

7 October 2008

Productivity Commission
GPO Box 1428
Canberra City ACT 2601, Australia

SUBMISSION RE PAID MATERNITY LEAVE

I refer to my letter to the Editor, Australian Financial Review, of 1 October 2008 and to our conversation just had. As requested, I make the following submissions with respect to the implications of paid Parental Leave for employers and the following comments on Chapter 8 of the Commission's draft report.

With regard to the Commission's invitation in the second last paragraph of Chapter 8, I believe that the reference to leave entitlements "*such as sick, recreational and long service leave*" is too narrow, as there are other entitlements which may be impacted. These include the calculation of "notice" and "severance" payments. I will address those matters below.

Generally, Chapter 8 does not sufficiently recognise that there are two concurrent industrial relations systems running in Australia, as follows:

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- 1 The Work Choices Regime, as reflected by the former Howard Government's *Workplace Relations Act 1996* (Cth) ("**the WR Act**"), which has been partially amended by the current Rudd Government earlier this year. The WR Act applies to all "Constitutional corporations" as defined by s.51(xx) of the Australian Constitution. If an entity is not a Constitutional corporation, then it will remain in the various State systems, with the exception of Victoria, which handed over its powers to the Federal Parliament in 1996.
- 2 The various State industrial relations Regimes, which continue to apply to non-Constitutional corporations, such as unincorporated sole traders, partnerships, unincorporated entities such as Churches and some charities and probably to Local Government (an industry employing many people across Australia).¹

This recognition is very important, as it means that, when considering the impact of paid Parental Leave, **two industrial relations systems** will need to be assessed when considering its implications for employee entitlements such as annual leave, long service leave, sick leave (called Personal and Carer's Leave at the Federal level) and notice and severance payments.

It is also important to note that the Rudd Government's new industrial relations regime, called "Fair Work Australia" will be shortly introduced into the Federal Parliament. The legislation, while apparently sweeping aside the Work Choices Regime, will operate on the same Constitutional basis as Work Choices.

The Impact of Paid Parental Leave on Annual Leave, Long Service Leave, Personal and Carer's Leave, Notice and Severance Payments under the WR Act.

Accrual of Annual Leave during Paid Parental Leave

Please note that the rights and obligations of employees and employers covered by the WR Act are also subject to the Australian Fair Pay and Conditions Standard ("**the Standard**").

Pursuant to s.232 of the WR Act, employees will accrue annual leave for each completed four week period of continuous service with their employer. According to s.238 of the WR Act, a period of annual leave does not break an employee's continuity of service and annual leave counts as service for all purposes except as prescribed by the regulations.

Under s.229 of the WR Act, **unpaid** leave does not count as service for the purposes of leave accrual, unless otherwise expressly provided by a term or condition of the employee's employment or a law or instrument under Commonwealth, State or Territory law.

¹ In the Federal Court's Decision in *AWU, Queensland & Ors v Etheridge Shire Council & Ors* [2008 FCA 1268, 20 August 2008], the Court held that a Council could not be a Constitutional Corporation, by its very nature. See paragraph 22 of Spender J's Decision, in which he says "*In my opinion, it is inconceivable that the framers of the Constitution and the Parliament which enacted it intended that the Commonwealth should have the powers described in para [21] above in respect of a local government, which is a body politic of a State government, having legislative and executive functions*" Contrast this position with the Decision in *Eric Bell v Shire of Dalwallinu* [2008 WAIRC 01269, 14 August 2008], (ie a week earlier) which found that this Council was a Constitutional Corporation.

Section 229(1) states as follows:

Meaning of nominal hours worked

Employees employed to work a specified number of hours

(1) *For the purposes of this Division, if an employee is employed by an employer to work a specified number of hours per week, the number of nominal hours worked, by the employee for the employer during a week, is to be worked out as follows:*

(a) *start with:*

(i) *the specified number of hours; or*

(ii) *if the specified number of hours is more than 38 hours—38 hours;*

(b) *deduct all of the following:*

(i) ***the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave which does not count as service;***

(ii) *the number of hours (if any) in the week (other than hours mentioned in subparagraph (i)) in relation to which the employer is prohibited by section 507 from making a payment to the employee.*

The provision bolded, refers to the effect of s.316 of the WR Act.

The service status of **unpaid** Parental Leave is specifically dealt with under s.316 of the WR Act, which provides that under the Standard, a period of **unpaid** Parental Leave² *does not break an employee's continuity of "service"*. However, under sub-section (2) that service *does not count as "service"* for the purposes of annual leave accrual, unless otherwise expressly provided by a term or condition of the employee's employment or a law or instrument under Commonwealth, State or Territory law.

Section 316 of the WR Act, states as follows:

(1) *A period of parental leave does not break an employee's continuity of service.*

² Section 282(1) of the WR Act defines "Paternity Leave" as : "(a) a single, unbroken period of unpaid leave (short paternity leave) of up to one week taken by a male employee within the week starting on the day his spouse begins to give birth; or (b) a single, unbroken period of unpaid leave (long paternity leave), other than short paternity leave, taken by a male employee after his spouse gives birth to a living child so that the employee can be the child's primary care-giver."

- (2) *However, a period of parental leave **does not otherwise count as service** except:*
- (a) *for the purpose of determining the employee's entitlement to a later period of leave under this Division; or*
 - (b) *as expressly provided by or under:*
 - (i) *a term or condition of the employee's employment; or*
 - (ii) *a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or*
 - (c) *as prescribed by the regulations.*
- (3) *In this section "parental leave" means any of the following:*
- (a) *maternity leave;*
 - (b) *paid leave under subparagraph 268(2)(b)(i) or (ii);*
 - (c) *paternity leave;*
 - (d) *pre-adoption leave;*
 - (e) *adoption leave.*

The WR Act does not expressly deal with the service status of **paid** maternity leave. This is because the Standard does not provide for this type of leave. Generally, however, all types of paid leave (including paid Parental Leave) count as "service" for the purpose of annual leave accrual, unless a term of an award, workplace agreement or contract of employment provides otherwise.

In my opinion, under the current WR Act, if the **paid** Parental Leave scheme comes into effect as described by the Productivity Commission's Report, then, in my view **any** period of paid Parental Leave **will** (like any other paid leave) count as service for the purposes of annual leave accrual unless a term of an award, workplace agreement or contract of employment provides otherwise.

In my further opinion, the introduction of the Rudd Government's "Fair Work Australia" regime may confirm my views. I note that with the introduction of the 10 National Employment Standards, due on 1 January 2010 (but legislation pending) that periods of paid leave may count as "service" for the accrual of annual leave.

Accrual of Long Service Leave during Paid Parental Leave

Section 16 of the WR Act provides as follows:

Act excludes some State and Territory laws

- (1) *This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:*
 - (a) *a State or Territory industrial law;*
 - (b) *a law that applies to employment generally and deals with leave other than long service leave;*

Accordingly, one must look to State and Territory long service legislation. In NSW, these entitlements are covered by the *Long Service Leave Act 1955* ("the LSL Act").

The issue of what constitutes "service" is dealt with in s.5(11) of the LSL Act, which relevantly provides:

- (11) *For the purposes of this section:*
 - (a) *service of a worker with an employer means continuous service, whether on a permanent, casual, part-time or any other basis, under one or more contracts of employment,*

It is interesting to note that Parental Leave is not mentioned in the following subsection (ie s.5(11)(a1)). Accordingly, for Constitutional Corporations, one must go to the WR Act to establish the entitlement (unless a relevant Award or Collective Agreement provides better entitlements) and as noted above, the WR Act refers to Parental Leave as unpaid and therefore not continuous service.³

In my opinion, if the **paid** Parental Leave scheme comes into effect as described by the Productivity Commission's Report then, in my view **any** period of paid Parental Leave **will** count as service for the purposes of long service leave accrual. When the legislation has been passed, the matter should be revisited.

This will expose some employers to increased long service leave payments. For example: If Sally has 4 years 8 months service and takes unpaid Parental Leave, then if her position is made redundant prior to or upon her return to work, she accrues no long service leave entitlements, as she does not have five years service. However if she received 18 weeks paid Parental Leave, then she would qualify and her employer will be exposed to a pay out of just over one month's long service leave.

Issues will also arise as to the calculations, but the s.3 of the LSL Act defines "Ordinary Pay", in relation to any worker, as follows:

- (a) *where the worker is, on the prescribed date, remunerated wholly in relation to an ordinary time rate of pay fixed by the terms of the worker's employment:*

³ Sections 282(1) & 316 of the WR Act

- (i) *the amount of the ordinary remuneration of the worker, as on the prescribed date, or*
- (ii) *the average weekly amount of the ordinary remuneration which was earned by the worker as a worker during that part of the period of 5 years ending on the prescribed date during which the worker was so remunerated,*

whichever is the greater,

For the purposes of the definition “prescribed date” means the day before the person commenced their long service leave⁴.

However, in the last example, should Sally’s “ordinary remuneration” for the calculation of long service leave entitlements be based upon what she last received during the 18 weeks paid Parental Leave or should it be the amount paid on her last day of actual work, or is it an average of what she has been paid over the five years? This may raise interesting arguments, especially where Sally is a casual or part time worker and earns less than the amount proposed to be paid according to the Productivity Commission’s Report.

Time and energy do not permit an analysis of the other States and Territories’ long service leave entitlements.

The position may also be affected by the proposed introduction of the Rudd Government’s “Fair Work Australia” regime (legislation pending). When the legislation has been passed, the matter should be revisited.

Accrual of Personal Leave during Paid Parental Leave

Part 7 Division 5 of the WR Act deals with the accrual by employees of Personal Leave entitlements.

According to s.239 of the WR Act, the entitlement to personal Leave applies to all employees other than casual employees.

Section 241(1), which is in exactly the same terms as s.229 of the WR Act states as follows:

Meaning of nominal hours worked

Employees employed to work a specified number of hours

- (1) *For the purposes of this Division, if an employee is employed by an employer to work a specified number of hours per week, the number of nominal hours worked, by the employee for the employer during a week, is to be worked out as follows:*

- (a) *start with:*

⁴ See s.3(2) of the LSL Act.

- (i) *the specified number of hours; or*
- (ii) *if the specified number of hours is more than 38 hours—38 hours;*
- (b) *deduct all of the following:*
 - (i) ***the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave which does not count as service;***
 - (ii) *the number of hours (if any) in the week (other than hours mentioned in subparagraph (i)) in relation to which the employer is prohibited by section 507 from making a payment to the employee.*

The provision bolded, refers to the effect of s.316 of the WR Act.

As noted in the discussion of annual leave entitlements above, the service status of **unpaid** Parental Leave is specifically dealt with under s.316 of the WR Act, which provides that under the Standard, a period of **unpaid** Parental Leave⁵ *does not break an employee's continuity of "service"*. However, *that service* does not count as "service" for the purposes of Personal Leave accrual, unless otherwise expressly provided by a term or condition of the employee's employment or a law or instrument under Commonwealth, State or Territory law.

In my opinion, under the current WR Act, if the **paid** Parental Leave scheme comes into effect as described by the Productivity Commission's Report, then, in my view **any** period of paid Parental Leave **will** (like any other paid leave) count as service for the purposes of Personal Leave accrual unless a term of an award, workplace agreement or contract of employment provides otherwise.

In my further opinion, the introduction of the Rudd Government's "Fair Work Australia" regime may enhance my views. I note that with the introduction of the 10 National Employment Standards, due on 1 January 2010 (but legislation pending) that periods of paid leave will count as "service" for the accrual of Personal Leave. When the legislation has been passed, the matter should be revisited.

Accrual of Notice Obligations during Paid Parental Leave

Pursuant to s.661(2) of the WR Act, an employer must give employees prescribed periods of notice as follows:

⁵ See Section 282(1) of the WR Act.

- (a) *first work out the period of notice using the table at the end of this subsection; and*
- (b) *then increase the period of notice by 1 week if the employee:*
 - (i) *is over 45 years old; and*
 - (ii) *has completed at least 2 years of continuous service with the employer.*

Employee's period of continuous service with the employer	Period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

As with Annual Leave and Personal Leave, the provisions of s.316 of the WR Act would seem to come into effect, which provides that under the Standard, a period of **unpaid** Parental Leave *does not break an employee's continuity of "service"*. However, under sub-section (2) that service *does not count as "service"* for the purposes of leave accrual, unless otherwise expressly provided by a term or condition of the employee's employment or a law or instrument under Commonwealth, State or Territory law.

However, with respect to the entitlement to notice, s.661(3) of the WR Act notes as follows:

For the purposes of subsection (2), the regulations may prescribe events or other matters that must be disregarded, or must in prescribed circumstances be disregarded, in ascertaining a period of continuous service.

Regulation 12.11 of the WR Act's Regulations relevantly prescribe that ...

- (1) *For subsection 661(3) of the Act, in ascertaining an employee's period of continuous service, the following actions and events must be disregarded:*
 - (b) *absence of the employee, on authorised leave, from work;*
 - (c) *absence of the employee from work due to:*
 - (i) *the employee's illness; or*
 - (ii) *an injury to the employee;*
 - (d) *absence of the employee from work, if there was reasonable cause for the absence;*

- (2) *Paragraphs (1)(c) and (d) do not apply unless:*
- (a) *if the employee is required, under an industrial instrument, to notify the employer of an absence and to substantiate the reason for the absence — the employee has done so; or*
 - (b) *in any other case — the employee informs the employer within 24 hours after the commencement of the absence, or such longer period as is reasonable in the circumstances, of:*
 - (i) *the employee's absence; and*
 - (ii) *whether the absence is due to illness, injury or other reason; and*
 - (iii) *the likely duration of the absence.*

In my opinion, with respect to Notice Periods, **paid** Parental Leave seems to exclude the effect of s.316 of the WR Act, and it falls into the same category as Annual Leave and Personal Leave. That opinion seems to be supported by Regulation 12.11 as there is the argument available that any period of "paid" leave is "authorised leave" in accordance with Regulation (1)(b). Regulation (1)(d) also seems to apply in that paid leave is a reasonable cause for the absence.

For example:

If Sandra has four years eight months service and takes unpaid Parental Leave then, if her position is made redundant prior to on upon her return to work, she would be entitled to three weeks notice pursuant to s.661(2)(a) of the WR Act.

However if she received 18 weeks paid Parental Leave, then she would arguably have over five years service and her employer will be exposed to another week's notice pay out.

If Sally was aged 44 years and 8 months when she took the unpaid Parental Leave then, if her position is made redundant prior to on upon her return to work, she would not be entitled to the additional one week's notice pursuant to s.661(2)(b) of the WR Act. However if she received 18 weeks paid Parental Leave, then she would arguably have accrued the entitlement to that additional week.

In looking at this issue, it is often constructive to consider an analogous situation. For example, Paul is a two year 11 month employee and is paid by his employer to take study leave in the USA for six weeks. Paul returns to Australia and due to the melt down of the world's banking system, is immediately retrenched. Paul would, in my opinion, successfully argue that he is now a three year plus employee and entitled to more notice.

In my further opinion, there is no difference between Sally and Paul's circumstances. Both should receive the benefit of "continuous service" during the periods of paid leave.

Accrual of Severance Obligations on Redundancy during Paid Parental Leave

The WR Act is silent on the quantum of severance payments on redundancy. However, many Awards, NAPSAs and Collective Agreements, as well as Contracts of Employment make provisions for sliding scales of severance pay.

In my opinion, with respect to the entitlement to Severance Pay, **paid** Parental Leave seems to exclude the effect of s.316 of the WR Act, and it falls into the same category as Annual Leave, Personal Leave and Notice Periods.

The effect upon employers can be gauged from the following example:

If Josephine has 3 years 8 months service and takes unpaid Parental Leave then, if her position is made redundant prior to or upon her return to work, under her Contract of Employment, she would be entitled to two weeks severance pay for each year of service.

However if she received 18 weeks paid Parental Leave, then she would arguably have over four years service and her employer will be exposed to another two weeks' severance payment.

Some Awards etc allow enhanced payments for employees over 45 years of age. If Josephine was aged 44 years and 8 months when she took the unpaid Parental Leave then, if her position was made redundant prior to or upon her return to work, she would not be entitled to the enhanced severance payments for persons aged 45 years. However if she received 18 weeks paid Parental Leave, then she would arguably have accrued the entitlement to those enhanced payments.

The Impact of Paid Parental Leave on Annual Leave, Long Service Leave, Personal and Carer's Leave, Notice and Severance Payments for non-Constitutional Corporations.

Time and my energy levels do not permit an analysis of the exposure of non-Constitutional corporations to the hidden costs of paid Parental Leave on annual leave etc, as the situation must be analysed across six states and two Territories.

Conclusions

If paid Parental Leave is to be introduced across Australia, it is important to document the extent to which employers are exposed to hidden costs, over and above the payments of 9% superannuation discussed in the Report.

A solution to the issue may be to reduce the paid Parental Leave from (say) 18 weeks to (say) 16 weeks, but have the Federal Government pay employers 18 weeks. Employers can be directed to make the payment of the additional two weeks to employees but on the basis of it being compensation for two weeks accrued annual and long service leave.

As to the other exposures, (Notice, Severance etc), perhaps the legislation can be amended to exclude the continuity of service when the employee is on Parental Leave.
