

1 December 2008

Mr Robert Fitzgerald  
Commissioner  
Productivity Commission  
Locked Bag 2  
Collins St East  
MELBOURNE VIC 8003

Dear Commissioner

**Paid Maternity, Paternity and Parental Leave - Public Inquiry**

Thank you for the opportunity to appear before you on Friday 21 November 2008, and to respond to your 29 September 2008 draft report.

On review, there was one issue we seek to provide further information on to assist the inquiry. That was the question regarding current payment practices for periods of Defence Force Reserve service, as follows:

MR FITZGERALD: ...if I can go to one of the very last points you have raised, but it's almost an incidental one. You have noted the constitutional issue about property on just terms and I don't want to go into constitutional discussion and neither do you, except to say, what is the current arrangement in relation to the payment of army reserves? Is it not the case already that employers make payments to army reservists and you are reimbursed by the government?

We have reviewed available ADF documentation, and the *Defence Reserve Service (Protection) Act 2001*. We now understand that the legislation does not operate as discussed. It does not require an employer to make payments to reservists, and it remains quite possible to provide entirely unpaid leave to a reservist employee.

However there is access to a minimum wage level payment (Employer Support Payments (ESP)) in two circumstances: where an employer does make payments to the employee, or as a 'thank you' subsidy where entirely unpaid leave has been provided. In each case the payments to the employer become available only after the first 10 days of reserve service in any year.

Thus, there are no mandatory payments from the employer, and this can actually be a subsidy rather than a recompense from the government. This appears more akin to a government gratuity rather than repayment. The ESP does not appear analogous in its operation to the current proposal for a paid parental leave scheme, nor to dispose of the point raised by ACCI.

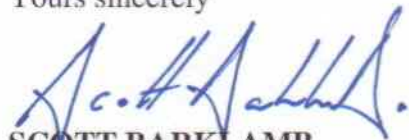
On looking further into this issue, the operation of the Protection Act bolsters a number of key points maintained by ACCI in relation to any paid parental leave scheme. Supporting information from the ADF makes clear that:

- The Protection Act does not oblige an employer of a member who is, or has been, absent on Defence Service to pay the member's remuneration in respect of the civilian employment.
- The Protection Act does not oblige an employer of a member who is, or has been, absent on Defence Service to grant the member's entitlements in respect of the civilian employment (i.e. leave does not accrue for the period of defence reserve service).
- The Protection Act does not oblige an employer of a member who is, or has been, absent on Defence Service to meet the employer's obligations under worker's compensation law to pay premiums, contributions or similar payments in relation to the member.
- The Protection Act does not oblige an employer of a member who is, or has been, absent on Defence Service to meet the employer's obligations under the *Superannuation Guarantee (Administration) Act 1992* in relation to the member.

It appears employment arrangements for Defence Reservists accord with the approaches advanced by ACCI and avoid the concerns we have with the paid parental leave scheme canvassed to date. We commend the Defence Reserve Support model to you in further support of the alternatives we raised following the draft report.

We invite your consideration of this further information as you finalise your report, and attach for your information an ADF Brochure "*Employer Support Payment Scheme: Providing financial support to employers of Defence Reservists*".

Yours sincerely

A handwritten signature in blue ink, appearing to read 'S. Barklamb', is written over the typed name.

**SCOTT BARKLAMB**

**Director – Workplace Policy**



DEFENCE RESERVES SUPPORT

# EMPLOYER SUPPORT PAYMENT SCHEME

Providing financial support to employers  
of Defence Reservists



Australia's Reserve Forces

## What is ESP?

The Employer Support Payment (ESP) Scheme provides financial assistance to eligible employers to help offset the costs of releasing employees for most categories of Australian Defence Force service. ESP is paid at a set weekly rate regardless of the employee's salary and there are no restrictions on the way employers can use the money. The weekly rate is equivalent to the average weekly full-time adult ordinary time earnings (AWOTE).

This figure is set for 12 months beginning on 1 July each year and is published on the Defence Reserves Support website at [www.defence.gov.au/reserves](http://www.defence.gov.au/reserves)

### Who is eligible to claim ESP?

All employers including government organisations, public and proprietary companies, private employers, discretionary or unit trusts and self-employed Reservists.

### Does it apply for all employees?

ESP is payable for full-time employees. It may be paid on a pro-rata basis for part-time employees (as long as they are not also in full-time employment). ESP may be payable for casual employees engaged in work on a regular or reliable basis.

### What are the criteria?

To qualify for ESP payments:

- Your employee's periods of Defence service must be a minimum of five consecutive days
- Your employee must have served a qualifying period of two weeks Defence service (in a single period or blocks of five consecutive days or longer) in the current financial year

- You must submit claims within six months of the first day of service for which the claims are being made. Claims submitted outside this period require special justification
- You must release your employee on leave, including leave without pay, to undertake Defence service. If your employee uses their own leave entitlements (such as annual leave or LSL), ESP is not payable
- You must agree to protect your employee's job

### For self-employed Reservists

If you are a self-employed Reservist, you must have received your principal source of income from your business or company for a continuous period of at least the previous six months or satisfy the requirements of the legitimate business test (see Additional information for self-employed Reservists).



## Injury/Illness

If your Reservist is injured or becomes ill as a result of the Defence service, you may be entitled to receive payments of ESP while they are recovering.

Further information is available on the Defence Reserves Support website at [www.defence.gov.au/reserves](http://www.defence.gov.au/reserves)

## What are the Reservist's responsibilities?

The Reservist should:

- Ensure you are aware of the scheme
- Provide you with a copy of the ESP claim form before beginning their Defence service
- Advise you of the address for submission of the claim

## Additional information relating to Reserve health officers

If your Reservist is a medical, dental, nursing or other health officer, you may be eligible for higher level payments under the CDF Capability provisions. Different claim forms are used (AD 138-3 and 138-4). These claim forms, as well as detailed instructions for completion and further information on applying for ESP under the CDF Capability provisions, are available on the Defence Reserves Support website at [www.defence.gov.au/reserves](http://www.defence.gov.au/reserves)

## Additional information for self-employed Reservists

### What are the criteria for self-employed Reservists?


As well as satisfying the general criteria, you must satisfy the delegate that:

- You conduct a recognised profession or business either as a sole trader or partner, or are employed (as an employee or director) by a company in which you have a controlling interest;
- The business, company or partnership is bona fide and is operating; and
- The business, company or partnership provides your principal source of income and has done so for a continuous period of at least the previous six months or it satisfies the requirements of the legitimate business test and has been your principal source of employment for at least the previous six months

### How do I determine my principal source of income?

The principal source of income is the source from which you earned, derived or received the highest amount of personal income during the six months before beginning the period of Defence service for which you are claiming ESP.

You must provide principal source of income evidence for an assessment period of six months or longer. Once you have established principal source of income, you may use this evidence for up to three years.



If you submit an ESP claim and you have undertaken prior periods of Defence service for which you received ESP, you may use principal source of income evidence relating to a six month or longer period that was submitted with a prior claim, as long as:

- You have not had a break of six months or longer between periods of continuous Defence service (i.e. service that is five days or longer), and
- The period covered by the principal source of income evidence is within three years of the period of Defence service for which you are claiming ESP

All sources of income (including Reserve salary, but excluding any pension) will be considered when determining which is the principal source. Income is the amount derived from the activities of the business for personal use, not the business or company income, profit, loss or turnover.

### How often do I need to provide evidence of my principal source of income?

Every three years, unless you have a break of six months or longer between periods of continuous Defence service. If you have such a break, you need to establish a new principal source of income.

However, you may provide new principal source of income evidence with any claim if you wish to do so (this may re-start the three year period during which you can use previously submitted principal source of income evidence).

### What is the legitimate business test?

It allows you to submit a claim for consideration in exceptional circumstances where it would be unfair to apply the principal source of income requirement. To satisfy the test, you must explain why your business or company does not provide your principal source of income and why it would be unfair not to approve payments from the ESP Scheme on this basis.

Circumstances might include:

- When your business or company is developing a product or service and will not receive a return until the product or service is developed and sold
- When your business or company is in its initial stages and you are reinvesting capital rather than drawing an income
- If your product or service is cyclical

You must also show evidence that your business or company has provided your principal source of employment for a continuous period of at least the previous six months.

If you are approved under the legitimate business test, you will be notified, in writing, of the approval period. Subsequent claims for service rendered within this period do not need to be accompanied by any supporting documentation.

You should seek further information before submitting a claim for ESP under the legitimate business test.

## How do I claim?

By completing the ADF Reserves Employer Support Payment Scheme - Employer's Claim Form (Form AD 138-1) or Self-employed Reservist's Claim Form (Form AD 138-2).

ESP claims are processed by authorised ESP delegates. Claims should be submitted direct to delegates. Claim forms and details of the postal addresses of delegates are available on the Defence Reserves Support website at [www.defence.gov.au/reserves](http://www.defence.gov.au/reserves)

### For Employers

You must attach evidence that your business is bona fide and that the Reservist is a bona fide employee.

### For Self-employed Reservists

Your claim must be accompanied by documentary evidence showing proof that your business, company or partnership:

- Is legitimate
- Is trading or operating
- Provides your principal source of income

Details of the acceptable types of evidence are on the claim form. Additional supporting evidence is required if a claim is submitted under the legitimate business test provisions.

### General

The delegate might request further documentation or information from you to support your claim.

By signing the Employer's Declaration on the claim form, you confirm that you have agreed to protect the Reservist's employment as if the service was protected by the *Defence Reserve Service (Protection) Act 2001*.

Delegates should make a decision on a claim for ESP within 30 days of receiving the completed claim form and ensure payment is made, where practicable, within 14 days of approval.

For employees on extended periods of continuous Defence service (greater than 21 days) you should receive an initial payment, followed by fortnightly payments in arrears, until the completion of the period of the continuous service.

Note: ESP can be paid for a maximum of 78 weeks for a single period of continuous Defence service.

### Is ESP taxable?

ESP is taxable in accordance with normal tax requirements. For self-employed Reservist claims, the payment is made to the member for the benefit of the employer.

GST does not apply to ESP payments.

### What if ESP is not enough to cover my employee's absence?

ESP can be paid at higher levels where you can demonstrate you have suffered substantial financial hardship or loss as a result of your Reservist's absence on Defence service. Applications for higher payments should be made in writing justifying the circumstances of the hardship or loss.

You should seek further information before submitting an application for ESP under the financial hardship or loss provisions.

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# Financial support for employers of Defence Reservists



**DEFENCE RESERVES SUPPORT**

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**Reserves are a fundamental part of the Australian Defence Force  
and play a key role in safeguarding Australia's security.**

For further information contact our helpline or visit the Defence Reserves Support website.  
**1800 803 485 [www.defence.gov.au/reserves](http://www.defence.gov.au/reserves)**

January 2008