

## **EXPLANATORY STATEMENT**

### **Paid Parental Leave Rules 2010**

#### **Summary**

The *Paid Parental Leave Rules 2010* (the Rules) are made under section 298 of the *Paid Parental Leave Act 2010* ('the Act').

The Rules are made for a number of purposes required or permitted by the Act. The Rules:-

- Prescribe additional categories of eligibility for parental leave pay
- Prescribe exceptional circumstances in which claims for parental leave pay may be made
- Prescribe what is paid leave or paid work for the purposes of the work test
- Prescribe the information to be provided by an employer to their employee in relation to parental leave pay and the records to be kept by the employer
- Prescribe guidelines for the exercise of the Secretary's power to give certificates for the disclosure of information
- Prescribe a penalty interest rate and guidelines for the operation of the provisions of the Act dealing with penalty interest
- Extend the operation of the employer role under the Act to include Victorian law enforcement officers.

Section 298 of the Act provides that the Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

#### **Background**

The Act provides for the Rules to make provision for certain people in less usual or exceptional circumstances to bring them within the Paid Parental Leave (PPL) scheme when they would not otherwise have entitlement under the primary legislation. The Rules also enable minor administrative matters to be addressed to complete the scheme.

#### **Eligibility**

Eligibility for parental leave pay for a primary claimant under section 31 of the Act requires that the person satisfies the work test, the income test and the Australian residency test. There is scope for the Rules to substitute for the requirements that the person is the primary carer of the child, and has not returned to work. The Rules maintain a person's eligibility for parental leave pay where the person is temporarily unable to provide care for the child for reasons beyond their control, loses care of the child in disputed circumstances, or the person is a birth mother, and has relinquished the child's care as part of a process of adoption, surrogacy or similar.

Similarly, if an individual is a defence force member and returns to work during the period in respect of which they are being paid parental leave pay because they have been compulsorily recalled to duty, the Rules provide for them to remain eligible.

The Rules make similar provision for the eligibility of secondary claimants.

The Rules also deal with eligibility in exceptional circumstances.

Decisions made applying the Rules are reviewable under Chapter 5 of the Act to the same extent as decisions made under the Act, because references to 'this Act' include the Rules (see section 6 of the Act).

### **Claims in exceptional circumstances**

The Rules also provide for a range of exceptional circumstances in which individuals may make a primary, secondary or tertiary claim. Such circumstances are generally those in which the child's birth mother or adoptive parent becomes incapable of caring for the child during the child's first year, such that another individual must step in to provide that care. Situations in which the Secretary is satisfied it is unreasonable for the birth mother, or adoptive parent to care for the child, and in the child's interests to be cared for by their current carer may also give rise to entitlement to claim parental leave pay. Formal foster care situations are not included.

Generally, fewer criteria need to be established by a claimant in exceptional circumstances in order to be eligible for parental leave pay. The Rules deal separately with the eligibility in exceptional circumstances of primary, secondary and tertiary claimants.

### **The work test**

The work test for parental leave pay involves establishing that a person has performed paid work, or taken paid leave. The Rules extend the concept of paid leave to include periods receiving workers' or accident compensation payments even though it is unpaid leave in formal terms. The Rules clarify that certain activities are not paid work, including work undertaken as a condition of receipt of a social security payment, eg 'work for the dole', work in prison otherwise than in a formal prisoner employment program or volunteer work or the receipt of passive income eg interest on investments.

### **Giving and keeping information relating to the payment of parental leave pay**

The Rules provide for the information that an employer is required to give a person after paying the person an instalment of parental leave pay. The Rules also specify the information that an employer is required to keep in relation to each person for whom an employer determination comes into force. The Rules also provide for the information that the Secretary is required to give a

person in those circumstances where the Secretary is required to pay a person an instalment of parental leave pay.

### **Public interest certificate guidelines**

The Act allows the Secretary to disclose information acquired by an officer under the Act to such persons and for such purposes as determined, if the Secretary certifies that it is necessary to do so in the public interest. The Rules provide for guidelines to assist the Secretary in the exercise of the Secretary's power to give public interest certificates for the disclosure of information. The Secretary must act in accordance with those guidelines in giving public interest certificates.

### **Penalty interest rate and guidelines**

A person may be given a debt notice under the Act if a debt has not been wholly paid, and may be given a further debt notice if, after being given the initial debt notice, the person has not entered into a debt payment arrangement or has failed to make repayments in accordance with a debt payment arrangement. The person may be liable to pay interest on the outstanding amount of the debt. The Act prescribes a penalty interest rate of 20 per cent for this purpose, unless a lower rate is set by the Rules. The Rules prescribe a lower penalty interest rate of 3 per cent.

The Rules provide for guidelines for the operation of the provisions of the Act dealing with penalty interest. It is a requirement of the Act that the PPL rules provide for such guidelines.

### **Employer determinations for Victorian law enforcement officers**

The Act provides for employer determinations to be made for an employer and an employee, and if an employer determination is in force, the employer is required to pay instalments of parental leave pay to the employee. The Act allows for the Rules to provide for employer determinations to be made for persons in a relationship similar to that of an employer and employee. The Rules provide for employer determinations to be made for the Chief Commissioner of Police (of Victoria) and Victorian law enforcement officers. If an employer determination is made and is in force in relation to a person who is a Victorian law enforcement officer, the Chief Commissioner of Police would be required to pay instalments of parental leave pay to the person.

### **Consultation**

Extensive consultation was undertaken when the Act was being developed to implement the PPL scheme as broadly proposed by the Productivity Commission. Consultation took place with the public broadly, but also with business and industry organisations, unions and women's groups. This consultation covered the content of the PPL rules as they relate to additional categories of eligibility and exceptional circumstances in which claims could

be made, the scope of paid leave or paid work and the information to be provided by an employer to their employee.

The Department of Education, Employment and Workplace Relations has been closely involved in the development of the rules. The Department of Defence has been involved in the development of the Rules relating to recall to duty for defence force members. Relevant government departments have been involved through their participation in the Paid Parental Leave inter-departmental committee.

Additional consultation on the guidelines for the Secretary's power to give certificates for the disclosure of information has been undertaken with the Office of the Australian Information Commissioner and the Department of Prime Minister and Cabinet. The Victorian Minister for Industrial Relations requested the inclusion of Victorian law enforcement officers as employees under the scheme.

## **Impact**

The PPL Rules form part of the PPL scheme, and have an impact and effect to the extent that they prescribe matters for the purposes of the Act. A Regulation Impact Statement was provided as part of the Explanatory Memorandum for the Paid Parental Leave Bill 2010, canvassing in detail the likely impact of the PPL scheme. All matters being dealt with by the PPL rules were covered by the Regulation Impact Statement.

## **Explanation of the sections**

The Rules are divided into Parts, Divisions and Subdivisions which are numbered to match those of the Act. Each Part has a separate purpose set out at the beginning of the Part.

### **Part 1-1 — Introduction**

**Part 1** sets out the name of the Rules (**rule 1.1**) and provides for commencement of the Rules the day after they are registered (**rule 1.2**).

### **Part 1-2 — Definitions**

**Rule 1.3** provides definitions for the Rules. Detail of these definitions is provided in the context of the Rule that calls upon the definition.

**Rule 1.4** provides for the meaning of *incapable of caring for a child* for the purposes of rules 2.28, 2.29, 2.33 and 2.36. Rule 1.3, Definitions, provides that the term *incapable of caring for a child* has the meaning given by rule 1.4.

A person is incapable of caring for a child if there is a parenting order in force resulting in the person not providing any care for the child. *Parenting order* is defined in rule 1.3 as having the meaning given by subsection 64B(1) of the *Family Law Act 1975*. The parenting order will generally provide for persons

other than the person to provide the care for the child, and as a result exclude the person the subject of rule 1.4. A person is incapable of caring for a child if they are deceased, in prison or otherwise institutionalised, their whereabouts are unknown, they suffer from a medical condition (physical or mental) that makes them incapable of providing care for the child, or the Secretary is satisfied that for a reason outside the control of the person, the person is incapable of providing care for the child.

Subrule (2) makes it clear that a person is not incapable of caring for a child if the person voluntarily chooses not to provide care for the child. A note to the subrule gives an example of a person deciding to travel overseas on a holiday or to visit relatives or friends, or ceasing to provide care as the result of deciding to look after other relatives eg aged parents.

## **Part 2-3 — Eligibility for parental leave pay**

### **Division 2.3.1 — When a person is eligible for parental leave pay**

#### **Subdivision 2.3.1.1 — When a primary claimant is eligible for parental leave pay**

The purpose of this Subdivision, set out in **rule 2.1** is to prescribe the conditions a person who is a primary claimant must satisfy to be eligible for parental leave pay for a child, for the purposes of subparagraph 31(4)(a)(iv) of the Act. *The Act* is defined in Rule 1.3 – Definitions as the *Paid Parental Leave Act 2010*.

In broad terms, the eligibility conditions for primary claimants match those in subsection 31(2) of the Act, but some conditions are substituted for particular tests by **rule 2.2**.

Subrule (1) provides that the person is the primary carer of the child, or satisfies the requirements of rule 2.3 or rule 2.4, or alternatively satisfies the requirement of rule 2.6, all of which provide substitute tests for the primary carer requirement. The person must either not have returned to work (unless paragraph 2.6(b) applies ie where a birth mother would have relinquished a child but for the child's stillbirth or death), or satisfy rule 2.5, or where the person satisfies the requirements of rule 2.4 (relating to loss of care of a child without the person's consent), have returned to work only for the period the child is not in the person's care. The conditions for a relinquishing mother in the case of stillbirth or death are more lenient to match the conditions which must be met in this situation by birth mothers more generally under the Act.

Additionally, the person is not eligible under subrule (2) if they or their partner have received baby bonus for the child at a time when they were a couple.

**Rule 2.3** provides a substitute requirement that can be met when the person is not the primary carer of the child, having previously been the child's primary carer (or in rare cases, is anticipated to become the child's primary carer), and is temporarily unable to be the primary carer of the child due to circumstances

beyond the person's control. Where the circumstance is that an event occurs in relation to the child without the person's consent that prevents the child being in the person's care, then rule 2.3 does not apply. (Rule 2.4 may instead be satisfied). Examples of circumstances intended to be covered by this rule are serious illness of the child's primary carer, or where the carer has to travel overseas for medical treatment.

The period of temporary inability must be likely to be less than 26 weeks. (If the period is likely to be longer than 26 weeks, the inability should not be regarded as temporary, and another person who is providing care for the child may be in a position to claim parental leave pay.)

Additionally, there must not be a determination in force under the Act that parental leave pay is payable for the child to another person for the same day. This is to prevent payments being made on the same day to two different individuals for the same child in these particular circumstances.

The Secretary must be satisfied that the person would have been the child's primary carer except for the person's temporary inability to be the child's primary carer.

If a person is temporarily unable to care for the child because an event occurs without the person's consent that prevents the child being in their care, for example, the child is not returned after spending time with their other parent, **rule 2.4** imposes additional requirements. To remain eligible, the person must take reasonable steps to have the child again in the person's care. The person, or their partner, must be the child's legal parent or be otherwise legally responsible for the child. If the child is in the care of another legal parent, the person or the person's partner must have a court order or parenting plan to the effect that the child is to live with the person or the person's partner to remain eligible for parental leave pay. *Parenting plan* is defined in Rule 1.3 as having the meaning given by subsection 63C(1) of the *Family Law Act 1975*.

Additionally, there must not be a determination in force under the Act that parental leave pay is payable for the child to another person for the same day. This is to prevent payments of parental leave pay being made on the same day to two different individuals for the same child.

One of the eligibility requirements for parental leave pay under the Act is that the person does not 'return to work' (see Part 2-3 Division 7). However, **Rule 2.5** maintains eligibility where the person is a defence force member, and has performed paid work on a day because the person has been compulsorily recalled to duty. 'Defence force member' is defined in the Act.

One of the objects of the Act is to enhance the health and development of birth mothers and children. This object involves providing parental leave pay in some circumstances to birth mothers who are not the primary carer of their child, to allow maternal recovery. **Rule 2.6** maintains the eligibility of a birth mother for 18 weeks after birth despite the fact she may have relinquished her

child because the child was born of a surrogacy arrangement, as part of the process for the adoption of the child or because the child has been removed from her care by a State or Territory child protection agency.

Eligibility will also be maintained where the child is stillborn or dies prior to being relinquished, where the mother would have otherwise relinquished the child in the circumstances set out above.

There is potential for parental leave pay to be paid to both the birth mother, and the receiving carer in this circumstance, subject to the requirements of the Act.

### **Subdivision 2.3.1.2 – When a secondary claimant is eligible for parental leave pay**

The purpose of this Subdivision, set out in **rule 2.7**, is to prescribe the conditions a person who is a secondary claimant must satisfy to be eligible for parental leave pay for a child, for the purposes of paragraph 31(4)(b) of the Act.

The rules in this subdivision are in general very similar to those for primary claimants in the previous subdivision. However, they are set out independently in this subdivision in order to make it easier for claimants in each category to know what eligibility conditions apply to them.

However, unlike primary claimants, secondary claimant conditions are separated into claims in normal circumstances and claims in exceptional circumstances. In general, a secondary claimant who claimed the balance of a primary claimant's parental leave pay in exceptional circumstances has fewer conditions to meet than a secondary claimant in ordinary circumstances.

For secondary claimants in ordinary circumstances, **rule 2.8** applies. These are secondary claimants covered by subsection 54(2) of the Act, who have made their claim under the Act. Subrule (1) makes it clear that this applies to a person who is the partner of a primary claimant, or a parent of a child and is not the primary claimant, or a partner of a parent of a child who is not the primary claimant.

Subrule (2) provides for the conditions such a claimant must satisfy. These are that the person satisfies the work test, the income test and the Australian residency test, all of which are defined in the Act. Additionally, the person must be the primary carer of the child, or alternatively satisfy rule 2.9 or 2.10. The person must not have returned to work, unless they satisfy the requirements of rule 2.10, in which case they must have returned to work only for the period the child is not in their care. Alternatively they must satisfy the requirements of rule 2.11.

As for primary claimants, subrule (3) provides that there must not be a determination in force under the Act that parental leave pay is payable for the

child to another person for the same day. This is to prevent payments of parental leave pay being made on the same day to two different individuals for the same child.

**Rules 2.9 and 2.10** are in identical terms to rules 2.3 and 2.4 set out above dealing with temporary inability to care and loss of care.

**Rule 2.11** is in identical terms to rule 2.5 above relating to recall to duty for defence force members.

For secondary claimants who have made a claim in exceptional circumstances prescribed by Subdivision 2.4.1.2 of the Rules, **rule 2.12** sets out the conditions which the person must satisfy to establish eligibility. The work test and income test do not apply. However, the person must satisfy the Australian residency test. The person must either be the primary carer of the child, or satisfy rule 2.13 or 2.14. The person must either not have returned to work, or satisfy rule 2.15 or 2.16, or where the person satisfies the requirements of rule 2.14, have returned to work only for the period the child is not in the person's care.

**Rules 2.13 and 2.14** are in identical terms to rules 2.3 and 2.4 set out above, dealing with temporary inability to care and loss of care. **Rule 2.15** is in identical terms to rule 2.5 above relating to recall to duty for defence force members.

**Rule 2.16** provides recognition that a secondary claimant in exceptional circumstances may have taken on the primary care of the child unexpectedly, such that the person could not immediately arrange to stop work to care for the child, and hence would not meet the eligibility requirement that they not return to work. Rule 2.16 maintains the person's eligibility despite the fact they continue to work provided this work occurs during the period commencing immediately after the primary claimant stopped caring for the child and ending when care arrangements for the child were settled, and care arrangements for the child were settled within a reasonable time after the primary claimant stopped caring for the child. Settling care arrangements for the child would also involve the person taking on primary care settling their work arrangements to allow them to be not working and providing care for the child.

### **Subdivision 2.3.1.3 – When a person is eligible for parental leave pay – tertiary claimants**

The purpose of this Subdivision, set out in **rule 2.17**, is to prescribe the conditions a person who is a tertiary claimant must satisfy to be eligible for parental leave pay for a child, for the purposes of paragraph 31(4)(b) of the Act.

Tertiary claims can only be made in exceptional circumstances. For tertiary claimants, **rule 2.18** sets out the conditions which the person must satisfy to establish eligibility. The work test and income test do not apply. However, the



person must satisfy the Australian residency test. The person must either be the primary carer of the child, or satisfy rule 2.19 or 2.20. The person must either not have returned to work, or satisfy rule 2.21 or 2.22, or where the person satisfies the requirements of rule 2.20, have returned to work only for the period the child is not in the person's care.

**Rules 2.19 and 2.20** are in identical terms to rules 2.3 and 2.4 set out above, dealing with temporary inability to care and loss of care. **Rule 2.21** is in identical terms to rule 2.5 above relating to recall to duty for defence force members.

**Rule 2.22** duplicates rule 2.16 – working while care arrangements being settled, described above in relation to secondary claimants.

### **Division 2.3.2 – The work test**

#### **Subdivision 2.3.2.1 – Paid leave**

**Rule 2.23** sets out the purpose of this Subdivision, providing that it is made for subsection 34(2) of the Act and prescribes what is or is not taken to be paid leave.

Paid leave for the purposes of the Act would ordinarily include all types of leave provided by an employer where the employer continues to pay the person while they are on leave. Additionally, **rule 2.24** expands this to include a person who is on unpaid leave from their employer, and is receiving workers' compensation or accident compensation payments from another body in relation to the person's employment with their employer.

#### **Subdivision 2.3.2.2 – Paid work**

The purpose of this Subdivision, set out in **rule 2.25**, is to prescribe what is or is not taken to be paid work for the purposes of subsection 35(5) of the Act.

Paid work is defined very broadly in section 35 of the Act, and for present purposes, includes a person who 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. This definition includes a range of activities which are not intended to be included as paid work and result in a person being eligible under the Act.

**Rule 2.26** provides that a person is not taken to perform paid work only because the person

- performs an activity which is required to be performed as a condition for receiving a social security payment, for example, 'work for the dole' which is an approved program of work under section 28 of the *Social Security Act 1991*. Subrule (3) defines 'social security payment' as having the same meaning as in section 23 of the *Social Security Act 1991*

- performs work while a prisoner otherwise than under a formal prisoner employment program. This is intended to exclude prison-based work, for which the prisoner receives a small amount of money and none of the other usual employment-related benefits.
- engages in an activity as a volunteer, whether or not the person directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity.
- receives rents, dividends or non-share dividends, or any other form of passive income. Subrule (3) provides that 'passive income' means income that is not obtained as a result of, or derived from, the personal exertion of the person.
- receives interest, although subrule (2) provides that this does not apply if the person's principal business consists of lending money, or the interest is received in relation to a debt due to the person for goods supplied or services rendered by the person in the course of the person's business.

## **Part 2-4 — Claims for parental leave pay**

### **Division 2.4.1 – Claims for parental leave pay**

#### **Subdivision 2.4.1.1 – Exceptional circumstances for primary claims**

The purpose of this Subdivision, set out in **rule 2.27** is to prescribe the circumstances that are exceptional circumstances in which a primary claim can be made for a child for the purposes of paragraph 54(1)(c) of the Act.

Under the Act, a primary claim may only be made by the child's birth mother or an adoptive parent of the child (see subsection 54(1)). In prescribed exceptional circumstances, a primary carer of a child who is not the birth mother or adoptive parent of a child may make a primary claim for parental leave pay for the child and, if eligible, receive a full 18 weeks of parental leave pay.

**Rule 2.28** sets out the general circumstances in which a person may make a primary claim, other than circumstances in which the person is the parent of a child born because of a surrogacy arrangement, (which are covered at rule 2.30). Those circumstances are that the person:

- has, and is likely to continue to have care of the child for at least 26 weeks, and
- became or will become the child's primary carer before the child's first birthday (or for an adopted child, before the first anniversary of the day of placement of the child).

Additionally, one of the following conditions in relation to the birth mother or adoptive parent of the child must be satisfied (set out in subrule (2)).

First, the person has or will have primary care for the child because the birth mother or adoptive parent of the child is incapable of caring for the child, and

will be incapable, or is likely to be incapable of caring for the child for at least 26 weeks. 'Incapable of caring for a child' is defined at rule 1.4 (above).

Second, the Secretary is satisfied on reasonable grounds that the person became the primary carer of the child in special circumstances, it would be unreasonable for the birth mother or adoptive parent of the child to care for the child, and it is in the interests of the child for the person to care for the child. Rule 2.31 further defines when it is unreasonable for the birth mother or adoptive parent of the child to care for the child, and when it is in the interests of the child for the person to care for the child.

**Rule 2.29** prescribes additional requirements for persons with no specific relationship with the child to meet in order to establish exceptional circumstances for the purposes of paragraph 2.28(1)(d). A person who is not the partner of the birth mother of the child or for adopted children, the partner of the adoptive parent of the child, or for separated parents, the other legal parent of the child or their partner will only satisfy this rule if they meet additional requirements that:-

- the partner of the birth mother, or of the adoptive parent is incapable of caring for the child, and
- the child was not entrusted to the care of the person, or to the care of the person's partner, under a decision by a State or Territory child protection agency under legislation dealing with child protection in the State or Territory.

Additionally, the person may satisfy rule 2.29 if the Secretary is satisfied on reasonable grounds that the person became the primary carer of the child in special circumstances, it would be unreasonable for the partner of the birth mother or adoptive parent of the child to care for the child, and it is in the interests of the child for the person to care for the child. Rule 2.31 further defines when it is unreasonable for the partner of the birth mother or adoptive parent of the child to care for the child, and when it is in the interests of the child for the person to care for the child.

Separate rules apply to surrogacy arrangements where parentage of the child has been transferred. A person who becomes the parent of a child as the result of a surrogacy arrangement has capacity in various States and Territories to seek a court order under State and Territory legislation transferring to them the parentage of the child. Various orders of this nature are prescribed for the purposes of section 60HB of the *Family Law Act 1975* (which is within Subdivision D of Part VII – how this Act applies to certain children). **Rule 2.30** then provides that a person who has such an order in their favour, or an order prescribed for the purposes of section 60HB of the *Family Law Act 1975*, is in exceptional circumstances for paid parental leave purposes such that the person may make a primary claim for parental leave pay.

**Rule 2.31** clarifies when it is unreasonable for a person to care for a child. The Secretary must be satisfied that either there has been extreme family breakdown or similar circumstances in relation to the child's family situation,

or there is a serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the child's family situation.

Rule 2.31 also clarifies that in considering what is in the interests of the child, the Secretary is to also consider the arrangements for the child's care with the person in comparison with the arrangements for the child's care under the child's previous family situation.

A note gives an example of situations in which it is in the interests of the child to be cared for by a particular person, such as the child's birth mother refuses to provide any care of the child, or because the child is severely disabled, and the mother is unable to provide for the child's needs.

#### **Subdivision 2.4.1.2 – Exceptional circumstances for secondary claims**

The purpose of this Subdivision, set out in **rule 2.32** is to prescribe the circumstances that are exceptional circumstances in which a secondary claim can be made for a child for the purposes of paragraph 54(2)(d) of the Act.

Under the Act, 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, or the partner of such a person. A secondary claimant, if eligible, may receive the balance of a primary claimant's 18 weeks of parental leave pay, where the secondary claimant was the child's primary carer for some proportion of that 18 week period.

Generally the exceptional circumstances in which a secondary claimant may claim parental leave pay to a large extent duplicate those applying to primary claimants who claim in exceptional circumstances. **Rule 2.33** provides that a secondary claim may be made in exceptional circumstances in which the person:

- has, and is likely to continue to have care of the child for at least 26 weeks, and
- the child was not entrusted to the care of the person, or to the care of the person's partner because of a decision by a State or Territory child protection agency under legislation dealing with child protection in the State or Territory.

However, additionally, it imposes different conditions depending whether or not the individual is the partner of the primary claimant for the child.

If the person is the partner of the primary claimant for the child, the condition is that the primary claimant is incapable of caring for the child, and will be incapable, or is likely to be incapable of caring for the child for at least 26 weeks.

If the person is not the partner of the primary claimant, then the person must be covered by one of the following.

First, the primary claimant and the primary claimant's partner is incapable of caring for the child, and will be incapable, or are likely to be incapable of caring for the child for at least 26 weeks. 'Incapable of caring for a child' is defined at rule 1.4 (above).

Second, the Secretary is satisfied on reasonable grounds that the person became the primary carer of the child in special circumstances, it would be unreasonable for the primary claimant or the primary claimant's partner to care for the child, and it is in the interests of the child for the person to care for the child. Rule 2.34 further defines when it is unreasonable and when it is in the interests of the child for a person to care for the child.

**Rule 2.34** is of identical effect to Rule 2.31 above.

### **Subdivision 2.4.1.3 – Exceptional circumstances for tertiary claims**

The purpose of this Subdivision, set out in **rule 2.35**, is to prescribe the circumstances that are exceptional circumstances in which a tertiary claim can be made for a child for the purposes of subsection 54(3) of the Act.

A tertiary claim represents a situation in which a child has had a further change in primary care in the space of 18 weeks, and so is anticipated to be relatively rare. The tertiary claimant may be the original primary claimant resuming care after a period, or may be a new primary carer.

Similarly to rule 2.33 in respect of secondary claimants, the exceptional circumstances prescribed by **rule 2.36** are that the person has, and is likely to continue to have care of the child for at least 26 weeks.

Additionally, the person, or the person's partner must not have been entrusted with the care of the child because of a decision by a State or Territory child protection agency under legislation dealing with child protection in the State or Territory.

There are then different conditions depending upon whether the person was previously the primary claimant in respect of the child.

If the person previously was the primary claimant, the person must have resumed, or will resume primary care of the child because either:-

- the secondary claimant had care of the child in exceptional circumstances and those circumstances have ceased to apply; or
- the secondary claimant is incapable of caring for the child and is likely to be incapable of caring for the child for at least 26 weeks. 'Incapable of caring for the child' has the meaning given by rule 1.4.

If the person was not previously the primary claimant, then the person must be covered by one of the following.

First, the primary claimant and the secondary claimant are incapable of caring for the child, and will be incapable, or are likely to be incapable of caring for

the child for at least 26 weeks. 'Incapable of caring for a child' is defined at rule 1.4 (above).

Second, the Secretary is satisfied on reasonable grounds that the person became the primary carer of the child in special circumstances, it would be unreasonable for the primary claimant and secondary claimant to care for the child, and it is in the interests of the child for the person to care for the child. Rule 2.37 further defines when it is unreasonable for a person to care for the child, and when it is in the interests of the child for a person to care for the child.

**Rule 2.37** is of similar effect to Rule 2.34 above.

### **Part 3-2 – Payment of instalments by employer**

The purpose of this Part is to provide for the information that an employer is required to give a person under section 80 of the Act, after paying the person one or more instalments of parental leave pay on a particular day, as well as the form in which this information is to be given. This Part also sets out the information that an employer is required to make and keep in relation to each person for whom an employer determination for the employer comes into force, for the purposes of section 81 of the Act. It also provides for the form in which this information is required to be kept.

**Rule 3.1** sets out the definitions relevant to this Part. In this Part, 'PPL payment' has the meaning given by rule 3.2, and can be one or more instalments of parental leave pay when paid on a particular day.

**Rule 3.2** outlines the information an employer is required to give a person after paying the person one or more instalments of parental leave pay. Rule 3.2 introduces the concept of 'PPL payment,' which is also used in Rule 3.5 in relation to the payment of instalments by the Secretary, and the information the Secretary is required to give a person. The 'PPL payment' is one or more instalments. An instalment is defined in the Act as an instalment of parental leave pay. Under the Act, an instalment is payable to a person if one or more days (the PPL days) of an instalment period fall within the person's PPL period. If an instalment is to be paid by a person's employer, the instalment period is the regular period for which the person would usually be paid in relation to the performance of work, and the payday for the instalment is the day on which the person would usually be paid for the performance of work. An instalment becomes payable on the payday for the instalment. A person will only be paid for those days in the instalment period that fall within the person's PPL period.

Rule 3.2 uses the concept of PPL payment because, under the Act, more than one instalment may be paid to a person on a particular day. An employer may be required to pay an earlier instalment on the payday for a later instalment. This could occur, for example, where an employer becomes required to pay an instalment to a person after the start of the person's PPL period, and neither the Secretary nor the employer was required to pay an earlier

instalment, but would have been, if one or more instalments had been payable from the start of the person's PPL period. Provided the employer has been paid enough by way of PPL funding amounts for the earlier instalments, the employer is required to pay those instalments on the payday for the later instalment. If more than one instalment is paid on a particular day, the employer will not be required to give the person the information required by rule 3.2 in relation to each of those instalments, separately. Rather, the information the employer is required to give a person will relate to the total of the instalments paid on a day. Therefore, rule 3.2 sets out the information the employer is required to give a person after paying one or more instalments (i.e. the PPL payment) to the person on a day.

Paragraphs (a) to (c) require the employer to give the person the employer's name; their ABN; and the person's name.

Paragraph (d) requires the employer to notify the person as to the period to which the PPL payment applies. For example, if the PPL payment is more than one instalment, then the period would be the total of all of the instalment periods to which the PPL payment relates. For example, a person's PPL period starts on 10 January 2011, however, the employer determination for the person and their employer comes into force on 25 January 2011. The person's instalment period is a fortnight, commencing on a Thursday and ending on a Wednesday a fortnight later (e.g. 6-19 January, and each such period after that); and the payday for the instalment period is the next day after the end of the instalment period (e.g. 20 January 2011). An instalment is payable to the person on 20 January, and another on 3 February. Subsection 72(2) requires the employer to pay the earlier instalment on the payday for the later instalment. The period that the employer must specify in the information the employer gives, as required by paragraph (d), is the period 10 January to 2 February for the PPL payment paid on 3 February.

Paragraph (e) requires the employer to specify the date on which the PPL payment is paid.

Paragraphs (f) and (g) distinguish between two situations: where the PPL payment is the only payment made by the employer to the person for the period; and where other payments, in addition to the PPL payment, are made to the person for the period. Other payments could include, for example, employer-provided paid maternity leave, or annual leave. If the PPL payment is the only payment made to the person for the period, the employer is required to give the person the following information: the gross amount of the PPL payment and a statement identifying the payment as parental leave pay; the net amount of the PPL payment; and the amount of tax withheld from the PPL payment. If, however, other payments are made in the period in addition to the PPL payment, the employer is required to give the person the following information: the gross amount of the PPL payment and a statement identifying it as parental leave pay; the total net amount paid to the person for the period; and the total amount of income tax withheld for the period.

The reason for this distinction is that, if a PPL payment is paid with other payments in the same period, PAYG withholdings would be made from the total of the PPL payment and other payments, e.g. salary or wages. Therefore, in this situation, an employer is only required to specify the total amount of the income tax withheld, rather than income tax withheld from the PPL payment separately. Similarly, the net amount would be the total net amount of the combined amount of the PPL payment and other payment. In a case where only a PPL payment is made for a period, then it will be clear that the net amount and income tax withheld will relate only to the PPL payment. In any case, the employer is required to give the person information as to the gross amount of the PPL payment, and identify that particular payment as parental leave pay.

Under sections 67 and 69 of the Act, an employer may deduct an amount from an instalment payable to a person, if the deduction is authorised by the person and principally for their benefit; or if the employer is required to deduct an amount under sections 46 or 72A of the *Child Support (Registration and Collection) Act 1988*. Therefore, paragraph (h) of Rule 3.2 requires that, if the employer makes a deduction from the PPL payment under section 67 or 69 of the Act, the employer must give the person the following information: the amount of each deduction; the name of the entity to whom the deduction is paid; and identify the bank account into which the amount deducted was paid.

**Rule 3.3** sets out the form in which the information prescribed by rule 3.2 must be given to a person. Employers may notify employees of the payment of parental leave pay using existing salary and wages systems. Therefore, rule 3.3. requires that the information must be in the form of a payslip (which is generally given in respect of salary or wages) or separate written advice; and either in electronic form or a hard copy.

**Rule 3.4** sets out that, where an employer determination is made (and is in force) for an employer, then that employer must make and keep certain information in relation to each employee to whom an employer determination relates, for the purposes of subsection 81(1) of the Act. The records that an employer must make and keep are set out in paragraphs (a) to (f) of subrule (1). Paragraphs (a) to (f) of subrule (1) generally reflect the information an employer will receive from the Secretary under section 77 of the Act, in relation to each PPL funding amount that the Secretary pays an employer for a person; together with the information the employer is required to give a person under rule 3.2.

Subrule (2) requires that, for subsection 81(2) of the Act, the record kept by the employer must be in the English language; legible; and in a form that is readily accessible to a person exercising compliance powers in accordance with the Act.

### **Part 3-3 – Payment of instalments by Secretary**

This Part sets out the information that the Secretary is required to give a person for the purposes of section 89 of the Act. Section 89 requires the



Secretary to give a person the information prescribed by the rules if the Secretary pays an instalment or part of an instalment to, or in relation to a person in particular circumstances, in relation to instalments paid in those circumstances. The Secretary is required to pay a person instalments in the circumstances set out in section 84 of the Act. Broadly, these circumstances relate to: where an employer determination for a person and their employer is never made; the employer has applied for review of the employer determination, and the employer determination has not come into force by the 28<sup>th</sup> day after the start of the person's PPL period; an employer determination for the person and their employer has been revoked; or a matter relating to a contravention by the employer of section 70, 72 or 74 of the Act has been referred to the Fair Work Ombudsman. The Secretary may be required to pay instalments that relate to particular instalment periods, in these circumstances.

The Secretary may also be required to pay the person arrears of instalments of parental leave pay, in the circumstances mentioned in sections 85 to 87 of the Act. This could include, for example, circumstances where the Secretary is required to pay an instalment to a person under subsection 84(3) (which deals with the payment of instalments where an employer determination is reviewed). The Secretary may also be required to pay instalments taken to have become payable to the person under section 91 (which deals with when the Secretary or an employer becomes required to pay instalments after the start of a person's PPL period) (i.e. for earlier instalments that are payable to the person), on the payday for the first instalment payable under subsection 84(3).

Subrule (1) of **rule 3.5** provides that rule 3.5 applies if the Secretary pays one or more instalments ('the PPL payment') to, or in relation to a person on a day, in the circumstances mentioned in sections 84, 85, 86 or 87 of the Act. More than one instalment may be payable on a particular day, and the Secretary may be required to pay an earlier instalment on the payday for a later instalment. This could occur, for example, where an instalment is payable to a person under subsection 84(3) of the Act, and arrears of instalments (i.e. for earlier instalment periods) are also payable under section 85, on the payday for the first instalment the Secretary is required to pay under subsection 84(3). Therefore, similarly to rule 3.2, the concept of 'PPL payment' (i.e. one or more instalments), is also used in rule 3.5 for the information the Secretary is required to give a person where the Secretary is required to make a PPL payment to a person, in the circumstances in subsections 84 to 87 of the Act. In the example described above, therefore, the 'PPL payment' would be the first instalment payable under subsection 84(3) as well as the arrears of instalments which are also payable on that day under section 85.

Subrule (2) sets out the information that, for section 89 of the Act, the Secretary is required to give a person in connection with the PPL payment. The information the Secretary is required to give a person is as follows:

- (a) information that the payment is paid by the Secretary and is a PPL payment;
- (b) the name of the person to whom the PPL payment is paid;
- (c) the period to which the PPL payment applies;
- (d) the period for which a final PPL payment is expected to be paid;
- (e) the frequency with which further PPL payments will be paid;
- (f) the date on which the PPL payment is paid;
- (g) the net amount of the PPL payment;
- (h) the total amount of income tax withheld from the gross amount of the PPL payment;
- (i) if a deduction from the PPL payment is made under section 67 or 69 of the Act: the amount of each deduction; the name of the entity to whom the amount deducted is paid; and identify the bank account into which the amount deducted is paid.

Subrule (3) then provides the time at which the information set out in subrule (2) is to be given to the person. The Secretary may pay a person several 'PPL payments', for the person's PPL period for a child. For example, the first 'PPL payment' the Secretary pays to a person may include arrears for earlier instalments payable on the payday for the first instalment the Secretary is required to pay under section 84. Thereafter, the Secretary may pay the person a PPL payment, which is only one instalment, on the payday for the instalment. (Where instalments are paid by the Secretary, an instalment period is a 14 day period starting on a day the Secretary considers appropriate, and each consecutive 14 day period after that; and the payday for the instalment is a day that occurs after the instalment period to which the instalment relates). In other circumstances, it may be the case that a person's PPL period is a full 18 weeks, and all instalments are payable by the Secretary, for example where no employer determination is made. In such a case, it is likely that the Secretary will pay a person 9 PPL payments, each PPL payment being one instalment, and payable on the payday for the instalment.

The requirement is that, in any event, the information in subrule (2) only be given in relation to the first PPL payment that the Secretary makes to a person for the person's PPL period for a child. Therefore, subrule (3) provides that the Secretary is required to give the information set out in subrule (2) only once, and at the time the first PPL payment is made by the Secretary to the person.

## **Part 4-1— Information gathering**

### **Division 4.1.1 General**

The purpose of this Part, as set out in **rule 4.1**, is to provide for guidelines for the exercise of the Secretary's power under paragraph 128(1)(a) of the Act, to give certificates that allow the disclosure of information in the public interest. The Secretary is required to act in accordance with these guidelines in giving certificates for the purposes of paragraph 128(1)(a) of the Act. For the most part, the rules in Part 4-1 largely mirror already existing guidelines, namely the *Family Assistance (Public Interest Certificate Guidelines)(FaHCSIA) Determination 2010*, and the *Social Security (Public Interest Certificate Guidelines)(FaHCSIA) Determination 2010*.

**Rule 4.2** sets out the definitions that are relevant to Part 4-1.

#### **Division 4.1.2 Guidelines – public interest certificate (general)**

Division 4.1.2 sets out how the release of protected information can generally occur under paragraph 128(1)(a) of the Act for the purposes of the Act.

**Rule 4.3** provides for matters that the Secretary must have regard to, in the giving of a public interest certificate. The Secretary must have regard to any situation in which a person (to whom the information relates) is, or may be, subject to physical, psychological or emotional abuse. In such a situation, the Secretary must also have regard to whether the person may be unable to provide the information to a third party themselves, because of age, disability or social, cultural, family or other reasons, which may require the Department to release the information to that third party instead. Rule 4.3 is intended to emphasise the importance of the release of protected information where individuals are not in a position to release the information themselves.

**Rule 4.4** provides that, for the purposes of Part 4-1, a public interest certificate may be given by the Secretary if:

- the information cannot reasonably be obtained from another source;
- the disclosure is to a person who has sufficient interest in the information; and
- that disclosure is for the purpose of rule 4.5, 4.6, 4.7, 4.8, 4.9, 4.11, 4.12, 4.13, 4.14, 4.15, or subrule 4.10(1) or (2).

Subrule (2) specifies that a person will have a sufficient interest in the relevant information if the person either has a genuine and legitimate interest in the information, or the person is a Minister.

**Rule 4.5** permits disclosure of protected information to prevent, or lessen, a serious threat to the life, health or safety of an individual. This rule reflects APP 6 of the exposure draft of the Australian Privacy Principles.

**Rule 4.6** permits disclosure of protected information if the disclosure is necessary:

- for the enforcement of a criminal law in relation to an indictable offence punishable by imprisonment of 2 years or more, or

- for the enforcement of a law imposing a pecuniary penalty equivalent to at least 40 penalty units, or
- to prevent an act that may have a significant adverse effect on the public revenue.

In general terms, this reflects the terms of IPP 11(1)(e) in section 14 of the *Privacy Act 1988*. Alternatively, the disclosure must relate to an offence or a threatened offence against a Commonwealth employee or Commonwealth property, or in departmental or Family Assistance Office premises.

The terms “criminal law” and “penalty units” are defined in subrule (2).

**Rule 4.7** permits disclosure of protected information to correct a mistake of fact in relation to the administration of a program of the relevant department where either the integrity of the program is at risk if the mistake of fact is not corrected or the mistake of fact relates to a matter that has been, or will be, published.

**Rule 4.8** permits the disclosure of information if the disclosure is necessary:

- to enable a Minister to consider complaints or issues by, or on behalf of a person, and respond to that person accordingly;
- to brief a Minister for a meeting or forum that the Minister is to attend;
- to brief a Minister in relation to issues raised, or proposed to be raised by or on behalf of a person so that the Minister can respond by correcting a mistake of fact, a misleading perception or impression, or a misleading statement;
- to brief a Minister about an error or delay on the part of the Family Assistance Office or the Fair Work Ombudsman; or
- to brief a Minister about an anomalous or unusual operation of the Act or the *Fair Work Act 2009*.

The Fair Work Ombudsman will have a role in compliance with various employer obligations in Act, and can exercise compliance powers under the Fair Work Act 2009, for the purpose of determining whether various provisions in the Act are being, or have been, complied with.

**Rule 4.9** permits disclosure of protected information which is necessary to assist a court, coronial enquiry, Royal Commission, department or any other authority of the Commonwealth a State or Territory in relation to the whereabouts of a reported missing person or to locate a missing person. However, disclosure will only be possible if there is no reasonable ground to believe that the missing person would not want the information disclosed.

A reported missing person is a person who has a missing person’s report filed with the police.

**Rule 4.10**, allows disclosure of protected information about a deceased person, which is:

- necessary to assist a court, coronial enquiry, Royal Commission, department or any other authority of the Commonwealth, a State or Territory in relation to a deceased person;
- necessary to locate a relative or beneficiary of the deceased person; or
- necessary to help an individual or authority responsible for the administration of the estate of the deceased person in relation to the administration of the estate of the deceased person.

However, disclosure will only be possible if there is no reasonable ground to believe that the deceased person would not have wanted the information disclosed.

Subrule (2) provides that the relevant information may also be disclosed if the information is to establish the death of the person or the place where the death of the person is registered.

**Rule 4.11** provides that protected information can be released where this is done for research purposes, including evaluation, monitoring and reporting, or statistical analysis in relation to any matter that is relevant to any department administering any part of the Act, the family assistance law or the social security law.

**Rule 4.12** provides for relevant protected information to be disclosed where it is necessary for the purpose of assisting the Queensland Family Responsibilities Commission in the performance of its functions or exercise of its powers.

This section is aimed at supporting the Family Responsibilities Commission which has been established by the *Family Responsibilities Commission Act 2008 (Qld)* (FRC Act). This statutory body underpins the Cape York Welfare Reform Trials.

Subrule (2) provides that in rule 4.12, the Family Responsibilities Commission means the Commission established by section 9 of the *Family Responsibilities Commission Act 2008 (Qld)*.

**Rule 4.13** allows for the disclosure of protected information where the information will be used by a State, Territory or the Commonwealth government for the purpose of contacting the customer in respect of compensation or other forms of recompense in various reparation processes, including the 'stolen wages' reparations in Queensland. This helps ensure that this assistance, formerly undertaken under the In Touch Program, can still be provided.

**Rule 4.14** allows for the disclosure of information to State or Territory Child Protection agencies where the agency is seeking to contact a parent or relative in relation to a child. For example, rule 4.14 may apply when a child protection agency is seeking to contact a parent to assist in a court case. This section helps ensure that this assistance, formerly undertaken under the 'In Touch Program', can still be provided.

**Rule 4.15** allows for the disclosure of information about a public housing or other State or Territory managed housing resident or tenant to a department or any other authority of a State or Territory where it is necessary to facilitate:

- rent calculation and rent deduction in relation to public housing or State or Territory managed housing; or
- the administration of an income confirmation service in relation to public housing or State or Territory managed Housing to avoid mistakes, underpayments and overpayments of rent, pensions, benefits and allowances.

An example of the application of rule 4.15 is the Automatic Income Confirmation Service (AICS). There is an existing Income Confirmation service (ICS), which is voluntary, under which all members of public housing households, who are also Centrelink clients, can authorise their relevant State or Territory housing authority (SHA) to automatically confirm details of their income directly from Centrelink. Those who do not participate in ICS must regularly verify their income to the SHA to allow for a reassessment of rent by SHA staff. The manual process of income verification consumes considerable resources for both SHAs and Centrelink. It also requires Centrelink clients to regularly respond to correspondence seeking income confirmation. If the response is not timely, action may be taken to adjust the rent and there are regular occurrences of incorrect rent payments. These outcomes increase the risk of eviction and consequently homelessness.

Information from SHAs indicate that there are at least 700 public housing evictions a year due to non-payment of rent with many more tenants each year owing rent, many without notice. On 29 November 2008 the Council of Australian Governments agreed to the National Affordable Housing Agreement (NAHA) which included the introduction of improved information exchange between the Commonwealth and the States and Territories as well as automatic rent deductions for public housing tenants to improve the operational efficiency of public housing and to reduce evictions from public housing as a priority area of reform.

Rule 4.15 will authorise the transfer of income details for people in public housing from Centrelink to SHAs to allow for the accurate calculation of rents. In the context of AICS, rule 4.15 will authorise the transfer of income details held by Centrelink to SHAs every six months and from time to time in response to SHA requests, which will help prevent evictions from incorrectly calculated or unpaid rent. The disclosure of information will provide administrative efficiency for both government agencies and those in public housing who need to have their rents determined according to their household income. Additionally, this disclosure of information will reduce the risk of privacy breaches, as automation will reduce SHA staff access to the income information.

## **Part 4-3 — Debt recovery**

### **Division 4.3.1 Debt notices and interest on debts**

In certain circumstances, a person may be liable to pay interest at the penalty interest rate on an outstanding amount of a debt under the Act. The Act sets a penalty interest rate of 20%, however a lower penalty interest rate applies if prescribed by the rules. Division 4.3.1 sets a lower penalty interest rate.

**Rule 4.16** provides that, for subsection 180(2) of the Act, the penalty interest rate is 3% per year. The penalty interest rate of 3% is consistent with the penalty interest rate applicable under the *A New Tax System (Family Assistance)(Administration) Act 1999* ('Family Assistance (Administration) Act').

### **Division 4.3.2 Penalty Interest Guidelines**

The purpose of this Division, as set out in **rule 4.17**, is to prescribe guidelines, as required by subsection 180(3) of the Act, for the operation of those provisions of the Act dealing with penalty interest. These guidelines are broadly consistent with guidelines for the operation of penalty interest rate provisions under the *Family Assistance (Administration) Act*, which are set out in the *A New Tax System (Family Assistance)(Administration) (Penalty Interest) Determination 2001*.

If a debt under the Act has not been paid, a person will be given an initial debt notice under subsection 173(1), specifying the outstanding amount, the date due and the repayment options available. A person may be given a further debt notice under subsection 174(2) if, after being given an initial debt notice, the debt has not been wholly paid, and either the person has not entered into a debt payment arrangement or has entered into such an arrangement but has failed to make a payment or payments in accordance with that arrangement. In some circumstances, the initial notice may also be taken to be a further debt notice.

Under subsection 175(4) of the Act, a person may be liable to pay interest on the outstanding amount of the debt, at the penalty interest rate, if the person has not entered into a debt payment arrangement by the final debt payment day (and the further debt notice states the person will be required to pay interest under subsection 175(4)). A person may also be liable to pay interest on the outstanding amount under subsection 175(6), if the person has entered into a debt payment arrangement but has failed to make a payment in accordance with that arrangement (and the further debt notice states the person will be required to pay interest under subsection 175(4)).

However, subsection 178(1) of the Act allows the Secretary to make an interest exemption determination, that interest is not payable, or is not payable in relation to a particular period, by a person on the outstanding amount of a debt.

**Rule 4.18** applies to a person who is liable to pay interest on the outstanding amount of a debt under subsection 175(4) of the Act.

Subrule (2) provides that the Secretary should make a determination that interest is not payable by a person if, after the final debt payment day, the person has entered into an arrangement to pay the debt and the person is making payments in accordance with the arrangement. The 'final debt payment day' for the payment of a debt is defined in subsection 175(2) of the Act, and subrule 4.18(4) provides that the term is to have the same meaning for the purposes of this rule.

Subrule (3) provides for the contents of a determination made in the circumstances described in subrule 4.18(2). Paragraph 4.18(3)(a) provides that the Secretary should determine that interest is not payable on and after the day when the first payment made in accordance with the arrangement is received by, or on behalf of, the Commonwealth Services Delivery Agency (Centrelink). Paragraph (b) requires the Secretary to specify, as a condition of the determination, that the person must continue to make payments in accordance with the arrangement. Subsection 178(5) of the Act provides that, if a determination is expressed to be subject to a person complying with a condition and the person contravenes that condition, the determination ceases to have effect from and including the day on which the person contravened the condition. Accordingly, the effect of paragraph (b) of rule 4.18 is that, if a person fails to make a payment in accordance with the arrangement, the interest exemption determination ceases to have effect and the debtor is again liable to pay interest from the date that the person fails to make the payment.

**Rule 4.19** applies to a person who is liable to pay interest on the outstanding amount of a debt under subsection 175(6) of the Act. A person becomes liable to pay interest under subsection 175(6) at the penalty interest rate if the person has entered into a debt payment arrangement and has failed to make a particular payment in accordance with that arrangement, which is the 'failure day' for the purposes of this rule (per subrule (5)). Interest is incurred from the later of the 'final debt payment day' for the debt under the Act, and the day after the day in respect of which the last payment was made, (defined in subrule (5) as the 'liability day') until the debt is wholly paid.

Subrule (2) provides that the Secretary should make a determination that interest is not payable by a person if either of two scenarios arise after the failure day. The first scenario (paragraph (a)) is that the person has resumed making payments in accordance with the existing arrangement mentioned in subsection 175(5) of the Act; the second (paragraph (b)) is that the person has entered into a new arrangement under section 190 of the Act and is making payments in accordance with that arrangement.

Subrule (3) provides for the contents of a determination made in the circumstances described in paragraph 4.19(2)(a), i.e. after the failure day, the person has resumed making payments in accordance with the existing arrangement. Paragraph (a) provides for the date from which interest will not be payable. The Secretary should determine that interest is not payable on and after the day when the first payment made after the failure day, is received by or on behalf of Centrelink. However, subparagraph (ii) provides



that if the first payment is received by Centrelink before the liability day, the determination is to provide that interest is not payable on and after the liability day.

Paragraph (a) of subrule (4) is necessary to prevent an undesirable potential application of subsection 175(6) of the Act. Under subsection 175(6) a debtor who fails to make a payment (ie in accordance with an existing arrangement to repay a debt) on or before the final payment day is liable to pay interest from the first day after the final payment day. By definition, the final payment day cannot occur before a debt becomes due and payable.

Without paragraph (a) a debtor who:

- before the final payment day, had entered into an arrangement to pay a debt; and
- before the final payment day, failed to make a payment in accordance with that arrangement; and
- on or before the final payment day, resumed making payments under the arrangement;

would be potentially liable to pay interest from the day after the final payment day. As this outcome is not intended as it would be inequitable, paragraph (a) expressly removes the potential for subsection 175(6) to be applied with that effect.

Paragraph (b) of subrule (4) requires the determination to specify, as a condition of the determination, that the person must continue to make payments in accordance with the arrangement. The rationale for this approach is discussed above in reference to paragraph 4.18(3)(b).

Subrule (4) provides for the contents of a determination made in the circumstances referred to in paragraph 4.19(2)(b). Paragraph (a) provides for the date from which interest will not be payable under the determination while paragraph (b) requires the determination to specify, as a condition of the determination, that the person must continue to make payments in accordance with the existing arrangement.

According to subparagraph (i) of paragraph (a), if the person makes the first payment under the new arrangement after the day on which the person became liable to pay interest, the determination is to provide that interest is not payable on and after the day when the payment is received by, or on behalf of, Centrelink. According to subparagraph (ii) of paragraph (a), if Centrelink receives the first payment before the day on which the person becomes liable to pay interest (ie before the liability day), the determination is to provide that interest is not payable on and after the liability day. The rationale behind this approach is similar to the rationale, discussed above, for subparagraph 4.19(3)(a)(ii).

Paragraph (b) of subrule (4) requires the determination to specify, as a condition of the determination, that the person must continue to make payments in accordance with the arrangement. The rationale for this approach is discussed above in reference to paragraph 4.18(3)(b).

Subrule (5) defines the terms *failure day* and *liability day*. The failure day is the day a person fails to make a payment under an arrangement entered into to pay a debt while the liability day is the day mentioned in paragraph 175(6)(a) or (b) of the Act from which a person is liable to pay interest.

**Rule 4.20** applies in relation to a person who is liable to pay interest on a debt under subsection 175(4) or (6) of the Act, per subrule (1).

Subrule (2) provides that the Secretary should determine that interest is not payable by a person in respect of a particular period if a notice has been given to another person under subsection 184(1) of the Act which requires the other person to pay to the Commonwealth an amount under paragraph 184(2)(b) or (c). In general terms, where a person owes or holds money on behalf of a debtor, section 184 allows the Secretary to give the person a notice requiring him or her to pay to the Commonwealth a specified amount (or a specified percentage) out of each payment that the person becomes liable to pay to the debtor from time to time.

The purpose of subrule (3) is to clarify what is the period referred to in subrule (2) where interest will not be payable. In effect, the period is the period during which the person is liable to make payments to the debtor.

**Rule 4.21** applies in relation to a person who is liable to pay interest on a debt under subsection 175(4) or (6) of the Act (per subrule (1)).

In part, the effect of section 193 of the Act is that the Secretary may decide to write off a debt if the debtor has no capacity to repay the debt. Significantly, the decision does not prevent subsequent recovery of the debt when the person does have the capacity to repay the debt.

Subrule (2) provides that the Secretary should determine that interest is not payable during the period during which the person had or has no capacity to repay the debt. In practice, this will commonly be the period for which a decision under section 193 is in force. The rationale behind this approach is that it is considered inappropriate for a person to be liable to pay interest in respect of the outstanding amount of a debt where the Secretary has decided that the person in fact lacked or lacks the capacity to repay the debt.

### **Part 6-3— Other matters**

Subsection 299(1) of the Act allows for the Rules to provide for employer determinations to be made for persons in a relationship similar to that of an employer and employee. Subsection 299(2) of the Act then allows the rules to modify provisions of the Act in relation to those persons provided for by the rules, in accordance with subsection 299(1). Part 6-3 of the rules provides for employer determinations to be made for the Chief Commissioner of Police (of Victoria) and Victorian law enforcement officers. If an employer determination is made and is in force in relation to a person who is a Victorian law enforcement officer, the Chief Commissioner of Police would be required to

pay instalments of parental leave pay to the person. In order to allow this to occur, this Part also modifies provisions of the Act in relation to Victorian law enforcement officers and the Chief Commissioner of Police.

**Rule 6.1** sets out the definitions relevant to Part 6-3. In this Part, the 'Chief Commissioner of Police' means the person holding the office of Chief Commissioner of Police under the **Police Regulation Act 1958** (Vic). 'Law enforcement officer of Victoria' means: a member of the police force of Victoria; a person appointed to a position for the purpose of being trained as a member of the police force of Victoria; or a person who has the powers and duties of a member of the police force of Victoria. It includes, without limiting paragraphs (a) to (c) of the definition, a police reservist, a police recruit, a police cadet, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer. The definition is based on the definition of 'law enforcement officer' in the Act.

**Rule 6.2** provides that, for subsection 299(1) of the Act, the Secretary may make an employer determination under Part 3-5 of the Act, for the Chief Commissioner of Police and a person who is a law enforcement officer of Victoria.

**Rule 6.3** then modifies certain provisions of the Act in relation to those persons provided for in rule 6.2. Various provisions of the Act, particularly in Chapter 3, which deals with the payment of parental leave pay, specifically mention an employer or an employee. Therefore, it is necessary to modify those provisions, so that reference to an employer or an employee are taken to be references to the Chief Commissioner of Police of Victoria, or a law enforcement officer of Victoria, as applicable.

Section 56 of the Act deals with the requirements of a claim for parental leave pay, and paragraph 56(1)(b) requires that the claim include any information required by the Secretary, including information about the claimant's employer or the claimant's employment with the employer. Paragraph 6.3(a) provides that references in section 56 to an employer are taken to be references to the Chief Commissioner of Police of Victoria.

Chapter 3 of the Act deals with the payment of parental leave pay, including instalments of parental leave pay; payment of instalments by an employer; and employer determinations. Various provisions in Chapter 3 make specific reference to 'an employer'. Paragraph (b) of rule 6.3 provides that, in relation to persons provided for in rule 6.2, references in Chapter 3 to an employer are taken to be references to the Chief Commissioner of Police of Victoria.

Subsection 101(1) of the Act sets out the conditions for when the Secretary must make an employer determination for an employer and a person. Paragraph 101(1)(d) requires that the person is likely to be an Australian-based employee of the employer during a particular period. Paragraph (c) of rule 6.3 provides that a reference to an employee is taken to be a reference to a law enforcement officer of Victoria.

Division 4 of Part 3-5 of the Act deals with an election by an employer to pay instalments to one or more employees of the employer. Paragraph (d) of rule 6.3 provides that a reference in Division 4 of Part 3-5 of the Act to an employee is taken to be a reference to a Victorian law enforcement officer, in relation to those persons provided for in rule 6.2.

Section 117 of the Act provides for a general power of the Secretary to require a person to give information that may be relevant to a matter set out in paragraphs (a) to (g) of section 117. Paragraph 117(g) deals with ensuring that an employer complies or has complied with its obligations under the Act. Paragraph 6.3(e) provides that a reference to an employer in paragraph 117(g) of the Act is taken to be a reference to the Chief Commissioner of Police of Victoria.

Part 4-2 of the Act deals with compliance with the Act, and Part 4-3 deals with debts in relation to the paid parental leave scheme, and the recovery of debts owing to the Commonwealth. Various provisions in those Parts refer specifically to an employer. Rule 6.3(f) therefore provides that a reference to an employer in Parts 4-2 and 4-3 are taken to be references to the Chief Commissioner of Police, in relation to those persons provided for in rule 6.2.

Section 172 of the Act deals with PPL funding amount debts, and debts owing by employers to employees. Paragraph 6.3(g) provides that a reference to an employee in that section is taken to be a reference to a Victorian law enforcement officer.

Chapter 5 of the Act provides for the review of decisions under the Act. Various sections in this Chapter deal with the review of certain decisions in relation to employers, and make specific reference to an employer. Paragraph 6.3(h) of the rules therefore modifies the Act such that, in relation to persons provided for in rule 6.2, a reference to an employer in Chapter 5 of the Act is taken to be a reference to the Chief Commissioner of Police of Victoria.