



CHAMBER OF COMMERCE AND INDUSTRY
WESTERN AUSTRALIA

14 November 2008

Commissioner Fitzgerald AM
Presiding Commissioner
Parental Leave Inquiry
Productivity Commission
GPO Box 1428
Canberra City
ACT 2601

By Email to: parentalsupport@pc.gov.au

Dear Commissioner Fitzgerald AM

Response to the Productivity Commission draft Inquiry report, *Paid Parental Leave: Support for Parents with Newborn Children*

1. Introduction

CCI reconfirms its support, as outlined in our initial submission to the Productivity Commission (submission 147), for a paid parental leave scheme of 14 weeks on the condition that it is fully government funded and administered.

CCI does not support a scheme of paid parental leave that places an undue burden on employers, especially small business.

The model proposed by the Productivity Commission takes into account some of the concerns outlined in CCI's initial submission. However, the model places undue pressure on business in the key areas described below.

2. Administration of the scheme

The objectives identified by the Productivity Commission of (i) enhancing maternal and child health, (ii) facilitating workplace participation and (iii) promoting gender equity and work/family balance are not related to an employee's attachment to an employer. As such employers should not bear the responsibility, extra costs and undue burden of administering the scheme.

Certain provisions contained in the proposed model clearly illustrate that the scheme is not founded on the employment relationship and as such the employer should not be responsible. For example, the eligibility requirements for the payment are inconsistent with the current federal entitlements contained in the *Workplace Relations Act 1996* or the proposed National Employment Standards (NES) for unpaid parental leave. The wider eligibility criteria of the paid leave scheme will result in some employees being eligible for the statutory paid parental leave but they will not be eligible for unpaid parental leave or the return to work guarantee.

CCI does not believe the inconsistency is a problem so long as the entitlement to the paid parental leave scheme is treated as separate from the contract of employment and the employment relationship. As such, there should be no obligation on the employer to administer the payment, the payment should not attract a superannuation component and leave (such as annual leave and sick leave) should not accrue during the period of leave.

The proposed model, which would be funded by general revenue, is effectively a government assistance program and should be administered by the government. However, the scheme could be developed to include an option whereby the employer may **choose to** opt into the responsibility of acting as paymaster. Employers may choose to administer the payment if they intended on topping up the payment or if there was a voluntary scheme in place which the employer intended to continue.

The proposed model requires the creation of processes and systems by the Government for making of payments to those who are ineligible for a payment by the employer. As a government system will be put in place, provision of payment through this central system should be extended to all employees. Such a system could include options providing for administration by the employer where suitable as described above.

The argument posed by the National Foundation for Australian Women and supported by the Productivity Commission at page 8.25 of the draft report, that employers already play a large role in the “provision and/or administration of a range of employment related entitlements”, does not recognise that the scheme proposed would not form part of the contract of employment or part of the employment relationship and as such is significantly different to other leave entitlements such as sick leave, annual leave or long service leave.

Further, the Productivity Commission claims that the effect on smaller firms would be minimal “because the probability of an employee actually being on parental leave at any point in time would be quite low.” While the probability may be small, for those small businesses that are affected, the burden and costs far outweighs the benefit of low probability.

Increased Administrative Burdens on the Employer

The proposed model, whereby the employer acts as the 'paymaster' imposes a significant administrative burden on business. Employers will be forced to make adjustments to their payroll systems, and re-train payroll staff in order to account for the changes. Changes to payroll systems will be made at the expense of the employer to cater for a single event of paid parental leave occurring in the business.

As already proposed in our initial submission, if employers are required to act as 'paymaster' then a model similar to that applying in the current British system should be considered. The British *Employment Act 2002*¹ provides compensation for small employers for the increased costs associated with payment and reimbursement of parental leave payments. This system allows for the reimbursement of 104.5% of the statutory maternity pay to cover the additional costs of replacement.

In the event that the scheme cannot be administered by the government, employers must be reimbursed for incidental costs, such as upgrades to payroll systems, training of staff or the greater time spent on payroll functions.

Additional burden on employers

The Draft Report identified a number of areas where the proposed model will impose a further burden on employers.² Necessary changes to payroll systems and the possibility of manual payroll requirements; increased record keeping requirements to ensure compliance and cash flow issues are only some of the foreseeable administrative problems.

The cost of administering the payment by employers is increased with the proposal that payment be taxable. In Western Australia, the *Pay-roll Tax Assessment Act 2002* requires employers to pay payroll tax of 5.5% on the payment as well as the superannuation component. In WA, this payment would be required on the full 18 weeks of the leave.

The Productivity Commission has underestimated the affect and the cost of the proposal of administration of the system. In businesses where the payroll system is not as sophisticated and where manual adjustments might be necessary the result is not only increased cost and time but also an increased risk of error and delay.

The Productivity Commission has also underestimated the effect of parental leave in general on small businesses. Feedback from CCI small business members is that it is currently very difficult to manage unpaid parental leave in the current environment. Increased administrative burden and cost (even if only marginal) may lead to discriminatory practices by employers. The reality is that a female employee with the

¹ Part 1, Chapter (2)(7)

² Productivity Commission 2008, *Paid Parental Leave: Support for Parents with Newborn Children*, Draft Inquiry Report, Canberra, page 7.7.

same skill set as a male employee will be regarded as more costly because of the contingent liability for paid parental leave, however marginal the cost.

This behaviour may become further exacerbated by the level of uncertainty in the economy. According to the latest *Commonwealth Bank-CCI Survey of Business Expectations* business confidence in the WA economy fell to its lowest level in seven years. The September quarter survey, which canvassed the views of almost 450 firms operating across a wide range of business and industry sectors, found that one third of WA businesses expect economic conditions in the State to deteriorate in the year ahead. Small businesses and those in the services and manufacturing sectors were the most pessimistic. Some 43 per cent of small businesses and 39 per cent of services and manufacturing respondents expected economic conditions in WA to weaken in the next 12 months.

3. Employer Interaction with voluntary schemes – is there a contractual benefits issue?

In dealing with the interaction between existing voluntary schemes and the proposed statutory scheme, the Productivity Commission has suggested the following alternatives:

- *abandoning its scheme (or plans for one) with employees relying solely on benefits provided by the statutory arrangement (in other words the statutory scheme crowds-out existing and future voluntary schemes)*
- *continuing existing parental leave benefits in parallel with statutory entitlements*
- *topping-up payments from the statutory scheme to full replacement wages for the duration of the statutory arrangement*
- *providing alternative/additional employment benefits in order to differentiate itself from other firms and signal it is an employer of choice.*³

The abolition of any scheme currently in place, in favour of the proposed statutory paid parental leave scheme could give rise to a contractual benefits claim. If a paid parental leave scheme was a term of the employment contract, or implied into the contract through the policies and procedures of the organisation, an employer cannot abolish that scheme as it may be considered a unilateral variation of the employment contract which is illegal.

The alternative proposal suggesting that an employer continue an existing parental leave scheme in “parallel” with the statutory scheme ignores resolving the issue of how the two entitlements would interact. If an employee was entitled to paid parental leave as a term of their contract, this entitlement would remain even after the introduction of a government funded scheme.

³ Ibid, page 7.10.

The proposal for parallel payments is uncertain. Further work is needed to understand the impact of such a proposal.

The employer may be required to provide the entitlement contained in the employment contract **on top of** the statutory paid entitlement. A contractual arrangement made prior to the introduction of a statutory scheme cannot be reduced or compromised following the introduction of a government funded scheme.

CCI submits that an employer already offering a voluntary scheme would not be able to either abandon, continue in “parallel” or “top-up” an existing scheme in response to the introduction of a statutory scheme without altering the contract of employment (any such alteration requiring agreement with both parties). If an employer has provided for paid parental leave in their employment contract, they will be required to continue with this payment to all existing eligible staff, who would receive their employer entitlements on top of their statutory entitlements.

CCI calls on the Productivity Commission to include as part of the model that Fair Work Australia is not empowered to arbitrate on matters relating to the paid parental leave scheme. For example, employers should not be forced to negotiate top-up arrangements in the agreement-making process.

4. Superannuation

The Productivity Commission report highlights the need for the paid parental leave model to be given a similar status to that of a normal workplace entitlement. This argument is flawed because, as already indicated in our response, such a payment is not a normal workplace entitlement, but a form of government assistance.

The Productivity Commission has proposed that employees should be eligible for a superannuation contribution while on paid parental leave, suggesting that superannuation payments are often customary for “recreational leave.”⁴

Parental leave should not be considered “recreational leave”. Rather it should be treated as a form of government assistance designed to assist in looking after the health of the mother and child and allow for a greater attachment to the labour force.

The *Superannuation Guarantee Ruling 94/4* states at section 19 that payments when on maternity or paternity leave are not considered ordinary time earnings, reasoning that, “these payments are made in respect of employment and parenthood, not in respect of ordinary hours of work.”

CCI concedes that the *Draft Superannuation Guarantee Ruling SGR 2008/D2*, if adopted, will result in paid maternity or paternity leave being considered as ordinary

⁴ Ibid, page 2.5

time earnings and as such attract a superannuation payment. However, this only serves to confuse the matter.

For example, if an employer provides a voluntary scheme of 8 weeks paid parental leave which acts in parallel with the statutory period of leave of 18 weeks, 8 weeks of paid parental leave would attract superannuation paid at the employee's ordinary rate of pay (if it is higher than the FMW) and the remaining 10 weeks would attract superannuation at the FMW. It is these complexities that have not yet been considered that will create confusion and an unnecessary burden on employers.

CCI urges the Productivity Commission to closely examine the unintended consequences and costs of requiring superannuation to be paid on a government assistance payment.

Other common forms of assistance payments, designed to support workers over a period in which they are unable to work do not include provisions for superannuation payments during this time.

For example, under the *Workers Compensation & Injury Management Act 1981* while an employee is on workers compensation the employee is not entitled to receive superannuation on their workers compensation payments, unless this is specifically stated in their terms of employment.

Those receiving other assistance payments from the Australian Government, such as the Newstart Allowance or Youth Allowance are not entitled to any superannuation on their payments. For example a worker who is receiving government assistance while engaged in full-time study will not receive superannuation on their payments.

5. Accrual of Leave While on Paid Parental Leave

CCI supports the idea proposed by the Productivity Commission that parental leave should be treated for all intents and purposes as an "unpaid" period of leave, although not break the employee's continuity of services as is the case with current unpaid leave.

Although the employee will receive payment for their period of leave this payment is in effect made by the government as a form of social assistance. The paid parental leave scheme is intended to replace the current welfare arrangements of the Baby Bonus and Family Tax Benefit, while encouraging a lifelong attachment to the workforce.

If an employee were to accrue entitlements to annual leave, personal leave and long service leave while on parental leave, the result would be additional cost burdens on employers. An employee on paid parental leave would continue to accrue leave entitlements over the 18 week period, and be eligible to use this leave upon a return to work.

The result is the accrual of around 3.4 days of personal leave and around 6.8 days of annual leave, to be paid out to the employee at the employees' *current* rate of pay, which is highly likely to create the anomalous situation of exceeding the minimum rate at which they accrued the hours.

6. Part-Time Leave Arrangements

CCI believes that employers and employees should be able to voluntarily agree to flexible arrangements for work and family balance. It is unnecessary and will only create further uncertainty if a parental leave scheme provided statutory part-time arrangements.

Under the proposed NES an employee must take their unpaid parental leave in one continuous block. To allow a leave-sharing arrangement, as proposed in the draft report, would place undue burden on employers and create far greater levels of complexity in the system.

The Productivity Commission already recognises the pressure that employers would face even if a statutory obligation required employer consent⁵. Such specificities should be negotiated at an enterprise level.

7. Impacts on Employee Retention

The costs involved in recruiting and retaining replacement employees during a period of paid parental leave is significant. CCI is concerned that a paid parental leave scheme will potentially impact further on business costs.

In considering the potential impacts on business through the paid parental leave scheme, the Productivity Commissions suggests that "business would benefit from the scheme through higher employee retention rates."⁶

As part of CCI's ongoing work on maximising human capital, paid parental leave was identified as an effective option to increase female participation in the labour force. However, it may have negative impacts on some individual employers. Many employers currently offer paid parental leave as an incentive for employee retention. The introduction of a universal scheme will effectively level the playing field, so that only businesses that are able to offer additional paid parental leave over a government scheme will have a competitive edge, effectively disadvantaging many small businesses, unable to compete.

CCI's discussion paper, *Women in the Workforce*, gauged employee's views on workforce issues through a survey of employee perceptions. The survey was

⁵ Ibid, page 2.17

⁶ Ibid, page XXXI

conducted in April 2008, and canvassed the views of more than 1,070 female workers, employed across a range of industries.

As part of the survey, female workers were asked to identify measures that they considered important to attract and retain female workers.

The majority of respondents (82 per cent) identified flexible working hours as the single most important measure to attract and retain female staff. This was identified as the most important measure to attract and retain female workers by respondents from all industry sectors.

Comparable pay was the next most popular option, favoured by almost two thirds of respondents.

Employees also rated career development (60 per cent), training and education (59 per cent) and paid maternity leave (57 per cent) as key measures to attract and retain female employees. Other key strategies that respondents believed were important to attract and retain female workers included affordable childcare facilities (50 per cent), accessible childcare facilities (42 per cent) and salary sacrifice of childcare expenses (41 per cent).

As outlined in our initial submission, the inquiry's terms of reference presuppose that providing paid maternity, paternity and parental leave has benefits that outweigh the costs and negative impacts. CCI's Women in the Workforce discussion paper highlighted that paid parental leave was only one model that would assist the promotion of the social good of having children. Other models such as tax relief for childcare and sponsoring building childcare facilities may be others.

To further inform the Commission we attach with this submission a copy of CCI's Women in the Workforce Discussion Paper.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Marcia Kuhne', with a stylized, cursive script.

Marcia Kuhne
Director, Workplace Relations Policy