The notice must contain the information, if any, prescribed by the PPL rules.

Clause 112 – When an election is in force

Under this clause, an election remains in force until the PPL period for each relevant employee ends, the employer withdraws the election or the election is cancelled.

Division 5 – Notice of decisions

Clause 113 – Notice of outcome of a payability determination

This clause applies where an employer determination is made for a person and their employer and, after the determination is made, the Secretary makes a payability determination that parental leave is either payable or not payable to the person. In these circumstances, the Secretary must notify the employer in writing about whether parental leave pay is payable to the person and, if so, the person's PPL period. The Secretary is also required to provide any other information prescribed by the PPL rules.

A note informs the reader that a decision that parental leave pay is not payable to the person results in revocation of the employer determination under new subsection 108(1).

However, the Secretary is not required to give such a notice if the employer determination has previously been revoked.

Clause 114 – Notice of varying, setting aside etc. payability determination

This clause applies where the Secretary has made an employer determination for a person and their employer and the Secretary then varies, sets aside or revokes a person's payability determination. In these circumstances, the Secretary must notify the employer in writing about the effect of the Secretary's decision, if the effect is to change the person's PPL period, the different PPL period and any other information prescribed by the PPL rules.

However, the Secretary is not required to give such a notice if the employer determination has previously been revoked.

Clause 115 – Notice of other decisions

This clause enables the PPL rules to provide for the Secretary to give notices in other circumstances, containing such information as is prescribed by the PPL rules.

Chapter 4 – Compliance and enforcement

Part 4-1 – Information gathering

Division 1 – Guide to this Part

Clause 116 – Guide to this Part

This clause outlines the scope of Part 4-1.

Division 2 – Information gathering

Division 2 provides for the collection of information from claimants and third parties to ensure that a person is paid their correct entitlement of parental leave pay, for debt recovery purposes and to facilitate accurate information sharing between the Australian Tax Office and Centrelink for the purposes of compliance and debt offsetting.

Subdivision A – Gathering information from any person

Clause 117 – General power to obtain information

This clause provides that the Secretary may request a person to give information, or to produce a document that is in his or her custody or control, to a specified agency. The Secretary may only make such a request if it is considered that the information or document may be relevant to the matters specified in this clause.

The note at the end of this clause points out that the agency must be a PPL agency (new subsection 120(4)).

Clause 118 – Power to obtain information from a person who owes a debt to the Commonwealth

This clause allows the Secretary to obtain certain information from a person who owes a debt to the Commonwealth under or as a result of this new Act. Such a person may be requested to give information, or to produce documents that are in the person's custody or control, concerning the person's financial situation to a specified agency. The person may also be required to notify of a change of address (if relevant) within 14 days of moving to the new address.

The note at the end of this clause points out that the agency must be a PPL agency (new subsection 120(4)).

Clause 119 – Obtaining information about a person who owes a debt to the Commonwealth

This clause deals with information or documents that would help a specified agency locate a person who owes a debt under or as a result of this new Act or that is relevant to the debtor's financial situation. The Secretary may require a person who may have such information or documents to give the information or documents to the Department.

The note at the end of this clause points out that the agency must be a PPL agency (new subsection 120(4)).

Clause 120 – Written notice of requirement

Subclause 120(1) provides that a request under this new Subdivision must be by notice in writing given to the person.

Subclause 120(2) provides that the notice may be given personally or by post or by any other manner approved by the Secretary. The notice must specify how the person is to give the information or produce the document to which the requirement relates, within what period of time, to whom the information is to be given or the document produced and the authority for the notice.

Subclause 120(3) ensures that a person is given at least 14 days within which to provide the information for the purposes of subparagraph 120(2)(b)(ii).

Subclause 120(4) provides that the Secretary must specify a PPL agency for the purposes of subparagraph 120(2)(b)(iii).

Subclause 120(5) provides that the notice may require the person to give the information by appearing before a specified officer to answer questions. If this is the case, a person may not be required to attend before the end of 14 days after the notice is given (subclause 120(6)).

Clause 121 – Obligations not affected by State or Territory laws

This clause provides that no State or Territory law may operate to prevent a person from giving information, producing a document or giving evidence that the person is required to give or produce to a specified agency or an officer for the purposes of the Paid Parental Leave scheme.

Clause 122 – Offence – failure to comply with requirement

This clause provides that a person must not refuse or fail to give information or produce a document as required under this new Subdivision (other than under new paragraph 117(d)). The penalty for such a refusal or failure is imprisonment for six months.

Subclause 122(2) provides that subclause 122(1) does not apply if the person has a reasonable excuse for refusing or failing to comply with a notice.

The note reminds the reader that, in accordance with subsection 13.3(3) of the *Criminal Code,* a defendant bears an evidential burden in relation to the matter in subclause 122(2)

Subdivision B – Gathering information relating to tax file numbers

Tax file number (TFN) information is required both to ensure that income eligibility is correctly assessed, and to allow the remission of tax withholdings to the Commissioner of Taxation for claimants not paid parental leave pay by their employer.

Clause 123 – Secretary may require Commissioner of Taxation to provide tax file numbers etc.

This clause provides that the Secretary may require the Commissioner of Taxation to provide the Secretary with information, including tax file numbers. The information that the Secretary can seek under this provision is limited to information about a person who has made an effective claim for parental leave pay, the information is relevant to the claim and contained in TFN declarations.

Clause 124 – Purposes for which tax file numbers may be used

This clause allows a person's TFN to be used to ensure that a person is entitled to be paid parental leave pay and as the primary matching key for data matching purposes between Centrelink and the Australian Tax Office with the object of strengthening compliance with the Paid Parental Leave scheme.

Subclause 124(1) provides that subclause 124(2) applies to a person's TFN that has been provided to the Secretary for the purposes of this new Act by the person, the person's partner or the Commissioner of Taxation (on the authority of the person or under new section 123).

Subclause 124(2) limits the purposes for which the TFN, provided pursuant to subclause 124(1), may be used. The purposes are limited to detecting cases in which parental leave pay has been paid when it should not have been and to ensure that parental leave pay is only paid to those people who are eligible for the payment and have made an effective claim and to ensuring that the amount of the payment is correct.

Subdivision C – Obligation to notify of change of circumstances

Clause 125 – Obligation to notify of change of circumstances

Subclause 125(1) requires a person, who makes an effective claim for parental leave pay and where the Secretary has not made a determination that the payment is **not** payable, to notify the Secretary of certain things, (that is, this provision operates where the Secretary has not rejected the person's claim).

Subclause 125((2) requires the person to notify the Secretary if anything happens (or is likely to happen) that causes the person to cease to be eligible for parental leave pay on a day.

Subclause 125(3) requires that notification of a change in circumstances occurs in the manner set out in a written notice to the claimant under subclause 125(5) as soon as practicable after the person becomes aware that the circumstance has happened (or is likely to happen).

Subclause 125(4) requires the Secretary to approve a manner of notification that a person must use when notifying the Secretary of a change of circumstances.

Subclause 125(5) requires that the Secretary must notify the person in writing of the approved manner of notification. In practice, such a power would give the Secretary the flexibility about how notification should occur (for example, by phone, in writing, by electronic means, etc).

Under subclause 125(4) a failure to notify of a change of circumstances is an offence, the penalty for which is six months imprisonment.

Division 3 – Confidentiality

Under the Paid Parental Leave scheme, personal information about claimants (defined as 'protected information') will be confidential and therefore protected against unauthorised recording, disclosure and use. Division 3 protects personal customer information by restricting what can be done with such information and providing offences for unauthorised recording, disclosure or use of customer information. These rules need to be read in conjunction with additional rules on personal information contained in the Privacy Act.

The definition of protected information for the purposes of the confidentiality provisions in this bill operates in a similar manner to those definitions in the *A New Tax System (Family Assistance) (Administration) Act 1999* and the *Social Security (Administration) Act 1999*. It relates to information about a person as held in the records of a number of agencies and is in effect 'all encompassing' beyond the definition of personal information as defined in the Privacy Act. The adoption of a common definition across these agencies will afford this information a consistent level of protection with that provided under the family assistance law and the social security law.

Protected information is defined in new section 6 as meaning information about a person that is, or was, held in the records of the Department or the Commonwealth Services Delivery Agency (Centrelink) and information about a person that is, or was, held in the records of Medicare Australia that was collected for the purposes of the Paid Parental Leave scheme. Information that there is no information about a person is also protected information within this definition.

There are, however, some purposes for which protected information can be obtained, recorded, disclosed or used.

Clause 126 – Operation of Division

This clause provides that nothing in the Division prevents a person from disclosing information to another person if the information is disclosed for the purposes of the *Child Support (Assessment) Act 1989* or the Child Support Registration and Collection Act.

This clause also provides that the provisions of the new Division relating to the disclosure of information do not affect the operation of the *Freedom of Information Act 1988*.

Clause 127 – Obtaining and using protected information

This clause provides for the collection and use of protected information. Subclause 127(1) provides that protected information may only be obtained for the purposes of the Paid Parental Leave scheme.

Subclause 127(2) authorises a person to record, disclose or otherwise use protected information provided the record, disclosure or use is made for the purposes of this new Act, for the purpose for which the information was disclosed to the person under new section 128 or with the express or implied authority of the person to whom the information relates.

Clause 128 – Disclosing personal information

This clause provides that (despite new sections 129 to 132) the Secretary may disclose, in certain circumstances, information that was acquired by an officer in the exercise of his or her powers, or performance of his or her duties or functions under this new Act. The grounds for disclosure are:

(a) if the Secretary certifies that it is necessary in the public interest to do so; or

(b) to an Agency Head for the purposes of that Agency; or

(c) with the express or implied authority of the person to whom the information relates; or

(d) to the Minister to enable the Minister to consider a complaint or issue in relation to a matter that arises under the Paid Parental Leave scheme if the Secretary reasonably believes that the disclosure is likely to assist the Minister; or

(e) to an SES or APS employee in the Department for the purpose of briefing, or considering briefing, the Minister if the Secretary reasonably believes the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under the Paid Parental Leave scheme.

The note at the end of subclause 128(1) clarifies that, in addition to the requirements of this clause, section 14 of the Privacy Act also applies to information disclosed under this new section.

Subclause 128(2) obliges the Secretary, when giving certificates to allow the release of information on the basis of the public interest, to act in accordance with guidelines (if any) that have been issued by the Minister under subclause 128(4). Information that is released by way of a public interest certificate could include information that was collected in respect of the Paid Parental Leave scheme before commencement of any guidelines made by the Minister.

Subclause 128(3) obliges the Secretary, when disclosing information to an Agency Head; to act in accordance with guidelines (if any) that have been issued by the Minister under subclause 128(4).

Subclause 128(4) provides for the Minister to make guidelines, in the PPL rules, for the exercise of the Secretary's power to give certificates in the public interest under paragraph 128(1)(a) or to an Agency Head under paragraph 128(1)(b).

Subclause 128(5) provides that, if a determination or certificate under paragraph 128(1)(a) is made or given in writing, the determination or certificate is not a legislative instrument. This provision is included to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Subclause 128(6) provides for the disclosure of protected information (as defined in paragraph (a) or (b) of the definition under new section 6) about the principal to the principal's payment or correspondence nominee.

Clause 129– Offence – unauthorised access to protected information

This clause provides that a person commits an offence if the person obtains protected information which the person is not authorised to obtain. The penalty for obtaining such information without authority is two years' imprisonment.

Clause 130 – Offence – unauthorised use of protected information

This clause provides that a person commits an offence if the person records, discloses or otherwise uses protected information which the person is not authorised or required under this new Act to record, disclose or use. The penalty for contravening this provision is two years' imprisonment.

Clause 131 – Offence – soliciting disclosure of protected information

This clause provides that a person commits an offence if the person solicits the disclosure of protected information from an officer or another person and the disclosure would be in contravention of this new Subdivision. The penalty for contravening this provision is two years' imprisonment.

A person may commit an offence under subclause 131(1) whether or not any protected information is actually disclosed.

Clause 132 – Offence – offering to supply protected information

Subclause 132(1) provides that a person commits an offence if the person offers to supply (whether to a particular person or otherwise) protected information about another person. The penalty for contravening this provision is two years' imprisonment.

Subclause 132(2) provides that a person commits an offence if the person holds himself or herself out as being able to supply (whether to a particular person or otherwise) protected information about another person. The penalty for contravening this provision is two years' imprisonment.

Subclause 1323) excludes an officer, who is acting the in the performance or exercise of his or her power, duties or functions under this new Act, from being guilty of an offence under subclause 132(1) or (2).

Division 4 – Offences against Part 7.3 and 7.4 of the Criminal Code

Clause 133 – Repayment of instalment of parental leave pay or PPL funding amount

This clause provides that if a person is convicted of an offence against Part 7.3 or 7.4 of the *Criminal Code* in relation to this new Act, the court may impose a penalty and also order the person to pay reparation to the Commonwealth of an amount equal to any amount:

(a) paid to, or in relation to, the person by way of an instalment of parental leave pay because of the act, failure or omission that constituted the offence (this relates to claimants of the payments); or

(b) paid to the person by way of a PPL funding amount because of the act, failure or omission that constituted the offence (this relates to employers).

The note at the end of subclause 133(1) reminds the reader that, under new sections 138 and 139, the Secretary and a court may give a certificate in relation to the amount referred to in paragraph 133(1)(b).

Subclause 133(2) provides that a person is not to be imprisoned for failing to pay an amount to the Commonwealth under paragraph 133(1)(b), despite anything in this new Act or any other law.

Clause 134 – Penalty where person convicted of more than one offence

This clause provides that, if a person is convicted of more than one offence against Part 7.3 or 7.4 of the *Criminal Code*, the court may choose to impose one penalty for all of the offences involved. However, the penalty must not be more than the total of the maximum penalties that could have been imposed if each offence were dealt with separately.

Clause 135 – Joining of charges

This clause enables more than one charge against a person for offences against Part 7.3 or 7.4 of the *Criminal Code* to be dealt with as one complaint, information or declaration. However, this may only occur if those charges are either founded on the same facts; form a series of offences of the same or similar character; or are part of a series of offences of the same or similar character.

Clause 136 – Particulars of each offence

This clause provides that if two or more charges are set out in the same complaint, information or declaration, the particulars of each offence charged must be set out in a separate paragraph.

Clause 137 – Trial of joined charges

This clause provides that, if charges are joined, they must be tried together, unless the court considers that it would be just to try them separately and makes an order to that effect.

Clause 138 – Evidentiary effect of Secretary's certificate

This clause stipulates that, for the purposes of the court's power to order the payment of reparation under new paragraph 133(1)(b), a certificate signed by the Secretary is evidence of the matters set out in the certificate. The certificate would specify the person to whom an instalment of parental leave pay or a PPL funding amount has been paid in consequence of an act, failure or omission for which any person has been convicted of an offence against Part 7.3 or 7.4 of the *Criminal Code*, the amount concerned and the act, failure or omission concerned.

Clause 139 – Enforcement of court certificate as judgment

This clause makes it clear that, if a reparation order under new paragraph 133(1)(b) is filed by certificate in any court that has civil jurisdiction to the extent of the reparation amount (including the court that made the order), it is enforceable for all purposes as a final judgment of that court.

Part 4-2 – Compliance

Division 1 – Guide to this Part

Clause 140 – Guide to this Part

This new Act imposes a number of obligations on employers in relation to the payment of instalments of parental leave pay to a person where an employer determination has been made for the employer and the person. Part 4-2 deals with compliance with those obligations in this new Act. The compliance framework applies from the time an employer is notified that an employer determination has been made in respect of the employer and the person (their employee). Clause 140 provides a Guide to Part 4-2.

Division 2 – Referring matters to the Fair Work Ombudsman

The Secretary and the Fair Work Ombudsman will each have a role in compliance with different employer obligations that are civil penalty provisions in the new Act, and will have the discretion to give compliance notices, infringement notices, and to seek a civil penalty order, in relation to a contravention of those civil penalty provisions. New Division 2 allows for the Secretary to refer certain matters to the Fair Work Ombudsman for investigation and compliance action, if necessary, where it is believed that an employer may have contravened his or her obligations under new section 70 or new Part 3-2 of the new Act.

Clause 141 – Functions of the Fair Work Ombudsman

This clause outlines the functions of the Fair Work Ombudsman in relation to the paid parental leave scheme. The Fair Work Ombudsman's functions are to inquire into, and investigate, any matter referred to the Fair Work Ombudsman under new section 143; to commence proceedings in a court in relation to a contravention of new section 70 (which deals with unauthorised deductions from instalments) or new Part 3-2 (which deals with payment of instalments by employer); and any other function that is incidental to those functions. The Fair Work Ombudsman's functions would extend to include the publication of information and advice about its investigative and enforcement role under the new Act.

Clause 142 – Exercise of compliance powers

Fair Work Inspectors have a range of compliance powers under Subdivision D of Division 3 of Part 5-2 of the Fair Work Act, which can be exercised for the compliance purposes described in section 706 of that Act, including for the purposes of a provision of another Act conferring functions or powers on inspectors. Clause 142 enables Fair Work Inspectors to exercise their compliance powers (other than those under sections 715 or 716 of the Fair Work Act) for the purpose of determining whether new section 70 (which deals with unauthorised deduction from instalments) or new Part 3-2 (which deals with payment of instalments by employer) is being, or has been, complied with.

Subclause 142(2) then provides that, for the purposes of the Fair Work Act, the purpose referred to in subclause 142(1) is taken to be a compliance purpose and a civil penalty provision under new section 70 or Part 3-2 of this new Act is taken to be a civil remedy provision. This is to allow Fair Work Inspectors to exercise their powers to enter premises under section 708 of the Fair Work Act (which refers to the power to enter business premises if the inspector reasonably believes that there are documents or records relevant to compliance purposes on the premises) and their compliance powers under section 711 (power to ask for a person's name and address, which only applies in situations where an inspector reasonably believes that a person has contravened a civil remedy provision).

Section 715 of the Fair Work Act deals with enforceable undertakings relating to contraventions of civil remedy provisions. However, employers will not be able to make enforceable undertakings to remedy a contravention of a civil penalty provision of this new Act. Therefore, it is not necessary for Fair Work Inspectors to be able to exercise this power. Section 716 of the Fair Work Act deals with compliance notices under that Act.

Clause 143 – Referring matters to the Fair Work Ombudsman

This clause provides for the Secretary to refer matters to the Fair Work Ombudsman for investigation. In the event of a dispute between an employer and their employee regarding an obligation related to paid parental leave, the Secretary would assist the employer and employee to resolve the dispute. If the Secretary has reason to believe that an employer has not complied with an obligation under new section 70 or new Part 3-2 in relation to a person, and does not believe that the employer and the person are able to resolve the matter themselves, the Secretary may refer the matter to the Fair Work Ombudsman for investigation (subclause 143(1)), and must inform both the employer and the person in writing of the referral (subclause 143(2)).

In referring a matter to the Fair Work Ombudsman, the Secretary must give the Fair Work Ombudsman information on any action taken, or information obtained by the Secretary in relation to the matter. If the referral is in relation to new section 70, 72 or 74 (which deal with unauthorised deductions from instalments, when an employer pays instalments, and method of payment of instalments by employer, respectively), then the Secretary must also give the Fair Work Ombudsman the following information:

- the day on which the Secretary paid a PPL funding amount to the employer for the person; and

- a copy of the notice given to the employer under new section 77 (that is, a copy of the notice in relation to payment of the PPL funding amount).

Clause 144 – Fair Work Ombudsman to notify of outcome of investigation

This clause requires the Fair Work Ombudsman to notify the Secretary in writing of the outcome of an investigation on a matter that was referred to Fair Work Ombudsman by the Secretary under new section 143. The note to this clause also alerts the reader to the Fair Work Ombudsman's obligation, at new section 158, to notify the Secretary of the outcome of a compliance notice.

Division 3 – Civil penalty orders

This new Division identifies those provisions in the new Act which are civil penalty provisions. The Secretary or the Fair Work Ombudsman can apply to the Federal Court or the Federal Magistrates Court for a civil penalty order in relation to a contravention of specified civil penalty provisions in the bill (the Fair Work Ombudsman can only apply in relation to a limited class of civil penalty provisions relating to new section 70 or Part 3-2 of the new Act). Civil penalty orders will operate in conjunction with compliance notices and infringement notices in the compliance framework for the paid parental leave scheme. The Secretary or the Fair Work Ombudsman may apply to the Court for a civil penalty order in relation to a contravention of a civil penalty provision for example, if a person fails to pay a penalty in an infringement notice, or as an alternative to giving an infringement notice.

Clause 145 – Involvement in contravention treated in same way as actual contravention

This clause provides for a person's involvement in the contravention of a civil penalty provision of this new Act to be treated in the same way as actual contravention of a civil penalty provision. Subclause 145(2) defines when a person is involved in a contravention. A person is involved in a contravention if the person has: aided, abetted, counselled or procured the contravention; has induced the contravention (whether by threats, promises, or otherwise); has been in any way, by act or omission, directly or indirectly knowingly concerned in or party to the contravention; or has conspired with others to effect the contravention.

This clause would allow for a pecuniary penalty to be sought, for example, against a person who is involved in the contravention, as well as the person who actually contravenes a civil penalty provision.

Clause 146 – Civil penalty provisions

This clause sets out a table of the provisions in the new Act which are civil penalty provisions. A provision listed in column 1 of the table is a ***civil penalty provision***, and column 2 provides a corresponding maximum penalty in relation to a contravention of a civil penalty provision in column 1. Items 6 to 8 and item 12 indicate a lesser maximum penalty applies to a contravention of a civil penalty provision which deals with an employer's obligation to give a person a record of payment (new section 80) or keeping records (new subsections 81(1) and (2)), as well as to a contravention of a compliance notice given in respect of one of those civil penalty provisions. The penalties are consistent with maximum penalties for a contravention of similar civil remedy provisions under the Fair Work Act.

Clause 147 – Civil penalty orders

The Secretary or the Fair Work Ombudsman can apply to the Federal Court or Federal Magistrates Court for a ***civil penalty order*** in relation to a contravention of specified civil penalty provisions (the Fair Work Ombudsman can only apply in relation to a limited class of civil penalty provisions relating to new section 70 and new Part 3-2). The Court, if satisfied that a person has contravened one or more civil penalty provisions, may on application, order the person to pay to the Commonwealth such pecuniary penalty as it determines appropriate in relation to each contravention. Subclause 147(2) provides that such an order is a civil penalty order. The note to subclause 147(1) directs the reader to subclause 147(3) for the maximum penalty that a court may order the person to pay.

Subclause 147(3) sets out the maximum penalty that the Court may order, with reference to the maximum penalties in column 2 of the table in new section 146. If a person is a body corporate, the pecuniary penalty that a court could order in relation to a contravention of a civil penalty provision must not be more than five times the maximum number of penalty units for that civil penalty provision in column 2 of the table in new section 146. (A penalty unit is defined in the dictionary as having the same meaning as in section 4AA of the *Crimes Act 1914).*

For persons other than a body corporate, the maximum pecuniary penalty that a court could order in relation to a contravention of a civil penalty provision is the maximum number of penalty units corresponding to that civil penalty provision in column 2 of the table in new section 146. For example, the maximum penalty that a court could order in relation to a contravention of new subsection 72(1) relating to when an employer must pay an instalment of parental leave pay to a person is 300 penalty units for a body corporate or 60 penalty units for an individual.

The Court has discretion to determine the amount of the pecuniary penalty it considers appropriate. However, in doing so, the Court must take into account all relevant matters. This includes those relevant matters specified in paragraphs (a) to (e) of subclause 147(4).

A pecuniary penalty that a court orders under clause 147 is a civil debt payable to the Commonwealth (subclause 147(5)), and which the Commonwealth may enforce in a court as a judgment debt (subclause 147(6)).

Clause 148 – Proceedings may be heard together

This clause provides for the Federal Court of Australia or the Federal Magistrates Court to hear two or more proceedings for a civil penalty order together, if it considers this to be appropriate.

Clause 149 – Time limit for application for an order

This clause sets a time limit for the Secretary or the Fair Work Ombudsman to apply for a civil penalty order in relation to a contravention of a civil penalty provision. Proceedings for a civil penalty order may be commenced no later than four years after the contravention.

Clause 150 – Civil evidence and procedure rules for civil penalty orders

Clause 150 provides that the Court, when hearing proceedings for a civil penalty order, must apply the rules of evidence and procedure for civil matters.

Clause 151 – Conduct contravening more than one civil penalty provision

This clause deals with the situation where certain conduct contravenes two or more civil penalty provisions under the new Act. The Secretary or the Fair Work Ombudsman could commence proceedings against a person in relation to any one or more of those provisions. However, subclause 151(2) also provides that the person is not liable for more than one pecuniary penalty in relation to the same conduct.

Clause 152 – Civil proceedings after criminal proceedings

Clauses 152 to 155 deal with the interaction between civil proceedings and criminal proceedings relating to substantially the same conduct.

Clause 152 prevents the Federal Court or Federal Magistrates Court from making a civil penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence which is constituted by substantially the same conduct as the conduct constituting the contravention of the civil penalty provision.

Clause 153 – Criminal proceedings during civil proceedings

Clause 153 provides that proceedings for a civil penalty order (defined in subclause 153(2) as the ***civil proceedings***) against a person for a contravention of a civil penalty provision are stayed if criminal proceedings are, or have already been, commenced against the person for an offence constituted by substantially the same conduct as that alleged to constitute the contravention of the civil penalty provision. If the person is not convicted of the offence then the civil proceedings can be resumed. Otherwise, this clause provides that the civil proceedings are dismissed and costs must not be awarded in relation to the civil proceedings (subclause 153(2)).

Clause 154 – Criminal proceedings after civil proceedings

This clause provides that criminal proceedings may be commenced against a person after civil proceedings have commenced, whether or not a civil penalty order has already been made against the person for substantially the same conduct.

Clause 155 – Evidence given in proceedings for penalty not admissible in criminal proceedings

This clause provides that evidence given by a person in civil proceedings for a civil penalty order may not be used in criminal proceedings against the person in relation to an offence constituted by substantially the same conduct as that constituting the contravention. This rule does not, however, apply to criminal proceedings relating to false evidence given by the person in the civil proceedings (subclause 155(2)).

Clause 156 – Requirement for person to assist in application for civil penalty orders

This clause enables the Secretary to request a person to provide all reasonable assistance in connection with an application for a civil penalty order, whether or not the application for the civil penalty order has been made. Failure to comply with a written request for assistance is an offence, attracting a penalty of 10 penalty units. The note to subclause 156(1) makes clear that this clause does not abrogate or affect the law relating to legal professional privilege, or any other immunity, privilege or restriction that applies to the disclosure of information, documents or other things.

However, subclause 156(3) limits those people from whom the Secretary could request assistance. The Secretary could only request a person's assistance if it appears that the person is unlikely to have contravened the civil penalty provision to which the application for the civil penalty order relates; or committed an offence constituted by the same or substantially the same conduct; and the Secretary suspects or believes that the person could give relevant information. Subclause 156(3) provides that the Secretary would also not be able to request the assistance of a person who is or has been a lawyer for the person who is the subject of the application for the civil penalty order.

Subclause 156(2) is included to clarify that the written request by the Secretary is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Subclause 156(5) that the Federal Court or the Federal Magistrates Court may order a person to comply with subclause 156(1) in a specified way, and that only the Secretary may apply to the court for an order under this subclause.

This clause does not include a reference to the Fair Work Ombudsman because Fair Work Inspectors have specific compliance powers under the Fair Work Act, including powers to interview any person while on premises and to require a person to produce a record or document, and which can be exercised for the purpose of determining whether new section 70 or Part 3-2 of the new Act is being, or has been, complied with.

Division 4 – Compliance notices

This new Division provides the Secretary or the Fair Work Ombudsman with the discretion to give a person a compliance notice in relation to a contravention of a civil penalty provision. The Secretary and the Fair Work Ombudsman can give a compliance notice in relation to different civil penalty provisions in the new Act. The giving of a compliance notice is one mechanism by which the Secretary or the Fair Work Ombudsman can seek to enforce compliance with an employer's obligations in relation to the payment of instalments of parental leave pay to a person where an employer determination has been made for the employer and the person.

Clause 157 – Giving a compliance notice

This clause identifies those civil penalty provisions for which the Secretary may give a compliance notice and those for which the Fair Work Ombudsman may give a compliance notice. The Secretary may give a compliance notice if the Secretary reasonably believes that a person has contravened new subsection 82(2) (which deals with notifying the Secretary if certain events happen); new section 103 (which deals with responding to an employer determination); or new subsection 105(3) (which deals with giving bank account and pay cycle information etc. after a review).

The Fair Work Ombudsman may give a person a compliance notice if the Fair Work Ombudsman reasonably believes that the person has contravened new subsection 70(2) (unauthorised deductions from instalments); new subsection 72(1), (2) or (3) or new section 74 (which deal with when an employer pays instalments, and the method of payment of instalments payable by an employer); new section 80 (giving a person a record of payment); or new subsection 81(1) or (2) (which deals with keeping records).

If clause 157 applies, subclause 157(3) provides that the Secretary or the Fair Work Ombudsman may give the person a ***compliance notice*** requiring the person, within 14 days of the day on which the notice is given, to take the action set out in the notice to rectify the contravention and to produce reasonable evidence that the person has complied with the notice.

Subclause 157(5) sets out further requirements as to the contents of a compliance notice, which must also set out brief details of the contravention; the name of the person to whom the notice is given; and the name of the person who gave the notice; as well as explain that a failure to comply with the notice may contravene a civil penalty provision. Paragraph 157(5)(e) also provides for the notice to set out any other matters that may be prescribed by the PPL rules.

Subclause 157(4) makes clear that a person must comply with a compliance notice. The note to subclause 157(4) indicates that it is a civil penalty provision, and directs the reader to new section 146. For example, if the Secretary gave a compliance notice to a person in accordance with clause 157 and a person does not comply with the compliance notice, the Secretary could seek a civil penalty order in relation to a contravention of subclause 157(4) (noting that a civil penalty order may also be sought for contravention of the civil penalty provision for which the compliance notice was given). Items 12 and 13 of the table in new section 146 set out the maximum penalty for a contravention of subclause 157(4). A lesser maximum penalty applies for a contravention of a compliance notice given in relation to a contravention of new section 80 or new subsection 81(1) or (2), to correspond with the lesser maximum penalty that applies to a contravention of those provisions, as set out in items 6, 7 and 8 of the table in new section 146.

Clause 158 – Fair Work Ombudsman to notify of outcome of compliance notice

This clause creates a requirement for the Fair Work Ombudsman to notify the Secretary of the outcome of a compliance notice given to a person. For example, the outcome of a compliance notice may be that a person has complied with the notice by taking action to rectify the contravention; or that a person has not complied with the notice. Notification of the outcome of a compliance notice is directly relevant to revocation of an employer determination for an employer and a person and the payment of arrears of instalments of parental leave pay to the person in particular circumstances.

If the Fair Work Ombudsman has notified the Secretary that an employer has not complied with a compliance notice given for a contravention of new section 70, 72 or 74 (which deal with unauthorised deductions, when an employer pays instalments and method of payment of instalments payable by employer) in relation to a person, then the Secretary must revoke the employer determination for the employer and the person under new subsection 108(1), and pay arrears of instalments of parental leave pay to the person as described in new section 86, if the other conditions in new subsection 86(1) are met.

Division 5 – Infringement notices

Division 5 provides for the Secretary or the Fair Work Ombudsman to give infringement notices in relation to contraventions of specified civil penalty provisions. Infringement notices are another option for enforcing compliance with employer obligations under the paid parental leave scheme, as an alternative to seeking a civil penalty order for a contravention of a civil penalty provision. A person who is given an infringement notice is required to pay the pecuniary penalty specified in the notice, which is a lesser penalty than that which a court would have the discretion to order in proceedings under new Division 3.

Clause 159 – Giving an infringement notice

This clause sets out those civil penalty provisions for which the Secretary may give an ***infringement notice*** and those for which the Fair Work Ombudsman may give an infringement notice. (An infringement notice is defined by reference to subclauses 159 (1) and (2).) The Secretary may give a person an infringement notice if the Secretary reasonably believes that the person has contravened one or more of the civil penalty provisions listed in paragraphs (a) to (d) of subclause 159(1). These include those provisions in relation to which the Secretary can give a compliance notice, as well as new subsection 157(4), in relation to a compliance notice given to the person by the Secretary. For example, if the Secretary reasonably believes that a person has failed to comply with a compliance notice given in relation to new subsection 82(2) (notifying the Secretary if certain events happen), the Secretary may give the person an infringement notice.

The Fair Work Ombudsman has the discretion to give a person an infringement notice if the Fair Work Ombudsman reasonably believes that the person has contravened one or more of the civil penalty provisions set out in paragraphs (a) to (f) of subclause 159(2). These provisions correspond to those for which the Fair Work Ombudsman has the discretion to issue a compliance notice under new section 157. In addition, the Fair Work Ombudsman may also give an infringement notice in relation to a contravention of new subsection 157(4) relating to a compliance notice given to the person by the Fair Work Ombudsman.

Subclause 159(3) sets a time limit for the Secretary or the Fair Work Ombudsman to give a person an infringement notice. If the infringement notice relates to a failure to comply with a compliance notice, then the infringement notice must be given within 12 months of the day on which the compliance notice period (referred to in new subsection 157(3)) ends. Otherwise, the infringement notice must be given within 12 months of the day on which the alleged contravention of the civil penalty provision occurred.

Subclause 159(4) sets out the requirements for the contents of an infringement notice given in relation to a contravention of a civil penalty provision. This includes a statement to the effect that the matter or matters will not be dealt with by a Court if the penalty specified in the notice is paid within 28 days after the notice is given or such longer period as the Secretary allows. If the person does not pay the penalty, the Secretary or the Fair Work Ombudsman could commence proceedings for a civil penalty order against the person in relation to the contravention.

Subclauses 159(5) and (6) provide for the amount of a penalty to be specified in an infringement notice given to a body corporate, and to a person other than a body corporate, respectively. The amount of the penalty in an infringement notice is one tenth of the maximum pecuniary penalty that a court could order a person to pay in proceedings for a civil penalty order in relation to the contravention. Lesser penalties apply if the infringement notice is given in relation to a contravention of new section 80 (giving person record of payments) or new subsection 81(1) or (2) (keeping records) or in relation to a contravention of a compliance notice given in respect of new section 80 or new subsection 81(1) or (2).

Clause 160 – Withdrawal of an infringement notice

This clause provides the Secretary and the Fair Work Ombudsman with the discretion to withdraw, by written notice, an infringement notice given to a person. Subclauses 160(1) and (2) clarify that the Secretary may withdraw an infringement notice that has been given by the Secretary, and the Fair Work Ombudsman may withdraw an infringement notice that has been given by the Fair Work Ombudsman.

Clause 160 would allow the Secretary or the Fair Work Ombudsman to withdraw an infringement notice, for example, where further evidence is provided after the infringement notice is given to suggest that a person has not contravened a civil penalty provision, or alternatively that further evidence suggests that the contravention is more serious than initially believed and would be more appropriately dealt with by proceedings for a civil penalty order rather than an infringement notice.

An infringement notice must be withdrawn within 42 days after it was given to the person. Subclause 160(4) extends this timeframe in circumstances where the person to whom the infringement notice has been given has applied to the Federal Court for judicial review of an employer determination. The timeframe for an effective withdrawal is extended in this situation to deal with the possibility that an infringement notice is given to a person in relation to a contravention of new subsection 105(3) (giving bank account and pay cycle information etc. after a review) and the Secretary later becomes aware that the person has subsequently applied to the Federal Court for judicial review of an employer determination.

Subclause 160(5) also provides that the amount of a penalty in an infringement notice must be refunded to a person if the penalty is paid before the infringement notice is withdrawn.

Clause 161 – What happens if the penalty is paid

This clause clarifies the effect of payment of a penalty in an infringement notice on a person's liability for a civil penalty in relation to the alleged contravention of a civil penalty provision. If a person is given an infringement notice in relation to the civil penalty; the penalty in the infringement notice is paid in accordance with the infringement notice; and the infringement notice is not withdrawn, then the person's liability for an alleged civil penalty is discharged. Subclause 161(2) then prevents proceedings from being brought against the person under new Division 3 for a civil penalty order in relation to the contravention.

Clause 162 – Effect of this Division on civil proceedings

This clause clarifies the relationship between infringement notices and proceedings for a civil penalty order in relation to a contravention of a civil penalty provision under the new Act. New Division 5 does not affect the person's liability to have proceedings brought by the Secretary or the Fair Work Ombudsman for a civil penalty order under new Division 3 if: the person does not comply with an infringement notice relating to the contravention; an infringement notice is not given to the person; or an infringement notice is given to the person and later withdrawn (paragraph 162(b)).

In addition, this clause clarifies that new Division 5 does not require an infringement notice to be given in relation to an alleged civil penalty (paragraph 162(a)), nor does it limit the Court's discretion regarding the amount of a pecuniary penalty that it could order a person to pay for a contravention of a civil penalty provision, in proceedings under new Division 3 (paragraph 162(c)).

Clause 163 – Further provision in relation to infringement notices

This clause allows for the PPL rules to provide further in relation to infringement notices.

Part 4-3 – Debt recovery

Division 1 – Guide to this Part

Clause 164 – Guide to this Part

This clause outlines the scope of new Part 4-3.

Division 2 – Main debts recoverable under this Act

Clause 165 – Debts due to the Commonwealth

This clause provides that, if an amount has been paid by way of parental leave pay or a PPL funding amount, it is only considered a debt due to the Commonwealth if a provision of this new Act or the *Data-matching Program (Assistance and Tax) Act 1990* expressly provides that it is. The note provides guidance as to the new sections under which debts can be raised.

Clause 166 – Parental leave pay instalment debts – instalments paid by employer

This clause sets out when an overpayment of an instalment of parental leave pay paid by an employer to an employee is a debt to the Commonwealth.

This clause applies if an employer receives more parental leave funding than they are required to pay to their employee and the excess amount is paid by the employer to the employee. In this situation, the excess amount paid to, or in relation to, the employee by way of instalment(s) of parental leave pay is a debt owed by the employee to the Commonwealth.

The reference to 'in relation to' covers any amounts that have been deducted or withheld from an instalment of parental leave pay payable to the employee.

The note after subclause 166(1) provides that, if the payability determination is set aside or varied after the instalments are paid to the employee, then instalments may stop being payable retrospectively. Therefore, debts can be raised from the date that the instalment stopped being paid.

The example after subclause 166(2) provides that, if an instalment is not payable to a person, the debt is the total amount paid to, or in relation to, the employee from the employer.

Subclause 166(3) sets out when a parental leave pay instalment debt arises. If the person has a PPL period, then the debt arises at the end of the PPL period. A PPL period can end in different circumstances, including that the period has run for 18 weeks or that parental leave pay ceases to be payable to a person because they are no longer eligible for instalment payments. In any other case, the debt arises when subclause 166(1) applies in relation to an amount paid to the person. That is when an excess amount has been paid to the employee.

The first note clarifies that, if a person never has a PPL period because a payability determination has not been made, or if the payability determination has been varied or set aside, then, as soon as there is an instalment excess, this amount becomes a debt under this provision.

Note 2 provides that an amount a person receives that exceeds their payability amount may be a debt if amounts are mistakenly paid.

Clause 167 – Parental leave pay instalment debts – instalments paid by Secretary

This clause is similar to new section 166 but applies if the Secretary pays a person by way of instalment an amount that exceeds the amount that the person is payable. The amount that has been overpaid to the person is a debt due to the Commonwealth.

Clause 168 – PPL funding amount debts – amounts not paid as parental leave pay instalments

This clause applies if the amounts paid to an employer by way of a PPL funding amount exceeds the amount paid by the employer to the person to whom, or in relation to, an instalment is payable (other person). The reference to ‘in relation to’ covers any amounts that have been deducted or withheld from an instalment of parental leave pay payable to the person. The excess is a debt due to the Commonwealth by the employer. The example given clarifies that, if the employer does not pay any amount to the other person, then the total PPL funding amount paid to the employer is a debt to the Commonwealth.

Subclause 168(3) sets out when a debt arises under this clause. If the employee has a PPL period for a child, the debt arises at the earlier of either when the Secretary pays arrears to the person by making one or more instalment payments or immediately after the end of the person’s PPL period. In any other case, the debt arises when the PPL funding amount paid to the employer exceeds the amounts paid to the other person.

The notes at the end of this clause clarify how this provision is intended to apply. Note 1 provides that, if a person never has a PPL period because a payability determination has not been made or has been set aside, then, as soon as there is an excess referred to in subclause 168(1), this amount becomes a debt under this provision.

Note 2 provides that this clause may apply to overpayments of PPL funding amounts or amounts that are mistakenly paid. This may occur because of administrative error or the revocation or setting aside of an employer determination.

Clause 169 – Wrong person receives parental leave pay instalment or PPL funding amount

This clause provides that, if an instalment of parental leave pay or a PPL funding amount (the PPL amount) is paid and a person (the wrong recipient) other than the person (the right recipient) to whom the amount is payable receives the amount and this is not authorised by the right recipient, the amount becomes a debt.

Subclause 169(2) provides that the amount received by the wrong recipient is a debt due to the Commonwealth by the wrong recipient if the original payment is made by the Secretary. If the original payment is made by the employer, the amount is a debt due by the wrong recipient to the employer.

Note 1 provides that the Secretary or the employer is obliged to pay the right recipient the amount of the PPL payment that is payable to them.

Note 2 provides that, where the amount is paid by the Secretary into the wrong recipient's bank account, the Secretary may, under the 'recovery from an ADI' provision in new section 192, recover the amount.

Clause 170 – Joint and several liability for debts arising because of false and misleading statements

A person (the recipient) and another person are jointly and severally liable to pay a debt if the recipient receives an unauthorised amount because they made a false or misleading statement (contravened Part 7.4 of the *Criminal Code*), and the other person is convicted of an offence because they were involved in the action that resulted in the payment of the unauthorised amount.

Clause 171 – Debts under the *Data-matching Program (Assistance and Tax) Act 1990*

This clause provides for the recovery of an amount that has been paid to a person by way of a parental leave pay instalment if the amount is a debt due to the Commonwealth under subsection 11(6) of the *Data-matching Program (Assistance and Tax) Act 1990*.

Division 3 – Parental leave pay recoverable by employees from employers

Clause 172 – PPL funding amount debts – debts owing by employers to employees

This clause provides that, if an employer receives a PPL funding amount and they do not pay any or all of this amount to the employee, or in relation to the employee, to whom an instalment is payable, then the amount that has not been paid is a debt due to the employee by the employer and is recoverable by the employee in a court of competent jurisdiction.

Division 4 – Debt notices and interests on debts

Clause 173 – Debt notices – initial notice

Clause 173 provides that a notice must be sent to a person who has a debt due to the Commonwealth. The notice will advise the person of: the date of the notice; if the debt relates to a PPL funding amount – the name of the person to whom or in relation to whom the instalment is payable; the reason the debt was incurred; the period to which the debt relates; the outstanding amount of the debt at the time of the notice; the day the outstanding amount is due and payable; options available for repayment of the debt; and the contact details for inquiries concerning the debt.

It will also advise the person that the debt is due and payable on the 28th day after the date of the notice.

The effect of subclause 173(3) is that, where it is desirable or convenient, the notice referred to in subclause 173(1) and that provided for by new section 174 may be sent at the same time and may be sent as a single notice. An example of where that approach might be considered desirable would be cases of customers who have previously incurred debts and have failed to comply with an arrangement to repay that debt. In those circumstances, it might be considered desirable to issue simultaneously the notice of the debt and the notice advising of the new interest charge and administrative charge scheme in an attempt to encourage early entry into a repayment arrangement.

Where that approach is adopted, the effect is simply that the debtor has received the clause 173 notice and the new section 174 notice simultaneously. This approach has no adverse consequences for a person who owes a debt as the person cannot become liable to pay interest at an earlier time than he or she would have been so liable if the notices had been sent (and received) separately.

Clause 174 – Debt notices – further debt notice if repayments not made

A further notice may also be sent pursuant to clause 174, where the debt has not been wholly paid. This notice may be sent where a debtor has not entered into an arrangement to repay a debt or, having entered an arrangement, fails to comply with that arrangement.

Subclause 174(2) provides that the notice must state the date on which the further notice under clause 174 was issued; the effects of the provisions set out in the notice provisions in new paragraph 135(1)(b) to (g); the amount that is outstanding at the date of the further notice; the effect of the provisions providing for the interest charge and administrative charge; and how interest under new section 179 is to be calculated.

Importantly, a person can only incur an interest charge if the person has received a clause 174 notice.

The note clarifies the giving of the further notice within the initial notice under new subsection 173.

Clause 175 – Interest on debts – when interest becomes payable

This clause sets out when interest will be payable. The effect of subclause 175(1) is that interest cannot be incurred unless the person has received a further notice under new section 174.

Subclause 175(2) defines the term ‘final payment day' for the purposes of this clause. The final payment day is the later of: the 90th day after the day on which the debt became due and payable; or the 28th day after the date of the further notice given under new section 176; or, if there has been an application for review of the decision to give the initial or further notice in new section 173 or 174, then 90 days after the day the authorised review officer made the decision.

It is only where debtors fail to enter an arrangement or, having entered an arrangement, fail to comply with the arrangement that interest can be payable. The emphasis is on encouraging debtors to negotiate arrangements to repay debts from an early stage, not on trying to collect interest on outstanding amounts of debts.

Subclause 175(3) deals with situations where a debtor has not entered into an arrangement to repay a debt on or before the final payment day and the Secretary has notified the person that the person will be required to pay interest. Subclause 175(4) provides that, in these circumstances, the debtor is liable to pay interest from the day after the final payment day until the debt is wholly paid at the penalty interest rate as set out in new section 180.

Subclause 175(5) deals with situations where a debtor has entered into an arrangement but subsequently has failed to comply with the arrangement and the Secretary has notified the person under new section 174 that the person will be required to pay interest. Two different scenarios are relevant here.

Paragraph 175(6)(a) is concerned with the situation where a person has entered an arrangement and, before the final payment day, the person fails to comply with the arrangement. In those circumstances, the debtor is liable to pay interest from the day after the final payment day. Paragraph 175(6)(b) is concerned with the situation of where a person fails to comply with an arrangement at any time after the final payment day. In those situations, the debtor is liable to pay interest from the day after the day in respect of which, in accordance with the arrangement, the last payment was made in respect of the debt. For example, a person has a payment arrangement and they make a payment on 1 March, but then fail to make their next payment on 1 April. In this situation, the debtor is liable to pay interest from 2 March, that being the day after the day the last payment was made.

Subclause 175(7) provides that a person will not have to pay interest on any part of a debt that has been incurred because of administrative error of the Commonwealth.

Clause 176 – Interest on debts – application

Clause 176 provides for how repayments made by a debtor will be allocated where interest is payable on the debt and an amount is paid for the purpose of paying the debt and interest (new section 175 refers). Repayments will first be used to reduce the original debt – that is, excluding any amount of interest that has become a recoverable debt. Once the original debt has been repaid, future payments by the debtor will be used in satisfaction of the interest that became payable on the original debt.

Clause 177 – Interest on debts – recovery as a debt

Clause 177 provides that any amount of interest that becomes payable is a debt due to the Commonwealth.

Clause 178 – Interest exemption determinations

Clause 178 creates a discretion for the Secretary to determine that interest is not payable, or is not payable in respect of a particular period. The purpose of this provision is to facilitate efficient and cost effective recovery of outstanding debts by providing flexibility in repayment negotiations.

Subclause 178(2) provides when an exemption determination may occur but is not limited by the examples in this subclause. The kind of circumstance where it is anticipated that this discretion could be used is: where a decision to impose the penalty is made on an assumption that is subsequently shown to have been incorrect; where the charge is applied as a result of clerical or system error; or where a person has been advised that he or she will be required to pay interest and the person subsequently enters into, and complies with, an arrangement under new section 190.

Under paragraph 178(3)(a), an interest exemption determination may apply to a period before the making of the determination. Paragraph 178(3)(b) provides that a determination under subclause (1) may be subject to the person complying with specified conditions.

Subclause 178(4) requires that, where a person has received notification under new section 174 that they are required to pay interest and the Secretary makes a determination under clause 178 that interest is not payable, the Secretary must give the person written notice of that latter determination.

Subclause 178(5) provides that, where a person contravenes a condition without reasonable excuse, the determination that interest is not payable ceases to have effect from and including the day on which the contravention (or, if there has been more than one contravention, the earliest contravention) occurred.

Accordingly, subclause 178(6) states that the Secretary may cancel or vary the determination by written notice to the person.

Clause 179 – Administrative charge

This clause provides for an administrative charge to be incurred when a debtor first becomes liable to pay interest in respect of a particular debt. That is, an administrative charge may only be incurred on one occasion in respect of any particular debt. Subclause 179(2) states that, where a person incurs an administrative charge, that amount is a debt due to the Commonwealth by the person.

Clause 180 – Penalty interest rate

Subclause 180(1) sets the penalty interest rate at 20 per cent per year, unless the Minister prescribes in the PPL rules, under subclause 180(2), a rate of interest that is lower than 20 per cent per year.

Subclause 180(3) provides that the Minister may prescribe in the PPL rules guidelines about the operation of the penalty interest provisions in this new Act.

Division 5 – How the Commonwealth can recover debts

Clause 181 – Debts to which Division 5 applies

Clause 181 provides that new Division 5 only applies to debts that are due to the Commonwealth under this new Act. The note lists the provisions that allow for debts to be raised and which are recoverable under this new Division.

Clause 182 – How to recover debts

This clause specifies the means by which a debt owed by a person may be recovered. Clause 182 specifies that, if a debt is owed by a person, it may be recovered by means of: legal proceedings; garnishee notice; debt payment arrangement; in limited circumstances, from deductions with consent from the instalments of another person to whom parental leave pay is payable; recovery from an ADI; or deductions or setting off in relation to a payment to which a person is entitled under another Act. The note further clarifies that deductions and setting off may occur under the social security law, family assistance law and *Veterans' Entitlement Act 1986*.

Clause 183 – Legal proceedings

Clause 183 provides that, where a parental leave pay debt or a PPL funding amount debt is recoverable by the Commonwealth by means of legal proceedings, the debt may be recovered in a court of competent jurisdiction.

The note clarifies that there are time limits set on recovery by legal proceedings as set out in new section 189.

Clause 184 – Garnishee notices – general

Clause 184 provides for recovery of a debt that is recoverable by the Commonwealth by means of a garnishee notice.

Subclause 184(1) provides that the Secretary may serve written notice on another person (not the debtor) who owes money to the debtor or is holding money for the debtor. The notice requires the person to pay the Commonwealth the amount that is covered by subclause 184(2). The note clarifies that the conditions on the payment of money due to the original debtor are to be ignored if subclause 184(3) applies. Note 2 clarifies that there are time limits set on recovery by legal proceedings as set out in new section 189.

Subclause 184(2) provides that the person to whom the notice is given would be required to pay to the Commonwealth the amount stated in the notice that should not exceed the amount required to be paid by the third person to the debtor. Payment to the Commonwealth may be demanded as a lump sum, or, where the third person makes ongoing payments to the debtor, by instalment expressed as a set amount or percentage figure.

Clause 184(3) provides that, where a condition has to be fulfilled before money becomes due to the person being served with the notice, the money is taken to have become due, for the purposes of this new section, even if the condition has not been fulfilled.

Subclause 184(4) provides that the notice should stipulate a time within which payment must be made. However, payment must not be demanded before the money becomes due or is held by the other person, or before the end of the period of 14 days after the notice is given.

Subclause 184(5) provides that a copy of the garnishee notice must be given to the debtor.

Clause 185 – Garnishee notices – amounts paid in compliance

Subclause 185(1) provides that a payment made to the Commonwealth in compliance with a garnishee notice is taken to be made with the authority of either the debtor or of any other person concerned.

Subclause 185(2) deals with the situation where a garnishee notice is served on someone and another person pays an amount in reduction of the debt. In these circumstances, the Secretary is to notify the person who received the garnishee notice that an amount has been paid and the amount stated in the notice is to be reduced by the amount already paid.

Clause 186 – Garnishee notices – debt for failure to comply with notice

Clause 186 deals with the situation in which a person who is given a garnishee notice (the garnishee) in respect of a debt due by another person (the original debtor) fails to comply with the notice to the extent that he or she is capable of complying with it.

In this situation, subclause 186(2) creates a debt due to the Commonwealth by the garnishee for the amount of the outstanding debt calculated under subclause 186(3).

Subclause 186(3) specifies that the amount of the debt outstanding is the lesser of: as much of the amount specified in the garnishee notice under new section 184 as the garnishee debtor was able to pay; or as much of the debt due by the original debtor at the time when the notice was given as remains due from time to time.

Subclause 186(4) provides that, if the Commonwealth recovers the whole or part of the debt due by the garnishee debtor under subclause 186(2), or the whole or part of the debt due by the original debtor, then both debts are reduced by the amount that the Commonwealth has so recovered. Consequently, the amount stated in the garnishee notice under new section 184 is taken to be reduced by the recovered amount.

Subclause 186(5) provides that this clause applies in spite of any law of a State or Territory that would have made the amount inalienable.

Clause 187 – Garnishee notices – offence for non-compliance

Clause 187 makes it an offence for a person not to comply with a garnishee notice, to the extent that the person is able to comply with the notice. The penalty for such non-compliance is set at imprisonment for 12 months.

Clause 188 – Garnishee notices – relationship with other laws

Subclause 188 stipulates that new sections 184 and 187 apply to money in spite of any law of a State or Territory (however expressed) under which the amount is inalienable.

Clause 189 – Legal proceedings and garnishee notices – time limits for debt recovery

Clause 189 stipulates a general limitation period for recovery of a debt by way of legal proceedings or garnishee notice of six years, beginning on the day on which the Commonwealth becomes aware, or could reasonably be expected to become aware, of the circumstances that gave rise to the debt.

The general limitation period can be extended if within the six years: some of the debt owed is paid; the person acknowledges that he or she does in fact owe the amount of the debt to the Commonwealth; if debt recovery action has been commenced; or following internal Departmental action such as reviewing a file or taking action to recover a debt.

In these circumstances, the limitation period on the Commonwealth taking action by way of legal or garnishee proceedings, for recovery is six years from the day that any of the actions mentioned above occurs.

Clause 190 – Payment of debts by arrangement

This clause enables the Secretary to decide that a person may enter into an arrangement to repay the debt by means of instalments. Subclause 190(2) provides that the Secretary's decision is to take effect on the day stated in the arrangement. If no day is stated, the decision is to take effect on the day the arrangement is entered into (subclause 190(3)).

Subclause 190(4) provides that the Secretary may end or alter an arrangement: at the debtor’s request; after giving 28 days’ notice to the debtor; or without notice where the debtor has not provided material information about their capacity to repay the debt.

Clause 191 – Deductions from instalments payable to another person

Clause 191 reduces a primary claimant's debt if an amount is deducted under new subsection 67(2) from an instalment to a secondary claimant for the recovery of a debt due to the Commonwealth by the primary claimant. For example, if a primary claimant has incorrectly been paid an instalment after the end of their PPL period and the secondary claimant is their current partner, the excess amount paid to the primary claimant can be recovered by deductions from the secondary claimant's first instalment payment if the secondary claimant agrees.

If clause 191 applies, the Secretary may deduct an amount from the secondary claimant's instalment. This will reduce the primary claimant's debt by an amount equal to the amount that is deducted from the secondary claimant's instalment. If the secondary claimant withdraws their consent, this clause stops applying.

Clause 192 – Recovery from an ADI

Clause 192 provides for the recovery of certain amounts directly from an ADI.

The effect of clause 192 is that, where the Secretary is satisfied that an instalment of parental leave pay or a PPL funding amount has been made to the account of a person who was not intended to obtain the instalment or PPL funding amount, the Secretary may, by written notice, require the ADI to pay the amount of the payment to the Commonwealth within a specified period. The period specified must be a reasonable period. Significantly, where the amount of the payment exceeds the amount that remains in the account when the notice is given, the obligation imposed on the ADI is to repay only the amount remaining in the account.

The effect of subclause 192(3) is that, where a payment (or payments) is made to the account of a person who has died before the payment (or payments) was made, the Secretary may, by written notice, require the ADI to pay the amount of the payment (or payments) to the Commonwealth within a specified period. The period specified must be a reasonable period. Significantly, where the amount of the payment (or payments) exceeds the amount that remains in the account when the notice is given, the obligation imposed on the ADI is to repay only the amount remaining in the account.

Subclause 192(4) makes it an offence for an ADI to fail to comply with the notice, to the extent that the institution is capable of complying with it.

Subclause 192(5) provides that any amount that has been paid by an ADI to the Commonwealth pursuant to this clause is to be deducted from any debt owed to the Commonwealth by any other person in respect of an instalment or PPL funding amount.

Division 6 – Writing off debts

Clause 193 – When debts can be written off

Clause 191 specifies that the Secretary may decide to write off a debt on behalf of the Commonwealth in relation to a stated period or otherwise. The note assists by setting out the provisions that allow for debts to be raised.

New subclause 193(2) provides that write-off may occur where: the debt is irrecoverable at law, the debtor has no capacity to repay the debt; after all reasonable efforts have been made to locate the debtor, the debtor's whereabouts are unknown; or it is not cost effective for the Commonwealth to take action to recover the debt.

Subclause 193(3) specifies when a debt is taken to be irrecoverable at law. This occurs when (and only when): the debt cannot be recovered, under new Division 5 (for example, the relevant time limits have elapsed); it would be impossible to sustain legal proceedings for the recovery of the debt because there is no proof of the debt; the debtor is discharged from bankruptcy or administration and the debt was incurred before the bankruptcy or before the person entered into administration and was not incurred by fraud; or the debtor has died leaving no estate or insufficient funds in the debtor's estate to repay the debt.

A person has the ‘capacity to repay the debt’ in paragraph 193(2)(b) if the debt can be recovered by deduction or setting off from an entitlement under this new Act or another Act unless recovery by those means would cause the person severe financial hardship.

A decision to write off a debt takes effect as set out in subclause 193(6). If a day is specified in the decision, the decision takes effect on the day stated in the decision. If the decision does not state such a day, then the decision takes effect on the day on which the decision is made.

It should be noted that subclause 193(7) specifies that nothing in clause 193 prevents the subsequent recovery of a debt that has been written off under this new section.

Division 7 – Waiver of debts

Clause 194 – Waiver of debts – general

Subclause 194(1) provides that new Division 7 only applies to debts that are recoverable by the Commonwealth under this new Act. The note assists by setting out the provisions that allow for debts to be raised.

Clause 194 covers the waiver of the whole or the part of a debt and this can only occur in accordance with new Division 7.

A waiver of debt takes effect in accordance with subclause 194(3). Under this subclause, if a day is specified in the decision, the waiver takes effect on the day stated in the decision. However, if the decision does not state such a day, then the decision to waive takes effect on the day on which the decision was made.

Clause 195 – Waiver of debts – administrative error

The Secretary must waive the right to recover the proportion of a debt that is attributable to administrative error if: the debtor received in good faith the payment or payments that gave rise to the administrative error proportion of the debt; and the person would suffer severe financial hardship if it were not waived.

For the purposes of this new section, the administrative error proportion of the debt may be 100 per cent of the debt.

Clause 196 – Waiver of debts – arising from offence

This clause applies where a person has incurred a debt, been convicted of an offence in relation to the debt, and had a longer custodial sentence imposed on them because they were unable or unwilling to pay the debt. In such a case, the Secretary must waive the right to recover the proportion of the debt that arose in connection with the offence.

For the purpose of this provision, references to ‘a proportion of a debt’ can be taken to include the entire debt.

Clause 197 – Waiver of debts – small debts

Clause 197 applies to small debts, which are defined as being, or being likely to be, less than $200. If a debt is less than $200 and it is not cost effective for the Commonwealth to take action to recover the debt, the Secretary must waive the right to recover the debt.

However, if the debt is at least $50 and could be recovered by deductions from the debtor’s entitlement under another law such as the family assistance law or the social security law, then it should be recovered.

Clause 198 – Waiver of debts – settlement of civil actions

This clause relates to the waiver of debts where there has been a settlement agreed, either through civil action or before the Administrative Appeals Tribunal.

Subclause 198(1) applies to settlement of civil action and subclause 198(2) applies to settlement of proceedings before the Administrative Appeals Tribunal. If the Commonwealth agrees to settle, then the Secretary must waive the right to recover the difference between the debt and the amount that is the subject of the settlement.

If the debtor has repaid at least 80 per cent of the original value of the debt, and is unable to repay a greater proportion of the debt, the Commonwealth and the debtor may agree that the amount recovered is in full satisfaction of the debt. In such a case, subclause 198(3) provides that the Secretary must waive the remainder of the debt.

Where there is an agreement between the Secretary and a debtor to the effect that the debtor's debt will be fully satisfied if the debtor pays the Commonwealth an agreed amount less than the amount of the debt outstanding at the time of the agreement, subclause 198(4) provides that the Secretary must waive the right to recover the difference between the unpaid amount and the agreed amount. However, subclause 198(5) provides that the Secretary must not make an agreement to which subclause 198(4) applies unless: the Secretary is satisfied that the agreed amount is at least the 'present value of the unpaid amount' repaid in instalments whose amount and timing is determined by the Secretary; and it would take at least a year to recover the unpaid amount under new Division 5 if subclause 198(4) did not apply.

The term ‘present value of the unpaid amount’ is defined in clause 198(6)**.**

Clause 198(6) provides that a determination for the purposes of the definition of 'settlement interest' will be prescribed in the PPL rules.

Clause 199 – Waiver of debts – special circumstances

The Secretary is provided with a discretionary power in clause 199 to waive a debt in special circumstances. This power may be exercised where the debt did not arise as a result of a false statement or false representation being knowingly made, or a person knowingly failing or omitting to comply with the new Act. In addition, there must be special circumstances (aside from financial hardship alone) which make it desirable to waive the debt, and, finally, it must be more appropriate to waive the debt than to write it off.

Clause 200 – Waiver of debts – determined classes

Clause 200 states that the Minister may specify, by legislative instrument, a class of debts that the Secretary may, on behalf of the Commonwealth, waive the Commonwealth's right to recover. Subclause 200(2) provides that the instrument may specify conditions to be met before the Secretary waives the debt and limits on the debts to be waived.

A decision under clause 200 will take effect as specified by subclause 200(3). According to this subclause, if a day is specified in the decision, it will take effect on the day stated in the decision (regardless of whether that day is before, after or on the day on which the decision is made). However, if the decision does not state such a day, then the decision would take effect on the day on which the decision is made.

Division 8 – Miscellaneous

Clause 201 – Overseas application of debts

Clause 201 extends the application of new Part 4-3 (except for new section 171) to acts, omissions, matters and things done outside Australia and to all people irrespective of their nationality or citizenship. The note reminds the reader that new section 173 provides for debts under the *Data-matching Program (Assistance and Tax) Act 1990.*

Chapter 5 – Review of decisions

Part 5-1 – Internal review of decisions

Division 1 – Guide to this Part

Clause 202 – Guide to this Part

This clause outlines the scope of new Part 5-1.

Part 5-2 – Internal review of decisions

Division 2 – Internal review of decisions

Clause 203 – Internal review – own-initiative review by Secretary

This clause provides for the Secretary to review a decision of an officer under this new Act, on his or her own initiative, if the Secretary is satisfied that there is enough reason to do so.

Subclause 203(2) provides that the Secretary may not review, on his or her initiative, a decision of an officer under new section 101 to make an employer determination. The reason for excluding employer decisions from review by the Secretary on his or her own initiative is that the Secretary must revoke an employer determination under new section 108 where the Secretary is satisfied that a condition for making the employer determination was not satisfied when the determination was made.

Note 1 clarifies that an employer may seek a review of a decision to make an employer determination (new section 207 refers).

Note 2 points out to the reader that new section 108 deals with revocation of employer determinations.

The Secretary may review a decision, whether or not a person has applied for a review and even if an application for review has been made to the Social Security Appeals Tribunal (SSAT) or the Administrative Appeals Tribunal (AAT). Having reviewed the decision, the Secretary may affirm or vary the decision or set aside the decision and substitute a new decision. A reference in subclause 203(1) to a decision of an officer under this new Act includes a reference to a determination that the Secretary is taken, because of a provision of this new Act, to have made (subclause 203(5)).

Clause 204 – Internal review – own-initiative review and tribunal review

If the Secretary makes a decision under subclause 203(4) and at that time the person (or the Secretary) has already applied to the SSAT for a review of the decision that the Secretary was also reviewing, the Secretary must give a written notice of the decision to the Principal Member of the SSAT.

Similarly, if the Secretary makes a decision under subclause 203(4) and, at that time, the person (or the Secretary) has already applied to the AAT for a review of the decision that the Secretary was also reviewing, the Secretary must give a written notice of the decision to the Registrar of the AAT.

Clause 205 – Internal review – review following application

This clause provides that the Secretary or an authorised review officer must, if an application is made under new section 206, 207 or 208, review the decision and either affirm or vary the decision or set aside the decision and substitute a new decision. The authorised review officer must not, however, review a decision under subclause 205(1) where the Secretary has exercised his or her power under new section 263 (settlement of proceedings before the AAT).

Clause 206 – Internal review – application for review of claimant decision

Subclause 206(1) provides for the scope of this clause. The new section applies to a decision of an officer under this new Act, unless the decision is a decision under new Part 3-2 (payment of instalments by employer), a decision under new Part 3-5 (employer determinations), a decision under new Part 4-2 (compliance), or a decision under the PPL rules or regulations if the PPL rules or regulations state that this new section does not apply to the decision.

Subclause 206(2) provides that a reference in subclause 206(1) to a decision of an officer under this new Act includes a reference to a determination that the Secretary is taken to have made because of a provision of this new Act.

Subclause 206(3) provides that a decision to which this new section applies is a ***claimant decision***.

Subclause 206(4) provides that a person whose interests are affected by a claimant decision may apply to the Secretary for review of the decision if the decision was not made personally by a PPL agency head.

Subclause 206(5) provides that an application under subclause 206(4) may only be made within 28 days after the day the decision was made or, if the Secretary is satisfied that a longer period should apply, then within the longer period.

Example
A woman makes a claim for parental leave pay. She meets all eligibility criteria and estimates her adjusted taxable income (for the previous income year) to be $160,000. She is advised that she is not eligible for parental leave pay as her income is too high. Two months later, the woman's accountant asks her if she has claimed parental leave pay. He calculates her adjusted taxable income (for the previous income year) and she realises that she had incorrectly estimated her adjusted taxable income. She also understands that she can seek review on the basis that:

- her actual adjusted taxable income is below the income limit; and

- she is still within the 12-month period from the date of birth of the baby.

If she had become aware, say, 16 months after the baby's birth that her actual adjusted taxable income is lower than the income limit, she would not be able to seek review.

Subclause 206(6) provides that a person, in their capacity as an employer, cannot make an application under subclause 206(4).

Clause 207 – Internal review – application for review of employer determination decision

Subclause 207(1) applies to a decision of an officer under new section 101 to make an employer determination.

Subclause 207(2) provides that a reference in subclause 207(1) to a decision of an officer under this new Act includes a reference to a determination that the Secretary is taken to have made because of a provision of this new Act.

Subclause 207(3) provides that an employer may apply, in writing, to the Secretary for review of an employer determination decision that relates to the employer if the employer believes that:

(a) a condition in new paragraph 101(1)(b) or (c) is not satisfied in relation to the employer determination and the employer has not made an election under new section 109 that applies to the person; or

(b) a condition in new paragraph 101(1)(d) or (e) is not satisfied in relation to an employer determination.

Note 1 reminds the reader that the conditions in new paragraphs 101(1)(b) to (e) relate to the employment by an employer of someone to whom parental leave pay is payable.

Note 2 clarifies the application of new section 109. It also clarifies how new subsection 103(2) applies new paragraphs 101(1)(b) and (c) if the employer has made an election under new section 109.

Under subclause 207(4), the employer cannot make an application under subclause 207(3) if the employer determination decision was made personally by a PPL agency head.

Subclause 207(5) provides that an application for review of an employer determination under subclause 207(3) may only be made within the 14-day period referred to in new section 103. It is the Government's intention that parental leave pay be paid to parents when they need it most, which is usually soon after the birth of their baby, or adoption of their child. In order to achieve this, the Family Assistance Office and employers will be required to work closely together so that payments can be made from, or as soon as possible after, a parent's nominated start date. The legislation provides that, where an employer wants to seek review, they may do so, but they must act within 14 days so as not to delay parental leave pay payments.

The note clarifies that, under new section 103, if an employer determination has been made, the employer is required either to give the Secretary a notice accepting the determination or to apply for a review of the employer determination within a 14-day period.

Subclause 207(6) provides that an application under subclause 207(3) must specify which condition or conditions the employer believes are not satisfied, and whether an election applies to the person; be signed by a person authorised by the employer. It must also be accompanied by documentary evidence supporting the application, or a statutory declaration supporting the application if the employer is unable to provide documentary evidence (for instance, where the employer does not have any records about the claimant as the claimant was never employed by the employer).

Subclause 207(7) provides that, for the purposes of making an application under subclause 207(3), the disclosure of personal information is taken to be authorised by law for the purposes of the Privacy Act and any provision of a law of a State or Territory that provides that personal information may be used or disclosed if the use or disclosure is authorised by law. This clause is intended to cover situations where the employer may have to disclose personal information about one of its employees (such as that a particular person no longer works for the employer) in order to be able to apply for a review of the employer determination.

Clause 208 – Internal review – application for review of employer funding amount decision

Subclause 208(1) provides that this new section applies to a decision of an officer under new section 75 to pay a PPL funding amount to an employer.

Subclause 208(2) provides that a reference in subclause 208(1) to a decision of an officer under this new Act includes a reference to a determination that the Secretary is taken to have made because of a provision of this new Act.

Subclause 208(3) provides that a decision to which this new section applies is a ***employer funding amount decision***.

Subclause 208(4) provides that an employer may apply, in writing, to the Secretary for review of an employer funding amount decision that relates to the employer if the employer believes that the Secretary has failed to comply with new subsection 75(3) in relation to the decision and the decision was not made personally by a PPL agency head.

This note reminds the reader that new subsection 75(3) requires the Secretary to pay a PPL funding amount to an employer within a certain time.

Subclause 208(5) provides that an application for review under subclause 208(4) must be signed by a person authorised by the employer.

Subclause 207(6) provides that an application under subclause 208(4) for a review in relation to a PPL funding amount may only be made within 14 days after the day of the second payroll cut-off referred to in new subsection 75(3) in relation to the PPL funding amount. For example, an employer may seek a review where the Secretary has not paid enough (or any) of a PPL funding amount to the employer to enable the employer to pay an instalment of parental leave pay that is payable to an employee. The reason for a 14-day time limit for employers is to ensure that claimants do not experience delays in the payment of parental leave pay payments (see the explanation provided in subclause 208(6) above).

Clause 209 – Internal review – withdrawal of application

This clause provides for a person or an employer to withdraw their application for internal review at any time before the review has been completed. An application (other than an application under new section 207) that is withdrawn is taken to have not been made. An application may be withdrawn orally or in writing or in any other manner approved by the Secretary.

Clause 210 – Internal review – when decision made on review comes into force

Subclause 210(1) provides that a decision under new subsection 203(4) or new paragraph 205(1)(b) (the ***review decision***) to vary a decision or set aside a decision and substitute a new decision comes into operation on the day that would give full effect to the review decision. For example, for a claimant who has been determined to be ineligible at week 30 after becoming the child's primary carer and who is successful in a review decision made in week 50, parental leave pay may be payable from week 30, although, in reality, parental leave pay for the past period would be paid from week 50 at the earliest. This ensures that the claimant can receive the full 18 weeks parental leave pay.

On the other hand, if a claimant has been determined to be ineligible at week 50 after becoming the child's primary carer and that decision is overturned on review, the claimant is only eligible to receive payments for two weeks (that is, from week 50 to week 52).

Subclause 210(2) provides that a decision comes into operation immediately on the giving of the decision if it is a decision under new subsection 203(4) or new paragraph 205(1)(b) to vary an employer determination decision or an employer funding amount decision or set aside such a decision and substitute a new decision.

Clause 211 – Internal review – notice of decision on review of claimant decision

Subclause 211(1) provides that this new section applies if a person (the ***decision-maker***) makes a decision under new subsection 203(4) or new paragraph 205(1)(b) in relation to a claimant decision.

Subclauses 211(2) and (3) specify who must be given a written notice of the decision.

Subclause 211(4) provides that the notice must include a statement to the effect that the person may apply to the SSAT for review of the decision and, if the person is dissatisfied with the SSAT's decision, the person may apply to the AAT for review of the SSAT's decision.

Subclause 211(5) provides that subclause 211(4) does not apply in relation to a decision referred to in new subsection 215(2). The note points out to the reader that new subsection 215(2) excludes certain claimant decisions from SSAT review.

Subclause 211(6) provides that a notice may also, if the decision-maker considers it appropriate, include a statement setting out the reasons for the decision, the findings by the decision-maker on material questions of fact, and reference to the evidence or other material on which those findings were based. This subclause gives the Secretary a discretion as to how much further information or evidence to give to each person whose interests are affected by the decision. This provision will allow the decision-maker to inform others likely to be affected by the decision, of the decision itself. This does not mean that reasons for the decision will be provided to all affected parties. In most cases, affected parties will be advised that a decision has been made, how it may affect them and, where appropriate, their options or rights.

Clause 212 – Internal review – notice of a decision relating to employer

Subclause 212(1) applies if a decision-maker makes a decision under new subsection 203(4) or new paragraph 205(1)(b) in relation to the any of the decisions listed, including any other decision under this new Act that directly affects the interests of an employer.

Subclause 212(2) provides that, to avoid doubt, new paragraph 212(1)(f) does not apply to a decision if the only effect of the decision on the interests of an employer is that the decision could result in an employer determination for the employer being made, varied, set aside or revoked.

Subclause 212(3) provides that a written notice of the decision must be given to the employer concerned.

Subclause 212(4) provides that the notice must include a statement setting out the reasons for the decision, the findings by the decision-maker on material questions of fact and the evidence or other material on which those findings were based.

Subclause 212(5) provides that the notice must include a statement to the effect that the employer may apply to the SSAT for review of a decision referred to in new paragraph 212(1)(a) or (1)(c).

Part 5-2 – Review by the Social Security Appeals Tribunal

Division 1 – Guide to this Part

Clause 213 – Guide to this Part

This clause outlines the scope of new Part 5-2.

Clause 214 – SSAT objective under this Act

This clause requires the SSAT to pursue, in carrying out its functions, the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

Division 2 – Review by SSAT of claimant decisions

Clause 215 – Application of this Division

This clause lists those decisions to which this new Division applies and does not apply. A decision to which this new Division applies is an ***SSAT reviewable claimant decision***.

Clause 216 – SSAT review of claimant decision – application for review

Subclause 216(1) provides that a person whose interests are affected by an SSAT reviewable claimant decision may apply to the SSAT for review of the decision. The note refers the reader to new section 217 for making an application.

Subclause 216(2) provides that an application under subclause 216(1) may only be made within 28 days after the day the SSAT reviewable claimant decision was made or, if the SSAT is satisfied that a longer period should apply, then within the longer period.

> ***Example***
> A mother says she is the primary carer and claims parental leave pay. The separated father challenges this determination. He is successful and the mother is advised of the outcome – that she is not eligible for parental leave pay. She may apply for a review of this decision to the SSAT within 28 days after the day the SSAT reviewable claimant decision was made. This rule also provides some flexibility for parents by allowing them to make an application to the SSAT after the 28-day period, if the SSAT is satisfied that a longer period should apply.

Subclause 216(3) provides that a person, in their capacity as an employer, cannot make an application under subclause 216(1).

Clause 217– SSAT review of claimant decision – making of application

This clause provides that applications to the SSAT for review of an SSAT reviewable claimant decision may be made in writing and sent to an office of the SSAT, the Department or an office of the Commonwealth Services Delivery Agency or Medicare Australia. Alternatively, an application can be made orally at, or by telephoning, an office of the SSAT. If a person receives an oral application, the person is required to make a written record of that application, including the date of the application. Such a written record is deemed to be a written application delivered to the SSAT on the day of the oral application. An application may include a statement of reasons for seeking a review of the decision.

Clause 218 – SSAT review of claimant decision – review following application

This clause provides that, if a person applies to the SSAT for review of an SSAT reviewable claimant decision, the SSAT must either affirm or vary the decision or set aside the decision and substitute a new decision or send the matter back to a PPL agency head for reconsideration in accordance with any directions or recommendations of the SSAT.

Clause 219 – SSAT review of claimant decision – powers of the SSAT

This clause provides that the SSAT may exercise all the powers and discretions that are conferred by the new Act (including the PPL rules) on the Secretary for the purposes of reviewing a decision under this new Division.

Clause 220 – SSAT review of claimant decision – when SSAT decision comes into force

This clause provides that a decision of the SSAT under this new Division to vary a decision or set aside a decision and substitute a new decision comes into force on the day that would give full effect to the SSAT's decision.

Clause 221 – SSAT review of claimant decision – variation of decision before review completed

Subclause 221(1) provides that any variation by an officer to an SSAT reviewable claimant decision that is being reviewed by the SSAT does not deprive the SSAT of its jurisdiction to hear the matter. The application to review the decision proceeds as if it were an application for review of the varied decision.

Subclause 221(2) makes a similar provision to subclause 221(1) except that it applies where an officer sets an SSAT reviewable claimant decision aside and substitutes a new one.

Subclause 221(3) provides that subclause 221(4) applies (which provides that a person may either proceed with the application for review of the decision as varied or the new decision, or withdraw the application under new section 251) where a decision is varied. or set aside and substituted. by an officer while the application for review is before the SSAT. This provision contemplates cases where an applicant will be satisfied with the decision after it is varied or set aside and there will be no longer any reason to proceed with the review by the SSAT.

Clause 222 – SSAT review of claimant decision – parties to review

Subclause 222(1) specifies who may be a party to a review. It provides that, in addition to the applicant and the Secretary, the CEO of the specified agency may be a party in cases where an officer of their agency has made the claimant decision that is subject to review and any other person who has been made a party to the review under subclause 222(3).

Subclause 222(2) provides that any person (other than a person who is an employer) whose interests are affected by a decision that is the subject of an application for review may apply in writing to the Principal Member to be made a party to the review.

Subclause 222(3) provides that the Principal Member may order that that person be joined as a party to the review.

Subclause 222(4) provides that the Principal Member may direct that a party no longer be a party to the review if:

(a) the party consents; or

(b) the Principal Member is satisfied, after having communicated with the party or after having made reasonable attempts to communicate with the party and having failed to do so, that the party does not intend to participate in or proceed with the review; or

(c) the party fails to comply with a direction or order of the SSAT or of the Principal Member given in relation to the review; or

(d) the party fails to attend the hearing.

Division 3 – Review by SSAT of employer decisions

Clause 223 – Application of this Division

This clause lists those decisions to which this new Division applies. A decision to which this new Division applies is an ***SSAT reviewable employer decision***.

Clause 224 – SSAT review of employer decision – application for review

Subclause 224(1) provides that an employer may apply to the SSAT for review of an SSAT reviewable employer decision that relates to the employer and a person if the decision is an employer determination decision and the employer believes:

(a) a condition in new paragraph 101(1)(b) or (c) is not satisfied in relation to the employer determination and the employer has not made an election under new section 109 that applies to the person; or

(b) a condition in new paragraph 101(1)(d) or (e) is not satisfied in relation to an employer determination,

Note 1 refers to new section 225 for making an application.

Note 2 points out to the reader that the conditions in new paragraphs 101(1)(b) to (e) relate to the employment by an employer of someone to whom parental leave pay is payable.

Note 3 clarifies the application of new section 109. It also clarifies how new subsection 101(2) applies new paragraphs 101(1)(b) and (c) if the employer has made an election under new section 109.

Under subclause 224(2), an employer may apply to the SSAT for review if the decision relates to an employer funding amount decision. The note refers to new section 225 for making an application.

An application may only be made within 14 days after the day on which the SSAT reviewable employer decision was made.

Clause 225 – SSAT review of employer decision – making of application

This clause provides that applications to the SSAT for review of an SSAT reviewable employer decision may be made in writing and sent to an office of the SSAT. The application must be in the form approved by the Principal Member; specify the conditions or conditions that the employer believes are not satisfied and, if new paragraph 224(1)(a) applies, the application must state whether the employer believes that an election applies to the person; be accompanied by a statutory declaration verifying the application and be accompanied by any other documents. An application may include a statement of reasons for seeking a review of the decision.

Clause 226 – SSAT review of employer decision – review following application

This clause provides that, if an employer applies to the SSAT for review of an SSAT reviewable employer decision, the SSAT must either affirm or vary the decision, or set aside the decision and substitute a new decision, or send the matter back to a PPL agency head for reconsideration in accordance with any directions or recommendations of the SSAT.

Clause 227 – SSAT review of employer decision – powers of the SSAT

This clause provides that the SSAT may exercise all the powers and discretions that are conferred by the new Act on the Secretary for the purpose of reviewing a decision under this new Division.

Clause 228 – SSAT review of employer decision – when SSAT decision comes into force

This clause provides that a decision of the SSAT under this new Division comes into force immediately on the giving of the decision.

Clause 229 – SSAT review of employer decision – variation of decision before review completed

Subclause 229(1) provides that any variation by an officer to an SSAT reviewable employer decision that is being reviewed by the SSAT does not deprive the SSAT of its jurisdiction to hear the matter. The application to review the decision proceeds as if it were an application for review of the varied decision.

Subclause 229(2) makes a similar provision to subclause 229(1) except that it applies where an officer sets an SSAT reviewable employer decision aside and substitutes a new one.

Subclauses 229(3) and (4) provide that a person may either proceed with the review or withdraw the application where a decision is varied or set aside and substituted by an officer while the application for review is before the SSAT. This provision contemplates cases where an applicant will be satisfied with the decision after it is varied or set aside and there will be no longer any reason to proceed with the review by the SSAT.

Clause 230– SSAT review of employer decision – parties to review

This clause sets out the parties to a review by the SSAT under this new Division.

Part 5-3 – Procedures for review by the Social Security Appeals Tribunal

Division 1 – Introduction

Clause 231 – Guide to this Part

This clause outlines the scope of new Part 5-3.

Division 2 – Preliminary procedures

Clause 232 – Procedure on receipt of application for review by SSAT

Subclause 232(1) provides that, where an application for review by the SSAT is sent to an office of the Department, the Commonwealth Services Delivery Agency or Medicare Australia, the Secretary is responsible for ensuring that it is sent to the Principal Member as soon as practicable, but, in any case, no later than seven days after the Department or agency received it.

Subclause 232(2) provides that the Principal Member must give both the applicant and the Secretary written notice that an application has been received.

Subclause 232(3) requires the Secretary to provide the SSAT with a statement about the decision under review. The statement must set out the findings of fact, refer to the evidence and give the reasons for the decision.

The Secretary is also required to provide the Principal Member with all documents relevant to the decision under review. This will, in practice, be a transfer of the applicant's file. These requirements have to be complied with within 28 days of the Secretary receiving a notice of the application for review.

Subclause 232(4) provides that, where the Principal Member asks the Secretary to send the statement and documents earlier than the date specified in subclause 232(3), the Secretary must take all reasonable steps to comply with this request. The Principal Member may issue a request under this subclause in cases in which financial hardship could occur pending the determination of the appeal.

Subclause 232(5) provides for the situation where relevant documents come into the Secretary's possession after the statement has been prepared and sent, with the file, to the Principal Member. The Secretary is required to send a copy of the later documents to the Principal Member as soon as practicable after receiving them.

Subclause 232(6) applies to the number of copies of documents that the Secretary must provide to the Principal Member, if the Secretary is required to give the Principal member a document.

Clause 233 – Parties to be given statements about the decision under review

Subclause 233(1) requires the Secretary to give, within 28 days after receiving the notice under new subsection 232(2), each party to the review a copy of the statement and documents referred to in new subsection 232(3).

Subclause 233(2) requires the Secretary to give, as soon as practicable after the Secretary sends a document under new subsection 232(5), each party to the review a copy of the document.

Subclause 233(3) enables the Principal Member to direct the person receiving a copy of the statement or document (under new subsections 233(1) or (2)) not to disclose any information from the statement or document or any information other than as specified in the direction.

Subclause 233(4) provides that a person commits an offence if the person engaged in conduct and the conduct contravenes a direction given under subclause 233(3). A penalty of imprisonment for two years applies for a failure to comply with the direction.

Clause 234 – Arrangements for hearing of application

This clause requires the Principal Member to fix a date, time and place for the hearing of an application for review and give to the applicant and any other parties to the review written notice about the details of the hearing a reasonable time before the date fixed.

Clause 235 – Notice of application to person affected by SSAT reviewable claimant decision

Subclause 235(1) provides that reasonable steps must be taken by the Principal Member to give written notice of the application to another person (other than a person who is an employer) whose interests are, in the Principal Member's opinion, affected by the decision.

Subclause 235(2) requires the above notice, which may be given at any time before the review is determined, to be in writing and also to set out the person's right to apply to be joined as a party under new section 222.

Under subclause 235(3), each party is to be given a copy of the notice.

Division 3 – Submissions from parties other than PPL agency heads

Clause 236 – Division does not apply in relation to PPL agency heads

This clause provides that this new Division does not apply in relation to a party to a review of a decision who is a PPL agency head.

Clause 237 – Submissions to SSAT

Subclause 237(1) allows a party to the review to make submissions either orally or in writing or in both.

Note 1 points out to the reader that the Principal Member may direct that a hearing be conducted without oral submissions (new section 238 refers).

Note 2 points out to the reader that a hearing may also proceed without oral submissions from a party in the circumstances set out in new section 239.

Subclause 237(2) allows a party to have another person make submissions to the SSAT on his or her behalf.

Subclause 237(3) enables the Principal Member to determine to accept submissions by the party or their representative by telephone or other electronic communications equipment.

Subclause 237(4) outlines some of the situations where the Principal Member may decide that submissions may be made by telephone or other electronic communications equipment.

Subclause 237(5) provides that, if a party is not proficient in English, the Principal Member may direct that communication proceed through an interpreter.

Clause 238 – SSAT hearings on written submissions only

Subclause 238(1) provides that the Principal Member may direct that the hearing proceed without oral submissions from the parties if the Principal Member considers that the review could be determined fairly on the basis of the parties' written submissions and all parties' consent.

Subclause 238(2) provides that, if the Principal Member gives a direction that the hearing is to proceed without oral submissions, the Principal Member must give each of the parties to the review a written notice informing them of that direction, invite each party to make written submissions, and specify the address to which such submissions are to be delivered and by when. Parties must be given a reasonable period to make written submissions (subclause 238(3)).

Despite subclause 238(1), the SSAT, as constituted for the hearing, may, if it considers necessary after taking into account the written submissions, make an order allowing the parties to make oral submissions (subclause 238(4)).

Clause 239 – SSAT hearings without oral submissions by party

Subclause 239(1) provides that the SSAT may proceed without oral submissions from a party where that party has advised that he or she does not intend making oral submissions.

Subclause 239(2) provides that the Principal Member may authorise the SSAT to proceed without oral submissions from a party or the party's representative (as the case may be) where the Principal Member had decided to have oral submissions from that party or the party's representative by telephone or other electronic communications equipment, and the Principal Member had made all reasonable efforts to contact the party or the party's representative but was unable to do so.

Subclause 239(3) provides that the Principal Member may authorise the SSAT to proceed without oral submissions from a party or a party's representative (as the case may be) where there has been no determination that submissions from that party or the party's representative may be made by telephone or other electronic communications equipment and the party does not attend the hearing.

Subclause 239(4) provides that the SSAT may proceed to hear the application where the Principal Member has given an authorisation under subclause 239(2) or (3).

Subclause 239(5) allows the Principal Member to revoke an earlier authorisation made under subclause 239(2) or (3). This may arise where contact is made with a party after the authorisation was made.

Division 4 – Submissions from PPL agency heads

Clause 244 – Submissions from PPL agency heads

Subclause 240(1) provides that a PPL agency head who is a party to a review of a decision may make written submissions.

Subclause 240(2) provides that the PPL agency head may, by writing, request the Principal Member for permission to make oral submissions, or both oral and written submissions, to the SSAT. The request must explain how such submissions would assist the SSAT.

Subclause 240(3) provides that the Principal member may, by writing, grant the request if such submissions would, in the opinion of the Principal Member, assist the SSAT, taking into account the objective laid down by new section 214.

Subclause 240(4) provides that the Principal Member may order the PPL agency head to make oral submissions, or both oral and written submissions, to the SSAT if such submissions would, in the opinion of the Principal Member, assist the SSAT, taking into account the objective laid down by new section 214.

Subclause 240(5) provides that, for the purposes of subclauses 240(3) and (4), the Principal Member may determine that oral submissions are to be made by telephone or by means of other electronic communications equipment.

Subclause 240(6) provides that subclause 240(5) does not limit subclause 240(3) or (4).

Division 5 – Other evidence provisions

Clause 241 – Evidence on oath or affirmation

This clause enables the SSAT to take evidence on oath or affirmation for the purposes of a review of a decision.

Clause 242 – Provision of further information by Secretary

This clause enables the Principal Member to ask the Secretary to provide any further information or a document that is in the Secretary's possession that is relevant to the review. The Secretary must comply as soon as practicable, and in any event within 14 days.

Clause 243 – Exercise by Secretary of information-gathering powers

This clause enables the Principal Member to ask the Secretary to exercise the Secretary's powers under new section 117 if the Principal Member is satisfied that a person has information, or has custody or control of a document, that is relevant to the review. The Secretary must comply as soon as practicable, and, in any event, within seven days after the request is made.

Clause 244 – Power to obtain information

Subclause 244(1) provides that, if the Principal Member reasonably believes that it is necessary for the purposes of a review, he or she may, by written notice, direct a person, within the period and in the manner specified in the notice to give information or documents that are relevant to the review or to attend before the SSAT and answer questions at a reasonable time and place specified in the notice.

Subclause 244(2) provides that the period for giving the information or documents must be at least 14 days after the notice is given.

Subclause 244(3) creates an offence if the person engages in conduct and the conduct contravenes a direction under subclause 244(1). The penalty is imprisonment for six months.

Subclause 244(4) provides that a notice must set out the effect of the provisions listed in this subclause.

Subclause 244(5) provides that a person who is required to attend a hearing is allowed reasonable expenses, as specified in the determination, that were incurred for travel and accommodation in relation to the hearing. This covers such things as transport costs, and accommodation costs if the person is required to be away from home for one or more nights.

Subclause 244(6) provides that the costs, in relation to a determination made by the SSAT under subclause 244(5), are payable by the Commonwealth.

Division 6 – Pre-hearing conferences

Clause 245– Pre-hearing conferences

This clause empowers the Principal Member to convene a conference before the hearing of the review if they consider that it would assist in the conduct and consideration of that review. At the pre-hearing conference, the Principal Member may fix a day, or days, for the hearing, give directions about the time within which submissions are to be made, give directions about the time within which evidence is to be brought, and give directions about what evidence is to be brought before the tribunal.

Subclause 245(3) provides that paragraph 245(2)(d) does not limit the evidence that may be brought before the SSAT.

Further, the Principal Member may make an order directing a party who is present at a conference not to disclose information obtained at the conference (subclause 245(4) refers).

A breach of the non-disclosure direction made under subclause 245(4) will be a criminal offence, punishable by imprisonment for two years.

Clause 246 – Powers of SSAT if parties reach agreement

This clause provides that, if:

- parties to a review reach agreement about all or part of the review; and
- before the hearing commences, they lodge written and signed terms of agreement; and
- the SSAT has the power to make a decision in line with the agreement;

then the SSAT can make a decision in accordance with the terms of agreement without the need to hold a hearing.

If the terms of the agreement relate to only part of the matter to be reviewed, then the SSAT can make those terms part of their decision and not deal with those aspects of the review in the balance of the hearing.

Division 7 – The hearing

Clause 247 – Hearing procedure

This clause provides that the SSAT is not bound by technicalities, legal forms or rules of evidence, and must act as speedily as possible but still ensure that the review receives proper consideration, having regard to the objective set out in new section 214. The SSAT is also free to inform itself on any matter relevant to a review in any manner it considers appropriate.

Clause 248 – Hearing in private

Subclause 248(1) sets out the general rule that the hearing of a review must be in private.

Subclause 248(2) provides the Principal Member with a discretion to issue directions in writing or otherwise as to who may be present at any hearing of a review.

Subclause 248(3) provides that the Principal Member, in exercising his or her discretion under subclause 248(2), must have regard to the wishes of the parties and the need to protect their privacy.

Clause 249 – Restrictions on disclosure of information obtained at hearing

Subclause 249(1) gives the Principal Member a power to direct, in writing, that people who are admitted to the privacy of a hearing are not to disclose the information gained in the course of the hearing except as specified in the direction.

Subclause 249(2) provides that a person commits an offence if the person engages in conduct that contravenes a direction. Penalty for such a contravention is two years' imprisonment.

Division 8 – Other procedural matters

Clause 250 – Adjournment of SSAT hearings

Subclause 250(1) gives the SSAT the power to adjourn a hearing from time to time.

The factors that may, among others, be relevant to a decision to refuse to adjourn are set out in subclause 250(2).

Clause 251 – Withdrawal of application for review

Subclause 251(1) provides that an applicant for a review of a decision may withdraw the application at any time.

Subclause 251(2) provides that, where the withdrawal is in writing, it may be sent to an office of the Department, or the SSAT, or an office of another agency where the Secretary has approved the office for this purpose, and, where the withdrawal is oral, it may be communicated to the SSAT either personally or by telephone.

Subclause 251(3) requires the person to whom the oral withdrawal is communicated to make a written record of that withdrawal, including the date of the withdrawal.

Subclause 251(4) provides that, where the withdrawal is sent or delivered to an office of a Commonwealth agency, the head of the agency must send the Principal Member a written notice of the withdrawal. This must be done as soon as practicable and, in any case, within seven days.

Clause 252 – Dismissal of an application

Subclause 252(1) gives the Principal Member the power to dismiss an application where he or she is satisfied that the applicant does not intend to proceed with the application, either after the applicant has communicated an intention not to proceed with the application, or if the Principal Member has made reasonable attempts to contact the applicant and there has been no contact.

Subclause 252(2) states that an application dismissed under subclause 252(1) is taken to have been withdrawn on the date of the dismissal.

Clause 253 – Presiding member at SSAT hearing

This clause provides that, if the SSAT is constituted by two or more members, the Principal Member must designate one of those members as the member who must preside at the hearing of the review.

Without specifically providing for what is to occur in the case of one member panels, it is intended that, where the SSAT is constituted by only one member, that member would be the presiding member.

Clause 254 – Decision of questions before SSAT

This clause provides that clause 253 is to apply only if the SSAT is constituted by two or more members.

Clauses 256 and 254 make it explicit that these provisions only apply in the case of multi-member panels. This is to avoid any possible interpretation that the legislation presumes there must always be two or more members on a panel.

Clause 255 – Directions as to procedure for hearings

This clause provides for directions to be given as to the procedures to be adopted by the SSAT for reviews. Subclause 255(1) provides that the SSAT Principal Member may give both general directions as to the procedure to be followed by the SSAT, and directions in relation to a particular review. Such directions must not be inconsistent with any provision of this new Act (see subclause 255(2)), and may be given before or after the hearing of a particular review has commenced (see subclause 255(3)). The power for the Principal Member to issue general directions may be necessary to stipulate specific procedures for hearings, the responsibilities of the parties to the proceedings and their representatives and to provide information and direction to assist the SSAT in the effective conduct of review. For example, the directions may include rules relating to documentary and other evidence and how, in what form and when it is to be provided The directions may also include matters relating to recording the proceedings and requests for adjournments in proceedings. Similar directions have been issued by the Principal Member in relation to child support appeals under section 103ZA of the *Child Support (Registration and Collection) Act 1988*.

The presiding member of the SSAT as constituted for a particular review may also give directions for that review (see subclause 255(4)). As with directions given by the Principal Member, such directions must not be inconsistent with this new Act, but, in addition, must not be inconsistent with any directions given under subclause 255(1) (see subclause 255(5)). Directions may be given before or after the hearing of a particular review has commenced (see subclause 255(6)). Directions given under this clause must be consistent with the SSAT's objective of providing review that is fair, just, economical, informal and quick (see subclause 255(7)).

A general direction made under new paragraph 255(1)(a) is a legislative instrument under the Legislative Instruments Act (see subclause 255(8)). A direction made under new paragraph 255(1)(b) or subclause 255(4) is not a legislative instrument (see subclause 255(9)). This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Ac 2004t*.

Clause 256 – Costs of review

Subclause 256(1) sets out the general rule that each party must bear their own expenses incurred in relation to the review.

Subclause 256(2) provides that the SSAT may specify in a determination that a party must be reimbursed by the Commonwealth for reasonable costs that are incurred by the party for travel and accommodation expenses in relation to the review.

Subclause 256(3) provides that the SSAT may determine that the Commonwealth pay the costs of a medical service that the SSAT arranges for a party to a review.

Subclause 256(4) provides that costs associated with a determination made by the SSAT under subclause 256(2) or (3) are payable by the Commonwealth.

Division 9 – Notice of decision

Clause 257 – Procedure following SSAT decision

Subclause 257(1) provides that, within 14 days after making the decision, the SSAT must prepare a written statement (the ***initial statement***), which sets out the decision of the SSAT, and give this statement to all parties. Also within 14 days after making the decision, the SSAT must do either of the following:

(i) give reasons for the decision orally to each party to the review. In doing so, the SSAT must explain that the party may make a written request for a written statement referred to in subparagraph 257(1)(c)(ii) (a statement of reasons) within 14 days after the initial statement is given to the party; or

(ii) give to each party a written statement that sets out the reasons for the decision and the findings on any material questions of fact, and refers to the evidence or other material on which the findings are based (a statement of reasons). This statement may be provided as part of the initial statement.

Further, the SSAT must return to the Secretary any documents provided by the Secretary, and give copies of any other documents that contain evidence or material on which the findings of fact are based.

Subclause 257(2) provides that, if the SSAT does not give a statement of reasons (that is, it chooses to give reasons orally), either party may, within 14 days after the initial statement is given to the party, make a request for a statement of reasons. This request must be in writing.

Subclause 257(3) provides that a PPL agency head may also make a written require for a written statement referred to in subparagraph 257(1)(c)(ii) if the SSAT has not given such a statement to the PPL agency heard and if a person applies to the AAT under new section 261 for review of the SSAT decision on the review referred to in subclause 257(1).

Subclause 257(4) provides that the SSAT must comply with the request under subclause 257(2) or (3) within 14 days after the day on which the SSAT receives the request.

Subclause 257(5) provides that, if the SSAT varies or sets aside a SSAT reviewable claimant decision or an SSAT reviewable employer decision, the SSAT must prepare a written statement that sets out the decision of the SSAT, the reasons for the decision, the findings on any material questions of fact and refers to the evidence or other material on which the findings of fact are based. The SSAT must also give each party to the review a copy of the statement within 14 days after making the decision, return to the Secretary any document that the Secretary provided to the SSAT and give the Secretary a copy of any document that contains evidence or material on which the findings of fact are based.

Subclause 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 (other than a PPL agency head) a written notice that includes a statement to the effect that, if the party is dissatisfied with the decision of the SSAT, application may be made to the AAT for review of the decision, subject to the *Administrative Appeals Tribunal Act 1975* (the AAT Act).

Subclause 257(7) provides that a failure to comply with subclause 257(6) does not affect the validity of the decision.

Division 10 – Correction of errors in decisions or statements of reasons

Clause 258 – Correction of errors in decisions or statements of reasons

Subclause 258(1) provides that, if the presiding member at a review, or the Principal Member, is satisfied that there is an obvious error in the text or written statement of reasons for an SSAT decision, either the presiding member or the Principal Member may alter the text of the decision or statement of reasons.

Subclause 258(2) provides that the altered text of a decision, or statement, is taken to be the decision or the statement of reasons of the SSAT.

Subclause 258(3) provides examples of what might constitute obvious errors in the text of a decision or statement of reasons, such as obvious clerical or typographical errors, or inconsistency between the decision and the statement. These examples are not intended to be exhaustive.

Division 11 – Appeals and references of questions of law from the SSAT to the Federal Court

Clause 259– Appeals and references of questions of law in relation to SSAT review of employer decisions

Subclause 259(1) provides that this clause applies to proceedings before the SSAT for review of an SSAT reviewable employer decision.

Subclause 259(2) provides that the object of this clause is to allow SSAT employer proceedings to be subject to judicial review as if they were proceedings before the AAT.

Subclause 259(3) provides, to achieve the objective of subclause 259(2), for appeals to the Federal Court from SSAT employer proceedings, on a question of law from any decision of the SSAT or on a question of law arising in those proceedings to be referred.

Subclause 259(4) provides for modification of the AAT Act. This subclause provides that, without limiting subclause 259(3), Part IVA of the AAT Act applies in relation to SSAT employer proceedings as if:

(a) references to the AAT in that Part were references to the SSAT;

(b) paragraph 44(2A)(a) of the AAT Act allowed an appeal to be instituted within the time prescribed, or further time allowed, by rules of court made under the *Federal Court of Australia Act 1976*;

(c) the reference to President in paragraph 45(1)(a) of the AAT Act were a reference to the Principal Member; and

(d) any other necessary changes were made.

Note 1 points out to the reader that paragraph 44(2A)(a) of the AAT Act relates to the time limit in which an appeal must be made, unless the Federal Court allows further time in which to appeal.

Note 2 points out to the reader that paragraph 44(2B)(b) of the AAT Act provides that the Federal Court may allow further time to appeal in certain circumstances.

Note 3 points out to the reader that paragraph 45(1)(a) of the AAT Act requires the President of the AAT to agree before the AAT can refer a question of law arising in proceedings before the AAT to the Federal Court.

Subclause 259(5) excludes subsection 44(2), paragraphs 44(3)(b) and (c) and subsection 44AA(2) of Part IVA of the AAT Act from applying in relation to SSAT employer proceedings.

Part 5-4 – Review of claimant decisions by the Administrative Appeals Tribunal

Division 1 – Guide to this Part

Clause 260 – Guide to this Part

This clause outlines the scope of new Part 5-4.

Division 2 – Right to review by AAT

Clause 261 – Review of decisions by AAT

This clause sets out when review by the AAT may occur.

Subclause 261(1) provides that an application for review may be made to the AAT in respect of a decision that has been affirmed, varied or set aside by the SSAT.

Subclause 261(2) clarifies that the ‘decision’ made by the SSAT as referred to above is taken to be the decision as varied or affirmed, or the new decision if the original one was set aside, or the directions or recommendations of the SSAT where the SSAT has set aside the reviewable decision and sent the matter back to the Secretary for consideration.

Subclause 261(3) provides that an employer cannot make an application for review by the AAT under subclause 261(1).

Subclause 261(4) clarifies that subclause 261(1) is subject to section 29 of the AAT Act.

Clause 262 – Variation of decisions under section 261 before AAT review completed

Subclause 262(1) provides that, where a decision is varied by an officer after an application for review has been made to the AAT, under new section 261, but before the application is determined, the application is to be treated as if the decision, as varied, had been affirmed by the SSAT and the decision under review is the varied decision rather than the original decision.

Subclause 262(2) has the same effect for decisions set aside and substituted.

Subclause 262(3) makes it clear that, where an officer varies the decision under review or sets the decision aside and substitutes a new decision, an applicant has a choice as to whether to proceed with the application for review under new section 261 or to withdraw.

Clause 263 – Settlement of proceedings before the AAT

Subclause 263(1) provides that, if AAT proceedings relate to the recovery of a debt, the Secretary and the other parties to the proceedings may agree to settle the matter. Any agreement must be in writing.

Subclause 263(2) provides that, if the proceedings are settled and the Secretary gives the AAT a copy of the agreement to settle the proceedings, the application for review that is the subject of the proceedings is taken to have been dismissed.

Division 3 – Modification of AAT Act in relation to section 261 review applications

Clause 264 – Notice of application for review

Clause 264 modifies subsection 29(11) of the AAT Act for the purposes of an application under new section 261 so that all parties to the SSAT review of the decision, except the party making the application to the AAT, receive notice that there has been an application to the AAT for review of the decision made by the SSAT.

Clause 265 – Parties to a review by the AAT

This new section modifies paragraph 30(1)(b) of the AAT Act so that the parties to a review by the AAT under new section 261 are the same as the parties to the review by the SSAT.

Clause 266 – Lodgment of documents with the AAT

Subclause 266(1) modifies section 37 of the AAT Act for the purposes of an application under new section 261. The modification allows for reference to the person who made the decision the subject of the application to be deemed to be reference to the decision maker as provided by this subclause.

Subclause 266(2) provides that, for the purposes of the deemed decision-maker meeting his or her obligations under paragraph 37(1)(a) of the AAT Act in respect of an application under new section 261, the statement provided by the SSAT under new subparagraph 257(1)(c)(ii) or new paragraph 257(5)(a) will be sufficient.

Subclause 266(3) clarifies that the AAT's powers under section 38 of the AAT Act to obtain an additional statement is not limited by the operation of subclause 266(2).

Clause 267 – Power of AAT to obtain additional information

Clause 267 modifies section 38 of the AAT Act so that the person who is required to provide any additional statements under that section to the AAT is the Principal Member.

Clause 268 – Operation and implementation of the decision under review

Subclause 268(1) modifies subsection 41(4) of the AAT Act for the purposes of an application under new section 261 so that, where a party applies to the AAT for an order staying or otherwise affecting the operation or implementation of a decision made by the SSAT, each party to the review before the SSAT will be able to make submissions to the AAT.

Subclause 268(2) clarifies that the 'decision' referred to in section 41 of the AAT Act for the purposes of an application under new section 261 is to be taken to be the original decision *and*: the decision as varied by the SSAT if it was varied; the new decision if the original one was set aside; or any decision made as a result of the matter being sent back to the Secretary with directions or recommendations.

Subclause 268(3) clarifies that, for this purpose, 'original decision' means the decision reviewed by the SSAT.

Clause 269 – Failure of party to appear

Clause 269 modifies subsection 42A(2) of the AAT Act so that the Secretary is the person who made the decision and therefore that provision does not apply to the Secretary as a party to the decision.

Part 5-5 – Other matters relating to review

Division 1 – Introduction

Clause 270 – Guide to this Part

This clause outlines the scope of new Part 5-5.

Division 2 – Other matters relating to review

Clause 271 – Authorised review officers

Clause 271 provides that the Secretary may authorise officers to be authorised review officers for the purposes of this new Act.

Clause 272 – Review body may determine events to have happened, or not to have happened

This clause applies if the Secretary, SSAT or AAT (the review body) is reviewing a decision under new Chapter 5. If the review body is satisfied that an event would have happened had the original decision not been made, then that event can be deemed to have happened for the purposes of the review. Similarly, if an event would not have happened had the original decision not been made, then that event can be deemed to have not happened for the purposes of the review.

For example, a person made a primary claim pre-birth, or within the 28 days immediately following birth, for which the Secretary determined parental leave pay was not payable to the claimant and, because of this, the claimant did not verify the child's birth within the required time. If, on review, the SSAT decides that the individual is eligible it may set the decision aside, remitting it back to the Secretary. The intention is to allow the Secretary to be able to seek verification at that time of the birth but be able to treat the claim as though the verification had been provided at a time which allows the claimant's nominated start date to have effect as the start of their PPL period. The Secretary should be satisfied that verification would have been provided within the required time but for the decision that parental leave pay was not payable to the claimant.

Similarly, if a person returned to work because the Secretary determined that parental leave pay was not payable to him or her, this event will not necessarily disqualify the person from parental leave pay. If, on review, the Secretary decides that the claimant was eligible and the Secretary was also satisfied that parental leave pay would have been payable from the claimant's nominated start date, but for the decision that parental leave pay was not payable to the claimant, it would be open to the Secretary to deem that the claimant had not returned to work.

Clause 273 – Certain income test determinations not to be changed on review

This clause applies where a review is being conducted by an officer, the SSAT or the AAT for the purposes of new Chapter 5 and if: the review involved a review of a decision that the person is or is not eligible for parental leave pay, or that parental leave pay is or is not payable; the review considered a determination that the person satisfies the income test; this determination was taken into account in deciding that parental leave pay is payable; and the person did not knowingly make a false or misleading representation or provide false or misleading information in relation to the determination of income.

The note refers the reader to new section 37, which provides for the income test.

If this occurs subclause 273(2) provides that, despite any provision of this new Chapter or the AAT Act, the review body cannot vary the income determination in such a way that the person does not satisfy the income test or set aside the income determination and substitute it with a new determination that the person did not satisfy the income test.

It is intended that, once a person has provided their estimate of adjusted taxable income and the Secretary has decided that parental leave pay is payable, this decision should not be over turned should the person's actual adjusted taxable income later be found to exceed the income limit. This does not include cases where a person provides false or misleading information/representation in relation to their income determination.

Chapter 6 – Miscellaneous

Part 6-1 – How the Act applies in particular circumstances

Division 1 – Guide to this Part

Clause 274 – Guide to this Part

This clause outlines the scope of new Part 6-1.

Division 2 – How this Act applies to an adopted child

Clause 275 – How this Act applies to an adopted child

Subclause 275(1) provides that this new Act applies in relation to an adopted child who satisfies the requirements of subclause 275(2) as if:

- a reference to the birth of a child were a reference to the placement of the child;
- a reference to the expected date of birth of the child were a reference to the excepted day of placement of the child;
- a reference to a child's first birthday were a reference to the first anniversary of the day of placement of the child;
- a reference to a birth verification form for a child were a reference to information required by the Secretary about the adoption of the child; and
- a reference to a child being born during the same multiple birth were a reference to the child being adopted during the same multiple adoption.

This allows the remainder of the new Act to be read appropriately to accommodate the circumstances of adoptive children and parents.

Subclause 275(2) sets out the circumstances in which an adopted child will be covered. It is modelled closely on the provision which makes adoptive parents eligible for baby bonus for their adopted child. It provides that a child satisfies the requirements if, as part of the process for the adoption of the child by a person, the child is, or is to be, entrusted to the care of the person by an authorised party and the child is, or will be, under 16 on the day of placement of the child.

'Day of placement' is defined in subclause 275(3) as the day on which, as part of the process for the adoption of a child by a person, the child is entrusted to the care of the person by an authorised party.

Division 3 – How this Act applies to claims made in exceptional circumstances

Clause 276 – How this Act applies to claims made in exceptional circumstances

A claim is made in 'exceptional circumstances' (defined in new section 6) when the claim is made in circumstances prescribed as exceptional by the PPL rules. These circumstances will generally be those in which there will be an unexpected change of primary carer for the child, for example, as the result of a death or serious illness of a parent of the child. This change may potentially allow the claimant to make a primary, secondary or tertiary claim, and be eligible as a primary, secondary or tertiary claimant, depending upon the eligibility criteria prescribed under new subsection 31(4) by the PPL rules. In these cases, this new Act will apply as if:

- a reference to the birth of a child were a reference to the claimant becoming the child's primary carer;
- a reference to the day the child was born were a reference to the day the claimant became the child's primary carer;
- a reference to the expected date of birth of the child were a reference to the day the claimant expects to become the child's primary carer;
- a reference to a child's first birthday were a reference to the first anniversary of the day the claimant became the child's primary carer;
- a reference to a birth verification form for a child were a reference to information required by the Secretary about the claimant becoming the child's primary carer; and
- a reference to a child being born during the same multiple birth were a reference to the claimant becoming the primary carer of the child at the same time as becoming the primary carer of another child.

Subsection 18(3), which deals with birth registration, is excluded from the effect of this provision so that a parental leave pay claimant in exceptional circumstances may still be required to comply with the requirements of that subsection.

277 – Primary carers when a child is stillborn or dies

This clause provides that, if a claim is made for parental leave pay for a child, and, before or after the claim is made, the child is stillborn or dies, then a reference in this Act to the claimant becoming or being the child's primary carer is taken to be a reference to, had the child not been stillborn or died, the person who would have become or been the child's primary carer. This means that a claim in exceptional circumstances can be made by a claimant for a child who was stillborn or who has died, and the operation of the Act modified appropriately by section 276 to correctly establish eligibility.

Subclause (2) provides that the PPL rules may modify the operation of subsection (1). This is necessary because the full range of exceptional cases in which it may be desirable to allow payment of parental leave pay where a child was stillborn or has died are not yet known, and the above rule may not be appropriate for all circumstances.

Division 4 – How this Act applies to Commonwealth employment

Clause 278 – How this Act applies to Commonwealth employment

This clause provides for the application of the Act in relation to Commonwealth employees, for the purposes of the Secretary being able to make an employer determination, and the various employer obligations in relation to the payment of instalments of parental leave pay to a person where the person is employed by the legal entity that is the Commonwealth.

The effect of the clause is to apply the new Act to a person engaged by or on behalf of the Commonwealth as an employee to perform functions in a Commonwealth agency, as if the person were employed by the agency rather than the Commonwealth, and the agency were a body corporate; and to make clear that the agency head is taken to be the person's employer rather than the Commonwealth. A Commonwealth agency for the purposes of this clause means a Department of State; a Department of the Parliament; a prescribed Agency within the meaning of the *Financial Management and Accountability Act 1997* that forms part of the Commonwealth; or any other unincorporated body established for a public purpose by or under a law of the Commonwealth.

Part 6-2 – Nominees

Division 1 – Guide to this Part

Clause 279 – Guide to this Part

This clause outlines the scope of new Part 6-2.

Division 2 – Appointment of nominees

Clause 280 – Appointment of payment nominees

This clause provides for the Secretary to be able to appoint a person to be the payment nominee of another person under this new Act and direct that the whole or part of an instalment be paid to the payment nominee.

The note at the end of subclause 280(1) reminds the reader that the appointment must be made in accordance with new section 282.

An appointment or a direction made under subclause 280(1) is not a legislative instrument. This provision is includes to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 281 – Appointment of correspondence nominee

This clause provides for the Secretary to be able to appoint a person to be the correspondence nominee of another person for the purposes of the Paid Parental Leave scheme.

The note at the end of subclause 281(1) points out to the reader that the appointment must be made in accordance with new section 282.

An appointment or a direction made under subclause 281(1) is not a legislative instrument. This provision is included to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 282 – Provisions relating to appointments

This clause deals with the administrative procedures that relate to appointment. Subclause 282(1) provides that a person may be both the payment nominee and the correspondence nominee of the same person. Additionally, the Secretary must not appoint a nominee in relation to a person unless the proposed nominee has consented in writing and the principal's wishes, if any, have been taken into account. When the Secretary has appointed a nominee in respect of person, then he or she must give both of those parties a copy of the appointment.

Clause 283 – Suspension and cancellation of nominee appointments

Subclause 283(1) provides that, if a person withdraws their consent to be a nominee under new section 280 or 281, the Secretary must cancel the person's appointment as nominee as soon as practicable.

Subclause 283(2) gives the Secretary the power to suspend or cancel an appointment where the nominee notifies the Department if an event or a change of circumstances has happened or is likely to happen, and the event is likely to have an effect described in new paragraph 288(1)(b).

Subclause 283(3) provides that the Secretary may suspend or cancel appointments, in writing, if the Secretary gives the nominee a notice under new section 288 or 289 and the nominee does not comply with the notice.

Subclause 283(4) provides that, while an appointment is suspended, the appointment has no effect for the purposes of this new Act.

Subclause 283(5) provides that the Secretary may, at any time, cancel a suspension of an appointment under subclause 283(2) or (3).

Subclause 283(6) provides that any suspensions or cancellations of nominee appointments must be made by the Secretary in writing.

Subclause 283(7) provides that the cancellation of an appointment has effect on and from the day specified in the cancellation.

Subclause 283(8) provides that the Secretary must give a copy of a suspension or cancellation of an appointment, or a cancellation of such a suspension, to the nominee and the principal.

Subclause 283(9) provides that a suspension or cancellation of an appointment, or a cancellation of such a suspension, is not a legislative instrument. This provision is included to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Division 3 – Payments of instalments to payment nominee

Clause 284 – Payments of amounts to payment nominee

Subclause 284(1) provides that, if a person has a payment nominee and the whole or a part of an instalment of parental leave pay is payable to the person under this new Act, the instalment must be paid to the payment nominee.

Subclause 284(2) provides that the amount paid to the payment nominee of a person is paid on behalf of the person and is taken to have been paid to the person when it is paid to the payment nominee.

Subclause 284(3) provides that an amount that is to be paid to the payment nominee of a person must be paid to the credit of a bank account nominated and maintained by the nominee.

Subclause 284(4) allows for the Secretary to direct that the amount that is to be paid to the payment nominee be paid to the payment nominee in a manner other than to credit a bank account maintained by the nominee.

Subclause 284(5) provides that a direction given under subclause 284(4) is not a legislative instrument. This provision is includes to assist readers as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Division 4 – Functions and responsibilities of nominees

Clause 285 – Actions of correspondence nominee on behalf of principal

Subclause 285(1) provides that any act (other than one under new Division 2 or 3) that may be done by a person may be done by that person's correspondence nominee for the purposes of the Paid Parental Leave scheme.

The note reminds the reader that this clause is subject to new section 296 and new subsection 284(4).

Subclause 285(2) provides that an application or claim that may be made under this new Act by a person may be made by the person's correspondence nominee on behalf of that person.

Subclause 285(3) provides that the actions of a person's correspondence nominee under this clause are those of the person for the purposes of this new Act.

Subclause 285(4) provides that subclause 285(1) does not extend to an act where the Secretary gives a notice to a person who has a correspondence nominee requiring the person to do the act.

Clause 286 – Giving of notices to correspondence nominee

Subclause 286(1) provides that any notice that the Secretary has the power to give to a person under this Act may be given to that person's correspondence nominee instead.

Subclause 286(2) provides that the notice must be in the same form as if it were being given to the person and it may be given either personally, sent by post or by any other means approved by the Secretary to the correspondence nominee.

Subclauses 286(3) and (4) deal with the giving of notices to both the claimant and the correspondence nominee. Where the Secretary gives a notice to a claimant, having previously given the same notice to their correspondence nominee then new section 287 no longer applies in respect of the notice given to the nominee. Similarly, if a notice is given to a correspondence nominee when that same notice has previously been given to the claimant, then new section 287 does not apply in respect of the notice given to the nominee.

Clause 287 – Compliance by correspondence nominee

This clause details what a correspondence nominee must do to comply with a notice that has been given to them under new section 286 and the consequences of the correspondence nominee complying or failing to comply with the notice. In effect, if a notice, making a PPL requirement of a person, is given to the person's correspondence nominee, the notice is taken to have been given to the person at such time as it was given to their nominee. The nominee is able to satisfy any PPL requirement made of the person.

Where the person's correspondence nominee does an act for the purpose of satisfying a PPL requirement imposed on the person, that act is taken, for the purposes of this new Act, to have been done by the person. Additionally, where a person is subject to a PPL requirement and neither the person nor their nominee complies with that requirement, then it is taken, for the purposes of this new Act, that the person has failed to comply with that requirement.

Clause 288 – Nominee to inform Department of matters affecting ability to act as nominee

Subclause (1) provides that the Secretary may give a nominee of a person a notice requiring the nominee to inform the Department of the occurrence of an event or change of circumstances, or of the nominee becoming aware that such an occurrence or change is likely to happen. The obligation to notify applies only if the event or change of circumstances is likely to affect the nominee's ability to act as a nominee, or the Secretary's ability to give notices to the nominee, or the nominee's ability to comply with notices given to the nominee by the Secretary.

Subclause 288(2) is subject to subclause 288(3) and deals with what form a notice under subclause 288(1) should take. It must be in writing and be given personally or by post or by such other means determined by the Secretary. It must also specify how the nominee is to give information to the department and the period within which to do so.

Subclause 288(3) provides that a notice under subclause 288(1) is not ineffective just because it does not comply with paragraph 288(2)(c).

Subclause 288(4) is subject to subclause 288(5). It provides that the period under paragraph 288(2)(d) must not end earlier than 14 days after either the day on which the event or change of circumstances happens, or the day on which the nominee becomes aware that the event or change of circumstances is likely to happen.

Subclause 288(5) provides that subclause 288(4) does not apply if a notice requires the nominee to inform the Department of any proposal by the principal to leave Australia.

Subclause 288(6) provides that the new section extends extraterritorially and to all people, regardless of their nationality or citizenship.

Clause 289 – Statement by payment nominee regarding disposal of money

Subclause 289(1) provides that the Secretary may give the payment nominee a notice requiring the nominee to give the Department a written statement about a matter relating to the disposal by the nominee of money paid to the nominee on behalf of the principal.

Subclause 289(2) is subject to subclause 289(3) and deals with the requirements of notices given under subclause 289(1).

Subclause 289(3) provides that a notice under subclause 289(1) is not ineffective just because it does not inform the nominee how to give the required information to the Department.

Subclause 289(4) provides that a person must be given at least 14 days, after either the day on which the event or change of circumstances occurs or the day on which the nominee becomes aware that the event or change of circumstances is likely to occur, to notify the Department.

Subclause 289(5) provides that the statement given in response to the notice must be in writing and in accordance with a form approved by the Secretary.

Subclause 289(6) creates an offence in relation to the nominee who refuses or fails to comply with a notice under subclause 289(1). The penalty for a contravention of subclause 289(6) is 30 penalty units.

Subclause 289(7) sets out that subclause 289(6) does not apply if the person has a reasonable excuse.

The note points out to the reader that, in accordance with subsection 13.3(3) of the *Criminal Code,* a defendant bears an evidential burden in relation to the matter in subclause 289(2).

Subclause 289(8) provides that the offence of refusing or failing to comply with a notice is an offence of strict liability.

A strict liability offence applies because nominees are receiving parental leave pay on behalf of a third party and, if they do not comply, the third party could be disadvantaged. The strict liability is softened to some extent by subclause (7), which provides that subclause (6) does not apply if the person has a reasonable excuse.

Subclause 289(9) provides that the new section extends extraterritorially and to all people, regardless of their nationality or citizenship.

Division 5 – Other matters relating to nominees

Clause 290 – Protection of principal against liability for actions of nominee

This clause provides that a person is not guilty of an offence under this new Division for the acts or omissions of the person's correspondence nominee.

Clause 291 – Protection of nominee against criminal liability

Subclause 291(1) provides that the nominee is not subject to any criminal liability under this new Act for any act or omission of the person or anything done in good faith by the nominee in his or her capacity as nominee.

Subclause 291(2) provides that it is subject to new section 289.

Clause 292 **– Duty of nominee to principal**

This clause establishes a duty upon the payment or correspondence nominee to act, or not to act, at all times in what he or she believes in good faith to be the best interests of the principal.

Clause 293 – Saving of Secretary's powers of revocation of appointments

This clause makes it clear that the power of revocation that is contained in subsection 33(3) of the *Acts Interpretation Act 1901*, is not affected by anything in this Part.

Clause 294 – Saving of Secretary's powers to give notices to principal

This clause makes it clear that the nothing in Part 6-2 is intended to limit the power of the Secretary to give notices to a person who has a nominee.

Clause 295 – Notification of nominee where notice given to principal

This clause provides that, if the Secretary gives a notice to a person who has a correspondence nominee, then the Secretary may inform the correspondence nominee of the giving of the notice.

Clause 296 – Right of nominee to attend with principal

This clause deals with the situation where the Secretary gives a notice to a person, even if the person has a correspondence nominee, because the Secretary requires the person to do something personally. Where the Secretary informs the correspondence nominee that a notice has been given to the person, the nominee is given the right to attend or accompany the person, subject to the person’s (that is, the principal’s) wishes.

Part 6-3 – Other matters

Division 1 – Guide to this Part

Clause 297 – Guide to this Part

This clause provides for the scope of new Part 6-3.

Division 2 – The PPL rules

Clause 298 – The PPL rules

This clause provides that the Minister may, by legislative instrument, make rules providing for matters required or permitted by this new Act to be provided, or necessary or convenient to be provided, in order to carry out or give effect to this new Act.

It is appropriate to include provision for delegated legislation in this way, particularly to enable the Government to bring certain people in less usual or exceptional circumstances within the Paid Parental Leave scheme, when they would not otherwise have the benefit of entitlement under the primary legislation. For example, see the discussion above under subclause 31(4) in Chapter 2 about the navy officer recalled to active duty.

The PPL rules would also enable minor administrative matters to be addressed to complete the scheme.

The PPL rules would be subject to full Parliamentary scrutiny according to the usual legislative instrument requirements.

Examples of exceptional circumstances are situations such as the death or serious illness of a parent of the child.

Clause 299 – Extension of Act to persons who are not employees and employers

Subclause 299(1) provides that the PPL rules or regulations may provide that the Secretary may make an employer determination under Part 3-5 for people who are in a similar relationship as that between an employer and employee. This is to allow for those relationships that do not fall squarely into the employer/employee model, such as defence force members and law enforcement officers.

Subclause 299(2) provides that the PPL rules or regulations, in relation to such people under subclause 299(1), may modify, including by adding, omitting or substituting, any provision of this new Act.

Subclause 299(2) will provide greater flexibility to include other types of employees as needed. Additionally, the rules or regulations may need to amend provisions to extend the powers of a relevant regulator to undertake compliance of PPL as these employers will not be regulated by the Fair Work Ombudsman.

Division 3 – Jurisdiction of courts

Clause 300 – Jurisdiction of Federal Court of Australia

This clause confers jurisdiction on the Federal Court of Australia in relation to civil matters arising under this new Act.

Clause 301 – Jurisdiction of Federal Magistrates Court

This clause confers jurisdiction on the Federal Magistrates Court in relation to civil matters arising under this new Act.

Division 4 – Other matters

Clause 302 – General administration

This clause provides that the Secretary has, subject to any direction of the Minister, the general administration of this new Act.

Clause 303 – Delegation

This clause provides that, subject to specific limitations set out in the clause, the Secretary may, by signed instrument, delegate to an 'officer', or the CEO or employee of the Commonwealth Services Delivery Agency or Medicare Australia, all or any of the powers of the Secretary under this new Act.

There are similar provisions in the *Social Security (Administration) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999* to allow for efficient administration of Government-funded income support and family assistance payments. As in those cases, and given the volume of decisions to be made under the new Act, it would not be viable to limit the delegations to Senior Executive Service officers, other than for those particular decisions that are so limited. This provision will allow for efficient administration of the PPL scheme.

Clause 304 – Decisions to be in writing

This clause provides that decisions made under this new Act must be in writing.

Clause 305 – Secretary may arrange for use of computer programs to make decisions

This clause deals with the situation where the Secretary arranges for a computer program to generate a decision for any purpose under this new Act. Where this happens, the computer decision is taken to be a decision of the Secretary.

This provision ensures that a computer-generated decision is subject to review by deeming it to be a decision by the Secretary.

Clause 306 – Notice of decisions

This clause makes it clear that a notice of a decision affecting a person's entitlement to be paid parental leave pay (such as a decision that a person is eligible for parental leave pay or a variation decision) is to be taken to have been given to the person if it is delivered to the person personally, or left at, or sent by prepaid post to, the address of the place of residence or business of the person last known to the Secretary. The note clarifies that notices of decisions can also be given electronically in accordance with the *Electronic Transactions Act 1999*.

A notice of a decision under this new Act may be given to a person by properly addressing, prepaying and posting the document as a letter. If this procedure is followed, then the notice is taken to have been given to the person at the time at which the notice would be delivered in the ordinary course of post unless the contrary is proved.

If a provision of this new Act requires a notice of a decision to be given, the notice is not ineffective just because the notice was not given or was given late or did not comply with the requirements of this clause.

Other notices of decision (such as a notice requiring a person to provide information) will be subject to the rules in sections 28A and 29 of the *Acts Interpretation Act 1901*.

Clause 307 – Appropriation

This clause provides that payments of parental leave pay under this new Act (other than payments of instalments by employers under new Division 2 of Part 3-2) must be made out of the Consolidated Revenue Fund, which is appropriated accordingly. A standing appropriation for payments of parental leave pay is appropriate because the volume of these payments under the new Act will depend on individual eligibility and cannot be predicted sufficiently accurately for the purposes of an annual appropriation. The standing appropriation model is consistent with established appropriation models under similar legislation such as the social security law and the family assistance law.

Clause 308 – Regulations

This clause provides that the Governor General may make regulations that are consistent with the provisions in this new Act setting out matters that are:

(a) required or allowed by this new Act to be prescribed; or

(b) necessary or convenient for carrying out or giving effect to provisions in this new Act.

PAID PARENTAL LEAVE SCHEME

REGULATION IMPACT STATEMENT *

This Regulation Impact Statement (RIS) has been prepared by the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR). Its purpose is to assist the Australian Government to make decisions regarding a paid parental leave (PPL) scheme.

The RIS assesses the impact of the Productivity Commission's (PC's) Final Inquiry Report *Paid Parental Leave: Support for Parents with Newborn Children*. The PC recommended a PPL scheme of 18 weeks duration for eligible mothers and 2 weeks paid paternity leave for fathers and other eligible partners, with payment based on the Federal Minimum Wage and in most cases for employers to act as 'paymasters' to make these payments to eligible parents.

The RIS analyses the impact of the PC's proposed PPL scheme and an option with the paternity leave component deferred. The analysis includes costs and benefits of each option, and the impacts on families, the broader community, government and business. The RIS identifies the specific business costs, in particular the costs for businesses due to the role they would play in the proposed scheme.

This RIS has been prepared in accordance with the Australian Government Best Practice Regulation Handbook, August 2007, issued by the Office of Best Practice Regulation (OBPR) in the Department of Finance and Deregulation and in consultation with the OBPR.

**This RIS was prepared in April 2009 at the time the Government chose to introduce a PPL scheme along the lines of the PC model with paternity leave deferred. The Government subsequently decided to phase-in the employer role over the first six months to help employers transition to the new arrangements. This change was in response to concerns raised by employers, payroll software developers and tax practitioners about the additional costs of upgrading IT systems in the middle of a financial year. This means employers will generally be required to provide parental leave pay to their long-term employees for births occurring from 1 July 2011, rather than 1 January 2011, unless they choose to opt-in to the scheme at the earlier time. The Government also decided to provide employers with the option of receiving either fortnightly or three six-weekly payments to provide more flexibility in how they handle the PPL funding from Government. In addition, the Government reconsidered the requirement that a person should be in paid work to receive PPL. A PPL applicant may resign and receive PPL, subject to meeting the eligibility criteria, including the work test. The continuing employment requirement has been removed to ensure the scheme does not result in an employee having an artificial, 'time-limited' attachment to an employer only in order to receive PPL. The Family Assistance Office will pay PPL to these recipients. It is expected these amendments will be viewed positively by employers and help to ease any initial implementation concerns for employers paying PPL to their employees.*

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1. Background

In a joint media statement released on 17 February 2008, the Deputy Prime Minister and Minister for Education, Employment and Workplace Relations, the Hon Julia Gillard MP, the Treasurer, the Hon Wayne Swan MP, and the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, announced that the Government would ask the Productivity Commission (PC) to examine ways in which the Government could provide improved support to parents with newborn children.

The PC was asked to look at the economic, productivity and social costs and benefits of paid maternity, paternity and parental leave, as well as the health and developmental benefits of any scheme for babies and their parents.

The PC released its draft inquiry report on paid parental leave (PPL) on 29 September 2008 and held extensive public hearings and invited written submissions on its draft report.

The Commission's final inquiry report 'Paid Parental Leave: Support for Parents with Newborn Children' (PC (2009)) was presented to the Government on 2 March 2009.

2. Problem

In its inquiry into paid parental leave the Productivity Commission (PC 2009) reported that 280 000 mothers gave birth in Australia in 2007. Of these, around 175 000 were in the workforce prior to giving birth, with at least 80 per cent of those mothers intending to return to work.

The PC (2009) also reported that around 11 per cent of mothers who were in paid work prior to childbirth return to work before the baby has reached three months of age, around 26 per cent before six months and around 57 per cent before the baby has reached one year old.

Mothers return to work within the first six to 12 months of a child's life often against their own preferences. Early return to work following childbirth can have adverse consequences for the health and wellbeing of the mother and child. In relation to the child, problems can include:

- an increase in a wide range of infant conditions (e.g. respiratory tract infection, and eczema), particularly in cases where children are not exclusively breast fed for the first six months;
- behavioural problems and delayed cognitive development; and
- adult impacts (obesity, diabetes and high blood pressure).

Mothers may experience psychological problems (particularly an increased incidence of post-natal depression), fatigue, slower recovery from birth, increased risks of breast cancer and ovarian cancer and possible increased risk of post-menopausal hip fractures and osteoporosis (PC 2009; HREOC 2002).

These health and wellbeing problems are not only borne by the parents. Society often has to pay for health costs and other consequences of poorer outcomes for children and parents.

The onset of family responsibilities is often associated with a loss of income. The financial stress associated with this can contribute to physical and emotional problems experienced by parents, in particular the mother. It can also affect the father's ability to adapt to parenthood; to bond with their child; to provide emotional support and household assistance for the primary carer. This may occur, for example, when fathers must work longer hours to compensate for the loss of the mother's income.

In addition to losing short term income, the mother's lifetime earning capacity is often severely reduced as result of leaving the workforce to bear children. Chapman et al (1999) found that women forgo lifetime earnings of around $157,000–$239,000 from having one child. Women often have lower wages and accumulated superannuation balances. The loss in lifetime earnings may reflect a number of factors. Almost one fifth of mothers in paid work resign instead of taking leave around childbirth. If a woman returns to work, this will often be on a part-time basis. They tend to work in jobs with flexible work arrangements, but which have fewer opportunities for career development and lower workplace entitlements and remuneration than other jobs.

There is a lack of comprehensive and equitable provision of paid parental leave in Australia. Around half of employed women (and a somewhat smaller share of men) are currently eligible for paid parental leave as part of arrangements negotiated with their employers. The provision of PPL has expanded over the past 40 years, but the PC (2009) reported that it is not clear that the proportion of the workforce covered by paid parental leave will change over the next decade. Access to PPL is higher for those in full-time employment and those on high wages (over $1200 a week). Only around one third of employed women who have children receive PPL.

In addition to privately negotiated benefits the Australian Government provides a range of family payments and subsidies, including the Baby Bonus. By comparison with other OECD countries family subsidies in Australia are relatively generous.

Despite this assistance about a quarter to a third of mothers return to work within six months of the birth of their child and two thirds of these report returning to work because they need the money.

For others the current system of tax-transfer payments can discourage mothers from returning to work at all. Family benefits and other welfare payments in Australia are targeted at low-income groups rather than being universally provided. For low earning second earners with low income partners, in particular, returning to work after the birth of a child may make them worse off because the net monetary returns from working are insufficient to compensate them for the forgone welfare payments and benefits of unpaid work and/or leisure.

The Productivity Commission reports that during their prime reproductive ages, Australian women's participation rates were lower than many other OECD countries.[1] For example, in 2005, labour participation rates for females aged 25-44 years were more than 80 per cent in Sweden, Iceland, Denmark and Finland, compared with less than 75 per cent in Australia. Therefore the current system appears to be contributing to a less than optimal female workforce participation rate in Australia. It is also likely to raise costs to business as a result of lost productivity from higher turnover and the associated costs of having to replace staff and train the replacement staff.

Addressing the problems associated with early return to work is likely to require financial support tied to leave – that is, paid parental leave. A carefully designed scheme may also help encourage greater female labour force participation before and after birth. This is unlikely to occur without intervention by the Australian Government.

3. Objectives

The Government's objectives in supporting parents with newborn children are:

- to enhance maternal and child health and development;
- to facilitate workforce participation by offsetting the disincentives to paid work generated by the social welfare and taxation arrangements; and
- to promote gender equity and work/family balance.

There are some inherent tensions between these objectives and the degree to which a scheme will have an impact on any one of these objectives will vary depending on choices about its design features.

4. Options

In terms of assessing the regulatory impact, this statement reports on three options:

- continuing with the status quo;
- introducing the scheme recommended by the Productivity Commission; or
- introducing the scheme recommended by the Productivity Commission, with the paternity leave component deferred.

[1] After adjusting for the fact that published statistics for many OECD countries count women on paid maternity leave as in the labour force, whereas women on unpaid leave in Australia are not.

4.1 Consideration of the Options

Take no action

A PPL scheme is not introduced. Parents of newborn children continue to be assisted through current family assistance and income support payments with no additional impacts. The Workplace Relations Act 1996 (the Act) currently allows for 52 weeks unpaid leave for new mothers who have had at least 12 months of continuous service with their current employer. The Act also entitles them to return to the position they held immediately before the start of leave or a position that has the same terms and conditions of employment as the former position.

Under the Government's Fair Work legislation, which will become fully operational from 1 January 2010, the National Employment Standards (NES) will provide eligible parents with separate periods of up to 12 months of unpaid leave associated with the birth or adoption of a child under 16 years. Alternatively, one parent can request an additional 12 months' unpaid parental leave. An employer could only refuse this request on reasonable business grounds.

The PC's proposed scheme

The PC's preferred PPL scheme has been designed to provide breadth of coverage, financial benefits to working mothers and minimal impact on employers. The key features of the PC's proposed model for a statutory PPL scheme are:

- A non-means tested taxable payment set at the rate of the Federal Minimum Wage (FMW) would by paid to eligible parents for 18 weeks (the parental leave component).
- Statutory PPL would be available to parents who:
  - are the primary carer of a new born or adopted child;
  - have been employed 'continuously' (with one or more employers) for at least 10 out of the 13 months prior to expected birth or adoption; and
  - have worked at least 330 hours in the 10 months (an average of 7.6 work hours per week).
- Statutory PPL would cover all employees who meet the above employment criteria, including the self-employed, contractors and casual workers.
- Parents receiving any payment under the parental leave component of the PPL scheme would not be eligible for the Baby Bonus (except for multiple births) and would not be eligible for Family Tax Benefit Part B (FTB B) during the period covered by payments under the parental leave component.
  - The scheme is optional and parents may choose to receive these payments instead of receiving PPL.
- Parents giving birth to more than one child would be eligible for one period of PPL and would receive the Baby Bonus for the second and subsequent children from the birth, subject to the Baby Bonus income test.

- Payments to parents eligible for statutory PPL would be made to them by their employers if the parent was entitled to unpaid leave under the National Employment Standards. All other eligible parents would be paid directly by Centrelink.
- Centrelink would prepay statutory PPL payments to the employers.
- Two weeks paternity leave would be available to eligible fathers and other eligible parents. This would be a non-means tested taxable payment set at the rate of the FMW (the paternity leave component).

The PC's proposed PPL scheme but with the paternity leave component deferred

This option is the PC's proposed model for a statutory PPL scheme but with the paternity leave component for fathers and other eligible partners deferred following the proposed review of the PPL scheme after two years.

Other options considered by the Commission

The PC considered a wide range of options for financing a PPL scheme, such as full direct employer financing, income contingent loans, pooled levy arrangements, concessional business tax arrangements and leave savings accounts. Due to the limitations of each of these options they have been rejected. A brief description of each option and its major limitations is provided below, but otherwise, they will not be further considered in this RIS.

- An employer funded scheme would mean lower cost to Government, but would place a significant cost burden on employers, especially small business, with a disproportionate impact on female-dominated industries. Due to the higher costs for business it could also increase the risk of employment discrimination against women of child-bearing age. There would be difficulties in administering, implementing and regulating the scheme and there could be an increase in gender wage inequality due to long-run downward wage pressures on female-dominated industries.
- An income contingent loan, similar to HECS, could result in a disincentive for parents to earn enough to exceed the income threshold for repayment. It could result in parents who are least likely to repay the loans in the near future, or not at all, receiving the greatest subsidy, thereby increasing the risk to Government revenue.
- A social insurance scheme, where PPL is funded through contributions paid by employers, employees and Government would have high implementation risks and a comparatively high administrative and compliance burden on business, as well as potential high transitional costs for business. Such a scheme would increase the complexity of the tax system.

- Concessional business tax arrangements involve employers receiving tax credits or deductions for expenses related to parental leave and other family friendly initiatives. As this type of scheme would provide tax concessions to existing negotiated parental leave schemes the PC (2009) noted that a significant part of the revenue cost of the scheme would support behaviour that was occurring anyway. This scheme would tend to favour higher-skilled and better paid employees and tend not to increase coverage of low-skilled or casual employees. This raises equity and efficiency concerns. Finally, this type of scheme would involve high risk to Government revenue due to the uncapped nature of the scheme and for some employers seeking to maximise their returns from the scheme.
- Leave savings accounts are bank accounts for employees (that employees and employers can contribute to, similar to superannuation arrangements) that move with employees from job to job over the course of their working life and can be drawn upon to pay for parental leave. The PC (2009) notes some limitations with this type of scheme. Employers may not receive retention benefits because eligibility for the scheme is not based on any period of tenure with an employer. The scheme would be quite complex and could lead to perverse outcomes, such as employees not intending to return to work and accessing an advance draw down.

5. Impact Analysis of the Options

5.1 Take no action

The problems associated with the 'take no action' option are discussed in the Problem section (Section 2).

5.2 The PC's proposed PPL scheme

<u>Impacts on families, the broader community and Government</u>

Maternal and child health and wellbeing

The PC Final Report argued that its proposed PPL scheme would increase the average length of leave taken by employed women after childbirth by around ten weeks. Coupled with other leave arrangements, this was estimated to allow most infants to be exclusively cared for by their parents for the first six months of life (without undue financial stress), improve child development outcomes, enhance support for breast feeding with its health benefits for mothers and infants and provide a reasonable period of leave for maternal recovery.

There is a consensus of evidence that time spent away from work supports the health and development of mothers and babies. Maternal recovery can be prolonged and an early return to work may increase the risk of depression and anxiety. To facilitate maternal recovery, the length of absence from work should be no less than 12 weeks and potentially up to six months (PC, 2009).

Biomedical literature suggests there are benefits from breastfeeding for infants and children (particularly if exclusively breastfed for six months) as well as for mothers. There is also evidence of a positive association between paid parental leave and the duration of breastfeeding. The World Health Organisation (WHO) recommends six months exclusive breastfeeding (WHO, 2002). Data from the Longitudinal Study of Australian Children shows that although 92 per cent of babies are breastfed at birth, only 57 per cent of babies are breastfed at six months. Paid parental leave, together with support for breastfeeding, has the potential to improve breastfeeding rates (PC, 2009).

Evidence suggests that parental leave can benefit the health and development of a child by enabling the child to bond with its parents from an early age, which is important for an infant's early brain development. It has also been found that an infant is more likely to have regular health check-ups and vaccinations if a mother has an extended period of leave following childbirth (PC, 2009).

Workforce participation and attachment

The PC estimated that its proposed scheme would provide an average net benefit of $1,750 in disposable income to 146,000 families a year (52 per cent of its estimated 280,000 families who each year have a child). It estimated 21,000 families with working mothers would opt out of the scheme due to the scheme's marginal benefit to them. This would result in an average net benefit of $2,040 to the 125,000 families with parents receiving payments under the scheme.

The PC Final Report argued that its proposed PPL scheme would encourage women to participate in employment prior to having children and in between pregnancies, with long-term beneficial impacts on the employment of women. The average Australian women's lifetime period of employment may be extended by around 2-3 months to 6 months.

The Productivity Commission notes that the projected long-term increase in female labour supply as a result of the scheme could have a dampening effect on female wages as a result of increased female labour force participation. Subject to the degree of segmentation in the labour market, this would have a dampening effect on male wages as well.

Evidence from the Australian Public Service Commission (APSC) and the Equal Opportunity for Women in the Workplace Agency (EOWA) indicates that organisations offering paid maternity leave experience a greater return to work rate than organisations not providing paid leave (APSC, 2008 & EOWA, 2008). International evidence shows that countries with paid maternity leave schemes have higher participation rates among women, especially when paid maternity leave is combined with other family friendly conditions such as flexible working arrangements and quality, accessible child care.

Although the PC's proposed PPL scheme is deliberately designed to decrease women's workforce participation in the period immediately following childbirth to enable exclusive parental care in the first six months, the PC suggests that the scheme would maintain women's link to the labour market and overall increase women's lifetime employment. In particular, PPL would benefit low income earners who are less likely to have access to employer funded PPL than high income earners, therefore seeking to improve equity for mothers in the workforce. Furthermore, it would be likely to promote employment prior to childbirth so as to enable women to qualify for the benefits (PC 2009).

Gender equity and work/family balance

The PC maintains that the introduction of PPL is a means by which to address issues of gender inequality. The Australian Human Rights Commission has noted that PPL may serve to provide some compensation to mothers for income lost at birth (HREOC, 2002). There is also evidence that PPL for both sexes can result in a more equitable distribution of domestic and caring responsibilities by encouraging fathers to take time off.

The OECD has noted that exclusive paternity leave has been introduced in some countries as a means of promoting gender equity objectives (OECD). The PC (2009) points to submissions to its inquiry to support the notion that PPL would also promote a better balance between work and family life. Although this needs to be considered within the greater context of community standards, PPL is said to have the potential to 'normalise' the management of caring responsibilities with employment (PC 2009).

The PC concluded that PPL would be likely to have a small positive impact on women's labour force participation. The PC noted that:

- long-run European studies into the impacts of parental leave entitlements on aggregate employment and wages imply moderate paid leave periods can stimulate female employment and workplace participation. The direct labour supply impacts of PPL would occur during women's prime childbearing years (25 to 34 years);
- a short term impact of its proposed scheme will be to reduce women's labour force participation in the period immediately following childbirth, but also to provide an incentive for women to maintain a link to the labour market in the longer term.
- labour force impacts are likely to vary depending on the income of families. The incentive effects are likely to be marginal for higher income families and be greater for low income families.

The PC's model could increase productivity and morale by offering a more attractive work/life balance for women.

The PC Final Report argued that its proposed PPL scheme would send a strong signal that having a child and taking leave from work around the time of the birth or adoption of a child is viewed by the community as part of the normal course of work and family life. Employers acting as paymasters may achieve cultural change by 'normalising' access to, and use of, PPL in workplaces where it has not previously been offered.

Potential workforce discrimination against women

The Commission noted employer organisation concerns about the potential for increased discrimination against women, particularly of child-bearing age, due to cost issues arising from its draft PPL model. For example, some employers may discriminate against hiring women in prime child-bearing years (25-44 years) in an attempt to avoid meeting potential future costs for that employee.

The Commission specifically identified risks of increased discrimination against potential parents – particularly younger women – as a reason not to have direct employer financing of a PPL scheme.

While discrimination is less likely under the PC's final model and there are legislative remedies against employers acting in this way, it may potentially occur due to increased costs and uncertainty for some small businesses.

Impact on existing voluntary paid parental leave schemes

In Australia there is currently no statutory period of paid parental leave. Many employers choose to offer a voluntary scheme to their employees. The leave is provided solely at the cost of the employer. DEEWR has estimated that paid maternity leave provisions were present in 15 per cent of workplace agreements, covering 44 per cent of the total Australian workforce. In addition, about 28 per cent of the workforce had workplace agreements containing paid paternity leave provisions and about 12 per cent of the workforce had workplace agreements containing adoptive leave provisions.[2] As a voluntary, unregulated system, there is considerable variation between the schemes with the terms set out in the employment agreement between employees and employers.

The Commission notes in its final report that employer funded schemes provide a positive signal to prospective workers that a firm is an 'employer of choice'. It notes the possibility of firms with employer funded schemes choosing to withdraw them and that a firm considering introducing a scheme may be discouraged from doing so.

Under the PC's proposed model, employees would be able to take statutory parental leave concurrently, or in addition to, existing employer-funded PPL schemes and other leave entitlements. Fathers would not be able to take their two weeks statutory paid paternity leave concurrently with any paid leave, e.g. annual leave. This includes Commonwealth and State Government employees who are currently entitled to PPL through legislation or industrial instrument.

Employers who provide for PPL through an industrial instrument cannot withdraw that entitlement for the life of that instrument. During bargaining for a new agreement, employers may seek to negotiate with employees to amend existing PPL provisions in light of the introduction of a new PPL scheme, however the PC predicts that wholesale withdrawal from existing PPL schemes is unlikely, given that employers with existing PPL schemes differentiate themselves as 'employers of choice'.

[2] Productivity Commission Inquiry Report, Paid Parental Leave: Support for Parents with Newborn Children, p3.7

The PC's proposed statutory PPL scheme is expected to provide a new foundation for employer-funded provisions, such as 'top up' payments to full replacement wages. In the longer term, a scheme with payments provided through employers may result in a better integration of the PPL scheme with employer funded parental leave and other family friendly employment benefits.

Cost to government

Of the 285,000 new mothers each year, an estimated 126,319 mothers would receive PPL payments under this option and 56,288 fathers would receive paid paternity leave payments.

The net cost to government of this option would be $752.8 million over four years.

Impacts on business

The PC removed business' significant concerns with its Draft Report PPL proposal for a PPL scheme by:

- deferring consideration of the introduction of compulsory superannuation contributions until after a review of the scheme to be completed three years after implementation; and
- recommending that Centrelink make advance payments of PPL to employers, reducing the cash flow implications for business.

The Commission has not attempted to quantify compliance costs either at a firm level or economy-wide. However, it has noted that these costs are likely to vary depending on business size. The additional administrative and compliance costs on businesses associated with a PPL scheme include:

- Education and professional advice costs such as the need for businesses to read information booklets and/or outsource and pay for advice;
- Purchasing costs such as those relating to the purchase of new accounting and payroll software or upgrading existing software to enable businesses to act as paymasters for a PPL scheme;
- Administration and record keeping costs such as the requirement for businesses to verify employee eligibility, the costs of providing the payroll function and related audit costs; and
- Business costs of temporary replacement staff during the period employees extend their leave as a result of receiving PPL payments.

The impacts on businesses associated with new parents taking leave, such as the hiring and training of replacement staff, the potential for reduced productivity and the costs of administration of unpaid parental leave, are not new costs for business. Costs may increase, however, if the average length of time that mothers take away from work increases as expected.

Number of businesses affected

The PC estimated that the maximum number of employing businesses that could be affected would be 841,317. It estimated that 4.3 per cent of the 757,200 small businesses (less than 20 employees) would have to act as paymaster for the PPL scheme in any given year. The PC does not provide precise estimates of the proportions of larger businesses that would need to act as paymaster in a given year. For medium businesses (20 to 199 employees), the percentage is around 60 per cent, whereas virtually all large businesses (200 or more employees) would have to act as paymasters in any given year. Businesses with a greater proportion of female employees of child bearing age such as hair and beauty shops would be more likely to be affected.

Under this option an estimated 99,792 mothers would be paid by employers as paymasters, with an estimated 28 per cent of these employers being small businesses (27,942). Of the 33,773 fathers paid by employers as paymasters, 28 percent of these are small businesses (9,456).

Detailed analysis of the costs to business is provided in section 6 of the RIS on 'Business Costs'. It is not possible to quantify the other benefits to business described above.

5.3 The PC's proposed PPL scheme with paternity leave component deferred

Impact on families, the broader community and Government

This option would not promote gender equity as strongly as the PC's proposed scheme because there would be less encouragement of fathers' active involvement in the early care of infants. The recommended two weeks paternity leave is an important signal to fathers and their employers that fathers have a pivotal role in the raising of their child.

The ABS *Career Experience* survey asks employed males about their leave experience when their youngest child was born. Only six per cent of employed males with children aged under six years take unpaid parental leave when their youngest child is born.[3] Men are most likely to take recreational /holiday/annual leave (68 per cent) on the birth of their youngest child.[4] On the other hand, all men who used unpaid parental leave did so for a period less than six weeks.[5] Clearly ABS data indicate that there is reluctance among Australian men to make use of unpaid parental leave provisions.

Cost to government

Of the 285,000 new mothers each year, an estimated 126,319 mothers would receive PPL payments under this option. This option reduces the net cost of the PC's scheme by around $118 million over four years due to the deferral of the paternity leave component.

Impacts on business

[3] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, Table 14.
[4] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, Table 14.
[5] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, unpublished data.

There are unlikely to be significant cost savings to business from the deferral of the paternity leave component of the PPL scheme due to the low expected take-up of the paid paternity leave component of the PPL. This is because men would be more likely to take paternity leave using their annual leave entitlement which, for most males would provide a higher level of payment than the FMW.

6. Business Costs

6.1 Business Costs of the PC's proposed PPL scheme

Estimating the costs to businesses

There is little evidence of likely firm behaviour on which to base estimates of the costs to business of the PPL scheme options.

Many small businesses will remain unaffected indefinitely. A small business employer with an eligible employee is likely to experience higher disruption, and higher costs as a proportion of their payroll costs, than a larger business. Small business owners might not have to increase their expenditures, but might have increased demands on their own time.

Larger businesses are more likely to have an existing employer funded parental leave scheme and dedicated human resources staff that could incorporate the new requirements into their management systems. In such cases, it might not be possible to identify any cost particularly associated with the new scheme.

A large part of this costing entails estimating the extra time it will take for both small and large businesses to deal with the new paid parental leave scheme. The costs to business are estimated to be significantly higher in the first year, by around 85 per cent compared with the second year. This is because self-education expenses will decline for all businesses, and the need for professional advice and expenditure on information technology (IT) systems will decline for all businesses, particularly for larger businesses. Most businesses will only spend on these services when they have an employee on PPL. This will happen to most large businesses in the first year, but will affect only 4.3 per cent of small businesses in any one year.

Many of the ongoing costs to business of a PPL scheme (i.e. those after the first year) are independent of the nature of the scheme. These arise from involvement in verification that parents are eligible for the scheme and from costs associated with parents taking additional time off work to care for their children. Employers have to replace these employees for an additional period of time.

The costing is based on the number of PPL recipients and will therefore exaggerate costs where businesses have multiple employees on PPL and could be expected to have economies of scale.

In the following costings, hours are costed using the appropriate average weekly hours series data for small and larger businesses[6].

[6] AWOTE for full-time employees, original data, November 2008, EEH unpublished original data, May 2006.

Business costs of providing the payroll function

There would appear to be minimal additional compliance costs associated with employers making the payment as the employee would already be in the businesses payroll system. It could be assumed that it would simply require that the payment amount and tax withheld be amended.

The cost depends on the average number of hours needed to handle the incoming funds from Centrelink and make the nine consecutive fortnightly payments. One half an hour has been allocated, resulting in a cost of $500,000 per year for small businesses (4.3 per cent) and $1.5 million per year for larger businesses.

The above estimate assumes perfect administration on the part of Centrelink. If payments from Centrelink to businesses are late, this may impose administrative costs in chasing up payments from Centrelink and cash-flow pressure on businesses if they pay the PPL before they receive the Centrelink payment.

This cost is a recurrent cost, and would not change significantly from year to year.

Cost of educating employers about the new scheme

The introduction of new policies – especially in the case of changes to employee entitlements – always involve additional costs to businesses as they familiarise themselves with the details of those policies. Past experience suggests that even when policy changes are intended to be simple and straight forward, some businesses will still seek advice from a professional to ensure that they have interpreted the proposed changes correctly.

It should be noted that the cost estimates for education will diminish considerably after the first year of the scheme, as employers become more familiar with it. Thus the cost estimates here are only for the first year, and the costs should decrease over the following years.

We have assumed that a manager of every small business devotes an average time of half an hour to informing themselves about the scheme, resulting in a total cost of $9.6 million across all small businesses. While there was little evidence on which to base this assumption, it represents a best rounded guess. Even the assumption that all small business managers will be aware of the new PPL scheme can be called into question, and some managers may only devote several minutes to it – for example, those who do not think it will affect their own business.

If we had rounded down to one quarter of an hour, the cost estimate would be $4.8 million across all small businesses.

Larger businesses will need to devote more time on average because they will often have multiple staff who need to familiarise themselves with the new regulations. We have allowed two hours per business resulting in an estimated total cost of $5.4 million across all larger businesses.

These estimated costs of education assume that the Government runs an effective publicity campaign at the launch of the scheme that succinctly informs employers of their responsibilities under the scheme.

Cost to business of professional advice

It is difficult to estimate the extent to which businesses will obtain professional advice, or when they might do so. Previous experience with the regulatory impacts of other policies suggests that many businesses will seek professional advice. However those policies had a direct impact on all businesses, whereas the current proposal will not directly impact on all businesses. In particular, it will only directly affect around 4 per cent of small businesses in any one year.

Therefore we expect a large majority of small businesses will delay paying for professional advice until such time as they are sure they will need it. Payment for professional advice will also be lessened by the provision of information and advice through government funded sources such as a call centre and website for the scheme, along with a Centrelink inquiry line to assist employers acting as paymasters.

Most larger businesses are likely to have at least one employee on PPL in any year, but larger firms may also have more in-house expertise and capacity to deal with a relatively simple scheme with their own resources. Consequently, we assume that 6 per cent of small businesses and 25 per cent of larger businesses will pay an average of $300 for professional advice regarding a PPL scheme in its first year of operation. The percentages of businesses seeking advice, and consequent costs, should fall considerably after the first year.

The estimated total costs are $13.6 million for those small businesses and $6.3 million for those large businesses which seek professional advice.

Business cost of processing applications and related administration

These estimates, which are based on data from the PC and FaHCSIA, make allowance for mothers of stillborn and adoptive parents (which only have a small impact), eligible mothers and partners who do not take PPL and those working mothers who will be paid by Centrelink.

We assume that businesses would not incur any costs additional to those mentioned above until such time as they became aware that an application for parental leave was pending. The required notice arrangements in the proposed scheme should provide adequate time for employers to prepare. These costs will vary across businesses depending on whether they have already sought external advice, the level of Government support, etc.

After becoming aware of a potential applicant for PPL, more small business employers will need to better inform themselves about the scheme. The aim is to implement the scheme so that it will impose minimal obligations on employers. It is envisaged that the onus for providing the necessary details to Centrelink will fall largely on the applicant. The employer will mainly provide the necessary information to the employee, rather than deal with Centrelink directly.

The likelihood that an individual business will have an eligible employee in a given year depends on the age profile and number of women it employs. The largest businesses are almost certain of having at least one birth to an employee in a given year compared with only around 6.1 per cent of small businesses. However, when eligibility criteria of the scheme are taken into account, only around 4.3 per cent of small businesses are estimated have a successful mother applicant in any year.

We assume that it would take half a day for employers to meet their obligations for successful mother and partner applicants, and half a day to assess unsuccessful applicants. This would include adapting their pay system to receive and disburse funds from Centrelink. The total estimated costs are $4 million for all affected small businesses and $13 million for all larger businesses.

We assume that audit cost will only be incurred by a very small proportion of those firms that are directly affected, and would be less than $100,000.

These costs are assumed to be ongoing without any significant change from year to year.

Business cost of information technology upgrades

The paymaster function may involve one-off costs associated with IT upgrades. Some businesses may need to purchase accounting and payroll software updates. The extent of such costs will depend on the size of the businesses.

In the first year of the scheme we assume that 6 per cent of the 757,200 small businesses would purchase software updates at a cost of around $100 each. This results in an estimated IT cost to small businesses of around $4.5 million in total. We assume the 84,117 larger businesses have more complex IT systems, and that 80 per cent of these businesses would spend around $1,000 per business on IT upgrades and related services. This resulted in an estimated IT cost to large businesses of around $67.3 million in total. Therefore the total cost to businesses of IT upgrades is estimated to be $71.8 million in the scheme's first year.

We assume that these costs will decrease significantly for larger businesses after the first year, as a majority of these businesses will have an employee on PPL in the first year and need to upgrade their system.

The costs for larger firms may also be sensitive to the timing of introduction of a scheme, for example a 1 July start date could enable system changes to be made as part of other upgrades (eg tax system changes) whereas a January start date could cause more disruption (and costs) as it would be in the middle of a financial year.

Assuming most small businesses do nothing about upgrading their IT system until such time as they need to, and only 4.3 per cent will be affected in any one year after the first year, the costs in subsequent years to small businesses will not fall as much as the costs to larger businesses.

Business costs of replacement staff

One of the largest costs identified by the PC is that associated with the temporary replacement of staff who take parental leave. Employee absences impose a range of costs on businesses such as the hiring and training of replacement staff, the potential for reduced productivity and the costs of administration. Importantly, it is not expected that this option will increase the numbers of mothers or their partners that will take leave around the birth of a child.

According to the PC, however, the scheme can be expected to increase the average term of maternity leave by 10 weeks. Evidence provided to the PC suggests that the costs associated with hiring replacement staff can be anywhere between 20 per cent and 200 per cent higher than the cost of the employee replaced.

However, it could be expected that hiring costs would depend more on the number of vacancies filled rather than the length of the vacancy, which would suggest that hiring costs would decrease as a proportion of total employment costs over time. Also, the productivity of the replacement employee would increase over time. We have therefore assumed that employment costs increase by 10 per cent for the duration of the replacement employment for small businesses. As employers already incur the costs associated with the current period of maternity leave (an average of 37 weeks), the additional small business employment costs are estimated as 10 per cent of wages for the 10 additional weeks of leave taken.

Assuming these are the only additional hiring costs to the status quo, the additional cost would be around $26.9 million for small business.

The PC argues that larger businesses are better able to cope with temporary staff absences by redistributing workloads and adjusting leave rosters. Assuming a five per cent on-cost for larger businesses their total cost would be $44.1 million.

It is worth noting in this regard that the higher the replacement costs, the harder the employee is to replace and the more benefit the employer is likely to gain from the employee's return to work, and so benefit from the scheme over the longer term.

However it should be noted that as the PC report indicates, existing entitlements to unpaid leave impose costs on business. Whilst the PC's proposal is expected to increase these costs, the PC expects the impacts on individual businesses to be modest and will only be felt if a parental leave occurs in any given year. The PC estimates that for small businesses generally, only four per cent of firms with less than 20 employees will experience a parental leave event in a given year.

This will be an ongoing cost, and will not fall over time.

Summary of business costs of the PC's proposed PPL scheme

While there are undoubtedly significant benefits from this scheme, they are not quantifiable. While not all the costs are quantifiable, we have been able to develop some indicative costs for several aspects of the scheme, and these are presented in the table below. The totals of the identified costs in the first year are $59.1 million for small businesses and $137.7 million for larger businesses, giving an overall cost of $196.7 million. In subsequent years, the total costs to business are estimated to be of the order of $107 million.

Summary tables of estimated costs of PC's proposed PPL scheme

Table 1: First year

	Costs by business size ($)		
Itemised costs	**Small(a)**	**Larger**	**Total**
Self education costs (b)	$9,580,666	$5,431,660	$15,012,326
Professional advice	$13,629,600	$6,308,775	$19,938,375
IT purchases	$4,543,200	$67,293,600	$71,836,800
Processing applications - mothers	$2,962,096	$9,717,894	$12,679,991
Processing applications - partners	$1,002,419	$3,288,801	$4,291,219
Paymaster function	$473,188	$1,552,424	$2,025,612
Additional replacement employee costs due to longer average period of PPL taken (10 weeks)	$26,869,288	$44,075,696	$70,944,985
Total costs	$59,060,457	$137,668,850	$196,729,307

(a) Small businesses are those with less than 20 employees while larger businesses are those with 20 employees or more.
(b) Rounding the average self-education time for small business down to a quarter of an hour instead of up to half an hour would reduce this cost by $4.8 million.

Table 2: Second year

	Costs by business size ($)		
Itemised costs	**Small(a)**	**Larger**	**Total**
Self education costs	$0	$0	$0
Professional advice	$9,767,880	$3,154,388	$12,922,268
IT purchases	$3,255,960	$841,170	$4,097,130
Processing applications - mothers	$2,962,096	$9,717,894	$12,679,991
Processing applications - partners	$1,002,419	$3,288,801	$4,291,219
Paymaster function	$473,188	$1,552,424	$2,025,612
Additional replacement employee costs due to longer average period of PPL taken (10 weeks)	$26,869,288	$44,075,696	$70,944,985
Total costs	$44,330,831	$62,630,373	$106,961,204

(a) Small businesses are those with less than 20 employees while larger businesses are those with 20 employees or more.

6.2 Business costs of the PC's proposed PPL scheme with the paternity leave deferred

This option would save the direct costs associated with management time and payroll function of partner PPL, amounting to $4.8 million per year off the cost of option 2. The total cost to business would therefore be $191.9 million in the first year, falling to around $102 million in subsequent years.

The estimated cost savings to business from the deferral of the paternity leave component are relatively low because of the low expected take-up of the paid paternity leave component of the PPL. Most men would be expected to take annual leave around the time of birth of their child rather than one of the PPL options, because their annual leave pay would be considerably higher. The paid paternity leave component of the PC's PPL scheme is likely to be viewed poorly by most men, compared with other more financially attractive forms of paid leave.

6.3 Summary of the costs to business of the options

Table 3: First year

	Costs by business size ($)		
Options	**Small**	**Larger**	**Total**
The status quo	-	-	-
The PC's proposed PPL scheme	$59,060,457	$137,668,850	$196,729,307
The PC's proposed PPL scheme with the paternity leave component deferred	$57,938,394	$133,987,512	$191,925,906

Note: Small businesses are those with less than 20 employees while larger businesses are those with 20 employees or more.

Table 4: Second year

	Costs by business size ($)		
Options	**Small(a)**	**Larger**	**Total**
The status quo	-	-	-
The PC's proposed PPL scheme	$44,330,831	$62,630,373	$106,961,204
The PC's proposed PPL scheme with the paternity leave component deferred	$43,208,768	$58,949,035	$102,157,803

(a) Small businesses are those with less than 20 employees while larger businesses are those with 20 employees or more.

6.4 Scheme features which minimise business costs

The PC has proposed a range of measures to reduce the compliance and administrative burdens and disruption costs that could be faced by businesses if the Government adopted the PC's scheme. These include:

- Closely aligning elements of the model with the Government's National Employment Standards (NES). For instance, unpaid leave – such as that allowed for parental leave under the NES – should not qualify as 'working' for the purposes of a statutory paid parental leave scheme;

- The advance payment of parental leave instalments to paymaster employers to minimise cash flow shortfalls for firms. In making this recommendation, the PC recognised that its preferred approach to payment delivery in the draft report, where businesses would make payments to their employees and then be reimbursed through reduced Pay-as-you-go withholding remittances to the ATO could, particularly given the current difficulties in accessing business credit to address short-term cash flow shortages, exacerbate such risks;
- Providing guidance to employers on minimising disruption costs. The New Zealand Department of Labour sought advice from employers on successful practices used to adapt business practices to minimise disruption burdens following the introduction of a paid parental leave scheme in New Zealand. The PC suggests that the Government could combine such guidance with other information for employers associated with the introduction of a statutory PPL scheme and that the Government should develop a web-based calculator that would show which employees would be eligible, what they would get and that would set out any obligations by employers;
- Increasing the notice period required under the NES from four weeks to six weeks for employees wishing to extend their originally indicated duration of leave. The PC notes that the period for leave notices that employees must give to employers when they are leaving and returning to work, more than the total leave period itself, may be the decisive factor in determining employer costs. This is because employers may face significant costs if they have to re-arrange contracts with substitute employees; and
- Introducing a 'keeping in touch' (KIT) provision similar to the United Kingdom's parental leave scheme and a range of other employer funded Australian schemes. The UK KIT provision allows parents on statutory paid parental leave to work up to 10 days while on leave, but only if the employer and employee mutually consent. For example, parents could participate in training or planning or strategy days, or undertake any other activities that maintain contact with the firm or that facilitate an orderly return. The PC believes a KIT provision would be likely to improve employee retention for businesses, decrease any productivity loss associated with a parent's absence from work and enhance the career prospects of the relevant parent.

There is also potential for costs to be minimised by using existing administrative and payroll processes.

Other benefits may also offset to some extent the costs to businesses of the PC's model. These are particularly pronounced in the areas of staff retention and the retention of specialist skills and knowledge associated with it.

7. Consultation

The PC undertook extensive public consultation on proposals for PPL by seeking public submissions and conducting public hearings.

Following receipt of the terms of reference, the PC placed advertisements in national and metropolitan newspapers and sent a circular to a wide range of individuals and organisations, inviting participation in the inquiry.

In April 2008, the PC released an Issues Paper and a Personal Feedback Paper inviting public submissions and personal responses, and indicating matters of particular interest to its inquiry. The PC held public hearings in most capital cities. On 29 September 2009, the PC released its Draft Report and interested parties were invited to provide their views through a further round of public hearings and written submissions.

Over the course of the inquiry, the PC received over 400 public submissions, including around 160 commenting on its draft report. Submissions were received from many key business and industry organisations, women's groups, and unions. In response to its consultations, the PC modified its draft proposal in a number of respects. These are identified in section 7.2 below, along with the stakeholder concerns which led to the change.

7.1 Stakeholder reactions

The following stakeholder reactions are summaries of the positions put by major stakeholders in responding to the PC's draft report on PPL and its draft proposal for a PPL scheme.

Business and industry organisations

Business groups such as the Business Council of Australia (BCA), the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group have generally expressed their support for a Government-funded PPL scheme. However, they feel that no extra cost or inconvenience should be borne by them, and therefore do not wish to take on the role of paymaster or be required to make superannuation contributions to employees on PPL.

ACCI agreed that PPL should be paid at the level of the Federal Minimum Wage and that the scheme could be partly funded by changes to the Baby Bonus. ACCI argued that companies that already provide PPL could use the money they spend on PPL for other family-friendly policies. ACCI also suggested that employers should not have to take on the paymaster role, fund some of the scheme themselves or pay superannuation.

In its submission to the PC inquiry, ACCI identified costs to employers as a result of PPL. It highlighted that employers already bear costs due to existing requirements related to parental leave, such as providing at least 52 weeks of unpaid parental leave with the right to return to the same position or an equivalent one, and incurring additional costs with respect to replacement employees during parental leave. With regards to the paymaster model, ACCI believe that employers are not a substitute for Centrelink for the payment of Government benefits. Employers have a clear preference to only return employees to their payroll when they return to work. ACCI highlighted concerns regarding administrative and financial costs associated with payroll tax, superannuation, workers compensation, and payroll costs (ACCI, 2008).

The Australian Industry Group (AIG) would like employers to be able to choose whether to act as 'paymaster' and those that do should receive the funds in advance to reduce the financial burden. AIG expressed some reservations about the necessity and cost of an 18 week scheme and recommended 14 weeks

instead. The AIG does not support paternity leave as a PPL scheme should focus on women due to their intrinsic childbearing role. The AIG suggests that funding for the scheme should be done through a reconfiguring of family payments, in particular possible adjustment to the level of Baby Bonus and its means testing (AIG, 2008).

The Australian Federation of Employers and Industries objected to characterising PPL as a workplace entitlement – it considered that the PC is trying to alter the legal status of parental leave as leave will not be 'earned' in the same manner as other leave and superannuation. It regards parental leave and its payment as social welfare and a community issue, not a workplace issue. It does not believe employers should have any part in the process. It does not support payment of superannuation while on parental leave (Australian Federation of Employers and Industries, 2008).

The Australian Mines and Metals Association supports the introduction of a PPL scheme that is entirely taxpayer funded but it opposes employers acting as paymaster. It opposes employers being required to make PPL payments before being reimbursed by Government and paying superannuation on PPL without reimbursement. The Association suggests that the 'keeping in touch' provision should be voluntary and agreed between employer and employee as it does not apply to all workplaces. It seeks assurance that employers would not be subject to compulsory arbitration on 'top-up' claims and that protected industrial action on parental leave issues would be prohibited. Any agreement should be privately bargained (Australian Mines and Metals Association, 2008).

The BCA considers PPL will boost maternal and child health. BCA strongly supports the PC aiming for a six month PPL scheme to increase health benefits, particularly for low income earners. The BCA considers PPL will facilitate greater workforce participation. While they consider payment of superannuation may be difficult for small business, the PC's PPL scheme will generally only be a slight increase in payments for large business and on what is already current practice. The PC's scheme is likely to enable large business to invest in other family support mechanisms (BCA. 2008).

Master Grocers Australia supports PPL in principle, but is opposed to employers being required to pay superannuation or act as paymaster (Master Grocers Australia, 2008).

The National Farmers' Federation consider that PPL should be framed as social assistance not a workplace entitlement and PPL should only be available as a workplace-related entitlement where it is agreed at individual workplaces. The Federation considers that the imposition of PPL on farm businesses may cause some farms to avoid the potential liabilities and obligations of hiring female employees. Payment of PPL prior to reimbursement would have significant cash flow issues for farmers and significantly add to their costs as would paying for superannuation entitlements. The Federation consider a large number of women in agriculture, while playing vital roles in family farm businesses, may not meet the test for paid employment where their contribution is not formal or consistent (National Farmers' Federation, 2008).

Unions

Unions generally support the idea of having employers act as paymaster and paying superannuation contributions. Many unions believe this should go further, and that employers should be required to top up wages to the employee's usual rate of pay, and pay superannuation at the usual rate. Most unions believed that the workforce attachment criteria in the PC's draft proposal were too strict, and that the hours should be reduced from 10 to seven per week, over six months instead of 12 months.

The Australian Council of Trade Unions (ACTU) submitted it would like a move to PPL at full replacement wages over time. It would like the duration of paid leave increased to 26 weeks. The ACTU considered the scheme should allow mothers the option of taking PPL at half pay over 36 weeks. It wanted to ensure that the net entitlements for mothers in both paid and unpaid work were equitable (ACTU, 2008).

The Australian Education Union supported the view that PPL is about women's participation in the labour market and supported distinguishing PPL from welfare payments given to those not in the labour force. It suggested future reviews of the scheme should include consideration of increasing PPL to six months at full income replacement. It considered that current workplace entitlements must be preserved and Government-funded PPL should be offered in addition to these employer provided entitlements (Australian Education Union, 2008).

The Community and Public Sector Union (CPSU)/State Public Services Federation (SPSF) Group Federal Office prefer a 26 week PPL scheme at replacement wages with superannuation paid at the normal rate of pay. It considered leave should accrue during periods of PPL (CPSU, 2008).

Women's Groups

Women's groups supported the PC's proposed draft PPL model as a positive first step towards a longer period of PPL in the future. They supported the suggestion for more Government support for breastfeeding initiatives and assistance. Many of these groups feel that paying a lower wage to junior workers is discriminatory and unjustified. Several women's groups feel that the continuous employment eligibility criterion should be clearly defined to include workers such as seasonal workers and teacher aides, who are not paid at certain times of the year.

7.2 Changes to the PC's draft PPL proposal in response to stakeholder concerns

The PC received over 400 public submissions and held public hearings in all major capital cities during its inquiry. It received extensive views from business, unions, women's organisations and community groups on its draft proposal for a PPL scheme. In developing its final proposal, the PC modified a number of the parameters of its draft proposal in response to concerns raised by stakeholders which are summarised below.

Changes to PC draft PPL proposal	Stakeholder feedback that led to change
Superannuation contribution deferred until	Following the release of the draft proposal

review of scheme in three years	business groups generally expressed support for a Government-funded PPL scheme, but most raised concerns about funding superannuation contributions for employees during the PPL period.
Work test reduced to average of 7.6 hours per week for 10 months in the last 13 months.	Unions and women's groups suggested changing the work test from a minimum of 10 hours per week to seven to make it more likely that contractors, casual workers and mothers who take leave before the birth are eligible.
Payment of PPL to employers by Centrelink before they make payments to employees.	Some business groups expressed concerns about the PC's draft proposals that they take on the 'paymaster' function, in particular the potential for negative cash-flow impacts arising from the proposed model.
PPL available for non-parent carers who take custody of children.	Some organisations, such as the Office of Child Safety Commissioner Victoria, suggested making PPL available to non-parent carers who take custody of children in exceptional circumstances (such as grandparents).
Paymaster function to exclude additional employer obligations for accrued leave entitlements, impacts on notice period and severance payments, and any impacts on payroll tax or workcover obligation. This exclusion will be reconsidered as part of the proposed three year review.	Business and industry groups expressed concerns about the hidden costs to business resulting from accrual of additional leave during a PPL period, workers compensation liabilities and payroll tax.
Income from statutory PPL will not count as income for the purposes of calculating parenting payments and other income support payments.	FaHCSIA provided advice to the PC about interactions of PPL with family assistance and income support. Some low income families would have received less financial assistance under the PC's draft PPL scheme than if they had obtained only the baby bonus, family assistance and income support entitlements.

Removal of lower rate of payment for juniors and others receiving wages less than the Federal Minimum Wage.	Some unions and women's groups raised equity concerns regarding the PC draft recommendation that juniors and others earning below minimum wage rates would receive a lower rate of payment from the PPL scheme. The draft PC report noted that a large differential between pre- and post-birth earnings for those on less than minimum wage rates might act as an inducement to early childbearing for some mothers. The PC reconsidered its position, taking note of the fact that the existing welfare system already provides a rate of payment post-birth that would substantially exceed the employment earnings of low wage groups.

8. Conclusion and Recommended Option

Based on the analysis of the impacts of the options on families, the broader community, Government and business and the costs of the options for business and government, the Government's preferred PPL option could be either:

- The PC's proposed PPL scheme, or
- The PC's proposed PPL scheme with the paternity leave component deferred.

The final Government decision on its preferred option should depend on its consideration of the weight to be placed on:

- The fact that the PC's proposed scheme has already been the subject of an open consultative process and the design of the final model has sought to balance the competing interests of parties and tensions between the scheme's objectives. The PC's proposed PPL scheme is assessed as being best able to meet the identified objectives, in particular the objective of promoting gender equity and work/family balance through more active involvement of fathers and other partners in child rearing and in achieving better child development outcomes.
- Concerns about the current Budget situation, requiring short term fiscal stimulus and efforts to ensure the Budget returns to surplus over the economic cycle. Deferral of the paternity leave component would provide significant savings with only a moderate adverse impact on the achievement of the scheme's objectives.

The 'Take no action' option was not recommended as it fails to address the problem identified in section 2 of the RIS.

9. Implementation and Review

The earliest implementation date for the proposed scheme with employers as paymasters is 1 January 2011. The scheme would be implemented primarily by Centrelink and Medicare Australia, with FaHCSIA and DEEWR being the key policy agencies.

The Government will consult with business groups (including small business) and employers between August and December 2009.

Program implementation and the first year of program operations will be monitored on a continual basis to ensure that administrative arrangements being introduced do not have unforeseen adverse consequences for parents, employers or Government.
The Government will conduct a comprehensive review of the program at the end of its first two years. The Review will require the collection of relevant baseline data, ongoing monitoring of relevant publicly available and administrative data and post implementation surveys. The scope of the review would include:

- the effectiveness of PPL in meeting its main objectives;
- assessment of the impacts of the scheme on leave taken by parents, including the impact of design features (such as employment eligibility criteria and benefit levels) on who is accessing the scheme;
- assessment of the impacts of the scheme on existing voluntary employer-provided PPL schemes;
- employer attitudes to and support for work/family balance and gender equity in childrearing;
- the viability of implementing mandated superannuation contributions by employers at that time;
- the scheme's administrative impact on business, in particular the regulatory impacts and costs on business of the paymaster function;
- whether employer-funded accrued leave or other entitlements should still be outside the scope of the statutory scheme.

Key performance indicators (KPIs) for the preferred option could include:

- Proportion of women working prior to birth.
- Rate of women resigning prior to birth.
- Average period of leave taken by mothers following the birth of the child.
- Average period of leave taken by fathers following the birth of the child.
- Rate of return to work by mothers following birth of the child.
- Rate of return to former employer by mothers following birth of the child.
- Rate of women returning to work prior to child reaching six months of age.
- Rate of breastfeeding children to six months.

The review would be followed by Government consideration of potential changes to the program, such as the possible introduction of the paternity leave component of the PC's proposed scheme as well as the possible introduction of mandated superannuation contributions by employers during the PPL period.