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The Parliament of the
Commonwealth of Australia

THE SENATE

Presented and read a first time

**Workplace Relations Amendment (Paid
Maternity Leave) Bill 2002**

No. , 2002

(Senator Stott Despoja)

**A Bill for an Act to provide paid maternity leave,
and for related purposes**

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A Bill for an Act to provide paid maternity leave, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Workplace Relations Amendment (Paid Maternity Leave) Act 2002*.

2 Commencement

This Act comes into force on the day after the date on which this Act receives the Royal Assent.

3 Application

This Act applies to an employee who takes parental leave from his or her employment in respect of a child, if:

- (a) the child is born on or after 1 September 2002; or
- (b) in the case of an adoption, the date on which the employee, with a view to adoption, first assumes the care of the child is on or after 1 September 2002.

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4 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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Schedule 1— Amendment to the Workplace Relations Act 1996

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Part 1—Paid maternity leave

8

1 After section 170KC

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Insert:

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Division 6—Paid maternity leave

11

170KD Object of Division

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(1) The object of this Division and Schedule 15 is to give effect, or further effect, to:

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(a) Article 11.2(b), Convention on the Elimination of All Forms of Discrimination Against Women, 1979; and

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16

(b) the Family Responsibilities Convention; and

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(c) the Workers with Family Responsibilities Recommendation, 1981, which the General Conference of the International Labour Organisation adopted on 23 June 1981 and is also known as Recommendation No. 165;

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by providing for a system of government-funded paid maternity leave that will help employees who take maternity leave from their employment in respect of a child.

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(2) In particular, Schedule 15 gives effect, or further effect, to the Article, Convention and Recommendation by entitling certain employees up to 14 weeks of maternity payments out of public money when they take maternity leave from their employment in respect of a child.

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(3) This provision is to be implemented in conjunction with Division 5 of this Part and its provision of unpaid parental (defined to include maternity and paternity) leave, so that employees entitled to paid maternity leave receive a maternity payment for 14 weeks of their maternity leave at and around the birth of a child.

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- 1 (4) This maternity payment is payable to eligible employees by means
2 of a payment by the Commonwealth to the employers of eligible
3 employees. Employers then make the payment directly to their
4 employees through established payment systems.
- 5 (5) This maternity payment does not affect or reduce any other
6 entitlement that the employee may have under the terms of any
7 other employment agreement, award or law.
- 8 (6) However, this maternity payment is not paid to Commonwealth,
9 State or Territory government employees (who receive other
10 government funded payments). It is payable to other employees
11 who meet the eligibility requirements.
- 12 (7) The maternity payment is for mothers in recognition of the
13 physical demands of the later stages of pregnancy, birth, recovery
14 from birth, and establishment, where possible, of breast feeding. It
15 is not intended as a transferable payment between employee and
16 spouse except in exceptional circumstances.
- 17 (8) If a person is eligible to receive a maternity payment under this Act
18 and either or both the maternity allowance and the maternity
19 immunisation allowance under the *A New Tax System (Family
20 Assistance) (Administration) Act 1999*, the person must elect to
21 receive either the payment, or the allowance or allowances, as the
22 case may be.
- 23 Note: Under the *A New Tax System (Family Assistance) (Administration)*
24 *Act 1999* the maternity allowance was \$798.72 in May 2002 and the
25 maternity immunisation allowance was \$208 in May 2002.
- 26 (9) A person is not entitled to a maternity payment if the person claims
27 and is paid either or both the maternity allowance and the
28 maternity immunisation allowance under the *A New Tax System*
29 *(Family Assistance) (Administration) Act 1999*.
- 30 (10) Schedule 15 establishes minimum entitlements and so is intended
31 to supplement, and not to override, entitlements under other
32 Commonwealth, State and Territory legislation, awards and
33 agreements.
- 34 (11) This maternity payment is to be treated as wage and salary income
35 for the purposes of taxation, superannuation and other relevant
36 laws and agreements.
-

1 (12) The regulations may provide for an analogous system of paid
2 adoption leave.

3 **170KE Application of Schedule 15**

4 The provisions of Schedule 15 have the force of law, in the same
5 way as if they were set out in this Division.

6 **2 After Schedule 14**

7 Insert:

8 **Schedule 15—Paid maternity leave**

9 Section 170KD

10 **Part 1—Preliminary**

11 **1 Purpose**

12 The purpose of this Part is to entitle certain employees, particularly
13 mothers, to up to 14 weeks of maternity payments out of public
14 money when they take parental leave from their employment in
15 respect of a child.

16 **2 Overview**

- 17 (1) Clauses 1 to 3 are preliminary provisions relating to the maternity
18 payment scheme.
- 19 (2) Clause 4 confers entitlements to maternity payments, primarily on
20 female employees.
- 21 (3) Clause 5 enables those employees to transfer their entitlements to
22 their spouses in certain circumstances.
- 23 (4) Clause 6 describes the process of applying for maternity payments.
- 24 (5) Clauses 7 to 12 relate to the duration, timing and amount of
25 maternity payments.
- 26 (6) Clauses 13 to 21 relate to the administration of the maternity
27 payment scheme.

1 (7) This clause is intended only as a guide to the general scheme and
2 effect of this Schedule.

3 **3 Interpretation of this Schedule**

4 (1) In this Schedule:

5 *continuous service* means service (otherwise than as a seasonal
6 employee) under an unbroken contract of employment, and
7 includes a period of leave, or a period of absence, authorised:

8 (a) by the employer; or

9 (b) by an award or order of a court or tribunal that has power to
10 fix wages and other terms and conditions of employment, or
11 a workplace agreement certified by such a body; or

12 (c) by a contract of employment; or

13 (d) by this Schedule or another law of the Commonwealth or of a
14 State or a Territory.

15 *long paternity leave* means Schedule 14 long paternity leave or any
16 other leave (however described):

17 (a) to which an employee is entitled, or that has been applied for
18 by or granted to an employee, in respect of the birth of a
19 child of his spouse, otherwise than under Schedule 14 (for
20 example, under another law of the Commonwealth or of a
21 State or Territory, or under an award, order or agreement);
22 and

23 (b) that is of a kind analogous to Schedule 14 long paternity
24 leave, or would be of such a kind but for one or more of the
25 following:

26 (i) it is paid leave;

27 (ii) differences in the rules governing eligibility for it;

28 (iii) differences in the period or periods for which it can be
29 taken.

30 *maternity leave* means Schedule 14 maternity leave or any other
31 leave (however described):

32 (a) to which an employee is entitled, or that has been applied for
33 by or granted to an employee, in respect of her pregnancy or
34 the birth of her child, otherwise than under Schedule 14 (for
35 example, under another law of the Commonwealth or of a

- 1 State or Territory, or under an award, order or agreement);
2 and
3 (b) that is of a kind analogous to Schedule 14 maternity leave, or
4 would be of such a kind but for one or more of the following:
5 (i) it is paid leave;
6 (ii) it can begin before the estimated date of birth;
7 (iii) differences in the rules governing eligibility for it;
8 (iv) differences in the period or periods for which it can be
9 taken.

10 ***medical certificate*** means a certificate signed by a registered
11 medical practitioner.

12 ***parental leave*** means maternity leave or paternity leave.

13 ***paternity leave*** means short paternity leave or long paternity leave.

14 ***short paternity leave*** means Schedule 14 short paternity leave or
15 any other leave (however described):

- 16 (a) to which an employee is entitled, or that has been applied for
17 by or granted to an employee, in respect of the birth of a
18 child of his spouse, otherwise than under Schedule 14 (for
19 example, under another law of the Commonwealth or of a
20 State or Territory, or under an award, order or agreement);
21 and
22 (b) that is of a kind analogous to Schedule 14 short paternity
23 leave, or would be of such a kind but for one or more of the
24 following:
25 (i) it is paid leave;
26 (ii) differences in the rules governing eligibility for it;
27 (iii) differences in the period or periods for which it can be
28 taken.

29 ***Schedule 14 long paternity leave*** has the meaning given by
30 clause 13 of Schedule 14.

31 ***Schedule 14 maternity leave*** has the meaning given by subclause
32 3(1) of Schedule 14.

33 ***Schedule 14 short paternity leave*** has the meaning given by
34 clause 13 of Schedule 14.

1 *spouse*, in relation to an employee, includes a person who lives
2 with the employee in a marriage-like relationship, although not
3 legally married to the employee.

4 *Multiple employments*

5 (2) An employee's entitlement to rights and benefits in respect of
6 parental leave must be determined by treating each of the
7 employee's employments separately, if the employee has more
8 than one employment.

9 *Multiple births*

10 (3) A person who gives birth to two or more children as a result of one
11 pregnancy and assumes or intends to assume the care of those
12 children must be treated as if the person had given birth to only one
13 child as a result of the pregnancy and had assumed or intended to
14 assume the care of only one of those children.

15 **Part 2—Paid maternity leave**

16 **4 Entitlement to maternity payment**

17 (1) An employee is entitled to a maternity payment under this
18 Schedule if the employee applies in the approved form and:
19 (a) is an eligible employee; or
20 (b) is an eligible spouse.

21 (2) An *eligible employee* is a female employee:
22 (a) who is granted maternity leave for the child under
23 section 170KB; and
24 (b) is not employed by a Commonwealth, State or Territory
25 government (including government departments, non-market
26 non-profit institutions that are controlled and mainly financed
27 by government, and corporations and quasi-corporations that
28 are controlled by government).

29 (3) An *eligible spouse* is an employee:
30 (a) to whom all or part of an entitlement to a maternity payment
31 is transferred under subclause 5(1); or
32 (b) who succeeds to a maternity payment under subclause 5(3).

1 **5 Entitlement may be transferred to eligible spouse**

- 2 (1) An eligible employee (within the meaning of subclause 4(2)) may
3 transfer all or part of her entitlement to a maternity payment in
4 respect of a child to her spouse if:
5 (a) the spouse has been granted parental leave; and
6 (b) the spouse takes parental leave from his or her employment
7 in respect of the child; and
8 (c) exceptional circumstances, as defined by the regulations,
9 make such a transfer necessary (such as the spouse becoming
10 sole guardian of the child to the exclusion of the employee).

11 Note: As maternity leave recognises the physical demands of the later stages
12 of pregnancy, birth, recovery from birth and establishment, where
13 possible, of breast feeding, the payment is intended for the mother,
14 and is not intended, under normal circumstances, to be transferable
15 from the biological mother to the spouse.

- 16 (2) To the extent that an eligible employee transfers all or part of her
17 entitlement to a maternity payment to her spouse under this clause:
18 (a) references in this Schedule to the employee's entitlement to a
19 maternity payment are references to the eligible spouse's
20 entitlement to a maternity payment; and
21 (b) references in this Schedule to the period of maternity leave
22 are references to the period of parental leave taken by the
23 eligible spouse; and
24 (c) the amount of the maternity payment is calculated according
25 to the work circumstances of the eligible spouse; and
26 (d) the entitlement that is transferred is deducted from the
27 transferring employee's entitlement to a maternity payment.
- 28 (3) An eligible spouse succeeds to the maternity leave entitlements of
29 an eligible employee under this clause on the later of:
30 (a) the date of the eligible employee's death or the date when the
31 spouse becomes sole guardian, as the case may be; or
32 (b) the date on which the eligible spouse's bereavement leave in
33 respect of the eligible spouse expires (if any).

34 **6 Applications for maternity payment**

- 35 (1) An eligible employee is not entitled to a maternity payment, and an
36 employer is not entitled to a maternity advance, unless the

1 employee makes an application for payment in accordance with
2 this clause.

3 (2) The application must:

- 4 (a) be made before the date on which the employee returns to
5 work or the parental leave otherwise ends; and
6 (b) be made in the manner prescribed in regulations; and
7 (c) specify the matters, and be accompanied by the documents,
8 prescribed in regulations.

9 (3) An employer and an employee must comply with any provision in
10 the regulations that requires them to specify matters in, or attach
11 documents to, or sign, an application under this clause or the
12 regulations.

13 **7 Duration of maternity payment**

14 A maternity payment is payable by an employer to an entitled
15 employee:

- 16 (a) for one continuous period not exceeding 14 weeks; or
17 (b) if part of the entitlement is transferred under clause 5, for one
18 continuous period per employee, so long as the two
19 continuous periods do not together exceed 14 weeks.

20 **8 Start of maternity payment**

21 A maternity payment is payable by an employer to an entitled
22 employee who is:

- 23 (a) an eligible employee—for a period that begins on the date of
24 commencement of her maternity leave; or
25 (b) an eligible spouse—for a period that begins on the date the
26 entitlement is transferred under clause 5.

27 **9 Backdating of maternity payments**

28 The first payment of a maternity payment includes an amount in
29 respect of the period from the start of the period mentioned in
30 clause 8 if the application is approved on or after that date.

1 **10 End of maternity payment**

- 2 (1) Subject to clause 7 (duration of maternity payment), a maternity
3 payment is payable by an employer to an employee for a period
4 that ends on the earlier of:
- 5 (a) 14 weeks after the date of start of his or her maternity
6 payment; or
 - 7 (b) the date on which that employee returns to work or resigns
8 from his or her employment.
- 9 (2) Subclause (1) applies despite the fact that the employee's parental
10 leave may end before that date if:
- 11 (a) the employee's employment is terminated due to redundancy
12 or dismissal for cause; or
 - 13 (b) the employee has a miscarriage or ceases to have the care of
14 the child; or
 - 15 (c) the employee or the child dies.
- 16 (3) However, the period for which a maternity payment is payable to
17 an employee terminates earlier than the date referred to in
18 subclause (1):
- 19 (a) if the employee takes parental leave only from fixed term
20 employment, in which case the payment stops on the date on
21 which fixed term employment ends; or
 - 22 (b) if the employee's spouse succeeds to the maternity payment
23 under subclause 5(3), in which case the payment to the
24 employee stops on the date of succession.

25 **11 Amount of maternity payment**

- 26 (1) The rate of maternity payment payable to any employee is the
27 lesser of:
- 28 (a) the Federal minimum wage as ordered, from time to time, by
29 the Australian Industrial Relations Commission; or
 - 30 (b) 100% of the employee's average weekly earnings (averaged
31 over the 12 months preceding the commencement of parental
32 leave).

33 Note 1: The Federal minimum wage from May 2002 was \$431.40 per week.

34 Note 2: As set out in subsection 170KD(9), those who receive a maternity
35 payment are not entitled to receive the maternity allowance and/or the

1 maternity immunisation allowance under the *A New Tax System*
2 (*Family Assistance*) (*Administration*) Act 1999.

- 3 (2) If an employee is entitled to receive a maternity payment from
4 more than one employer in respect of a child, the total of those
5 payments cannot exceed the amount mentioned in paragraph (1)(a).
- 6 (3) This maternity payment is to be treated as wage and salary income
7 received by the eligible employee, or eligible spouse as the case
8 may be, for the purposes of taxation, superannuation and other
9 relevant laws and agreements.

10 **12 Amount of payment not affected by other non-statutory**
11 **entitlements**

- 12 (1) An entitlement to a maternity payment under this Schedule is not
13 affected or reduced by any other entitlement that the employee may
14 have under the terms of any employment agreement.

15 Note: Under paragraph 4(2)(b) of this Schedule, a Commonwealth, State or
16 Territory government employee is not eligible to receive the maternity
17 payment.

- 18 (2) An employer must not, without the agreement of the employee,
19 reduce any other entitlement that the employee may have under the
20 terms of any employment agreement because of the employee's
21 entitlement to a payment under this Schedule.
- 22 (3) An employer who fails to comply with this clause is liable to a
23 penalty imposed by a court of competent jurisdiction under
24 Part VIII of this Act in respect of each employee to whom the
25 purported reduction applies.

26 **13 Employer to be advanced payments out of public money**

- 27 (1) Subject to this Act, if an individual is entitled to be paid a
28 maternity payment under this Schedule, the department must, at
29 such time and in such manner as the Secretary considers
30 appropriate, pay that employer an amount equal to the payment,
31 known as the *maternity advance*.
- 32 (2) Where possible, that maternity advance is to be made before or at
33 the same time as the employer makes a maternity payment to the
34 employee.

1 **14 Method of paying the maternity advance**

- 2 (1) A maternity advance is payable on a fortnightly, monthly or lump
3 sum basis, as determined by the regulations.
- 4 (2) Every instalment of the payment must be paid into the employer's
5 Australian bank account specified by the employer for that
6 purpose, unless the Secretary in any particular case otherwise
7 determines.

8 **15 Obligation of employer to notify employee of payment**
9 **entitlements**

10 Every employer who receives a notice of an employee's wish to
11 take parental leave must, within 21 days after the receipt of the
12 notice, inform the employee of the substance of this Schedule by
13 giving the employee a notice in a form prescribed by the
14 regulations.

15 **16 Obligation to notify early return to work, etc.**

- 16 (1) An employee must give notice if, during the period for which the
17 employee is receiving a maternity payment under this Schedule:
18 (a) the employee returns to work; or
19 (b) the employee's fixed term employment ends; or
20 (c) the employee resigns from his or her employment.
- 21 (2) The notification must be made in the manner prescribed in the
22 regulations and specify the matters, and be accompanied by the
23 documents, prescribed in the regulations.

24 **17 Failure to return to work does not affect payment**

25 An employee is not required to refund any maternity payment
26 under this Schedule because the employee does not return to work
27 at the end of his or her parental leave.

28 **18 Obligation to supply information**

- 29 (1) The department may, by written notice, request an employee who
30 has applied for a maternity payment, and any employer of that
31 employee, to supply to the department any information in the

- 1 employee's or the employer's (as the case may be) possession
2 relating to:
- 3 (a) the employee's entitlement or continued entitlement to a
4 maternity payment under this Schedule; or
5 (b) the employer's entitlement or continued entitlement to a
6 maternity advance under this Schedule.
- 7 (2) The employee or the employer must comply with a request under
8 this clause within a period of time to be specified by the
9 regulations.

10 **19 Recovery of debts by department**

- 11 (1) A sum of a maternity advance (an overpayment) paid under this
12 Schedule is a debt due to the department if the sum was:
- 13 (a) paid in respect of an employee in excess of the amount to
14 which the employee is entitled under this Schedule; or
15 (b) paid in respect of an employee who has no entitlement to it
16 under this Schedule.
- 17 (2) The department may:
- 18 (a) recover the debt by way of legal proceedings; or
19 (b) deduct all or part of the debt from any amount payable in
20 respect of that person under this Schedule.
- 21 (3) The department may not recover any maternity advance or part of
22 an advance under this Schedule that was paid as a result of an error
23 not intentionally contributed to by the employer, if the employer:
- 24 (a) received the payment in good faith; and
25 (b) so altered their position in reliance on the validity of the
26 payment;
- 27 that it would be inequitable to require repayment.

28 **20 Offence to mislead department**

- 29 A person commits an offence who, for the purpose of receiving or
30 continuing to receive any payment or entitlement under this
31 Schedule for themselves or any other person:
- 32 (a) makes any statement knowing it to be false in any material
33 particular; or

1 (b) does or says anything, or omits to do or say anything, with
2 the intention of misleading or attempting to mislead the
3 department or any other person concerned in the
4 administration of this Act.

5 Penalty: 50 penalty units.

6 **21 Regulations**

7 Regulations to implement this Schedule may:

- 8 (a) prescribe the manner in which an application for, or other
9 notices relating to, a maternity payment or a maternity
10 advance must be made;
- 11 (b) prescribe the information that employees and employers must
12 give in, or the documents that employees or employers must
13 attach to, an application for, or other notice relating to, a
14 maternity payment or a maternity advance;
- 15 (c) extend the class or classes of person entitled to a maternity
16 payment or a maternity advance.

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2 **Part 2—Other amendments**

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4 **3 Schedule 14, clause 2, definition of *employee***

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Omit “casual or”.

6 **4 Schedule 14, clause 2, definition of *continuous service***

7

Omit “casual or”.

8 **5 Schedule 14, clause 2, definition of *spouse***

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Omit “of the opposite sex to the employee”.

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Schedule 2—Amendment of other Acts

5

A New Tax System (Family Assistance) (Administration) Act 1999

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7

1 After subsection 39(5)

8

Insert:

9

*“Normal circumstances” entitlement not effective where individual
entitled to and receives maternity payments under the Workplace
Relations Act 1996*

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- (6) A claim for payment of maternity allowance or maternity
immunisation allowance is not effective if the claimant is entitled
to, or has transferred the entitlement to, a maternity payment in
respect of a child under the *Workplace Relations Act 1996*.

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