



Professionals together

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APESMA's Second Submission to Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave

RESPONSE TO THE DRAFT INQUIRY REPORT: *Paid Parental Leave: Support for Parents with Newborn Children*

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1. Introduction

APESMA appreciates the opportunity to provide a submission regarding the Productivity Commission's Draft Inquiry Report.

APESMA supports the recommendation of a statutory paid parental leave scheme of 18 weeks for mothers or primary care givers and two weeks paternity leave for fathers or partners as a good start and seeks that there be a staged increase of primary care giver leave to 26 weeks over five years.

The Association supports many of the recommendations in the Draft Inquiry Report. However we have concerns regarding some aspects of the scheme.

The following are the principle concerns:

- The scheme should be at full income replacement (or Federal Minimum Wage, whichever is the greater) with employers providing a "top up" to that

paid by government. In the event that the Commission does not see fit to make this recommendation, APESMA urges the Commission to recommend a staged increase up to full income replacement over the next five years;

- Sufficient protection must be provided to ensure that a new scheme is in addition to current paid parental leave entitlements; and
- A recommendation be made to provide for the scheme within the 2009 Federal Budget.

APESMA has further concerns regarding the eligibility requirements, providing flexibility in the taking of leave, legislation and dispute resolution, superannuation, no disadvantage, complimentary National Employment Standards and equitable entitlements. All of these concerns are addressed within the recommendations of the ACTU. APESMA supports the recommendations of the ACTU and urges the Commission to amend the scheme to reflect those recommendations.

A supplementary submission prepared by Connect, a special interest group of independent contractors and consultants within APESMA, is attached. It proposes a four part test for eligibility of self-employed and independent contractors.

2. Full income replacement through greater employer contribution

APESMA fears that some of the social and employment benefits of a paid parental leave scheme will be reduced if the scheme is paid at the Federal Minimum Wage, rather than full income replacement (at a minimum of Federal Minimum Wage) and urges the Commission to revise this recommendation. If the Commission does not see fit to do so, APESMA seeks that the Commission recommend a staged increase to full income replacement over five years.

Full income replacement

The Average Weekly Earnings (full time) in August 2008 were \$1145.10,¹ considerably higher than the Federal Minimum Wage. Therefore it is not only high income earners that would be significantly affected by providing the scheme at Federal Minimum Wage rather the full income replacement. APESMA urges the Commission to evaluate and analyse the implications of this aspect of the scheme for the whole workforce (including technical professionals).

¹ Australian Bureau of Statistics, 6302.0, August 2008 Average Weekly Earnings, Full-time adults, ordinary time (available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0>).

The incomes of primary care givers (predominantly women) within a household are seldom discretionary and the loss of all, or a significant part, of that income can reduce women's financial independence, entrench the gender pay gap and place a strain on the family budget, including for professional employees.

Within APESMA's original submission members noted the financial implications of receiving no, or limited, paid parental leave. Providing paid parental leave at full income replacement would give much greater support to families, reducing the number of parents that return to work earlier than they would chose for financial reasons.

APESMA is also concerned that fathers and partners will be much less likely to access the two weeks leave at Federal Minimum Wage than if provided at full income replacement, negating some of the potential benefit of this aspect of the scheme.

Many technical professionals have no paid parental leave

Many employees who earn above the Federal Minimum Wage and would benefit from a scheme paid at full income replacement do not have access to any existing paid parental leave. It is important that this is recognised when considering the design of the scheme.

Whilst it is acknowledged that, as demonstrated within the Draft Inquiry Report, a greater proportion of professionals and those on middle and higher incomes currently have access to paid parental leave, it is not universal. As noted within APESMA's original submission a recent APESMA survey of technical professional women (predominantly scientists and engineers) found that 46.3% of respondents did not have access to any paid maternity leave.²

Retention and Workforce Attachment

Providing paid parental leave at Federal Minimum Wage rather than full income replacement may reduce some of potential retention and workforce attachment benefits. This is of particular concern for those do not currently have an entitlement to any paid parental leave (including many technical professionals). However the potential retention benefits may also be reduced for those with current parental leave entitlements if provided at Federal Minimum Wage rather than full income

² APESMA (2007) *APESMA Women in the Professions Survey Report 2007* (available at www.apesma.asn.au/women/survey_report.asp).

replacement; cited in APESMA's first submission was a UK study that found that a more generous duration of leave and financial compensation available affected likelihood of return to work.³

Of interest in relation to the retention of women engineers is a recent survey by Engineers Australia which asked respondents that answered they were likely or very likely to leave their current employer within the next twelve months their main reason.⁴ Options provided were limited to gain experience, more pay, insufficient opportunities, management style, limited chance of promotion, more variety and other. As by far the largest response among women respondents, 42.3% answered "Other". The survey report states that of the 30-39 year age range the most prevalent reasons for those that responded "other" were maternity leave and family responsibilities. Of all women respondents that had answered they were likely or very likely to leave their current employer in the next twelve months only 58.2% of women answered that they would be likely to search for an engineering position in future (and a further 34.2% responded "maybe"). This compares to 74.3% of men responding that they would and 21.7% answering that they may seek an engineering position in future. There are very significant limitations to this data in identifying potential causes for such a response (which may be multifaceted). The survey does, however, provide indications of potential retention issues of women engineers and the need for further research, which should include maternity leave and balancing work and family.

APESMA recognises that paid parental leave is not a panacea. However it is concerned that providing paid parental leave at Federal Minimum Wage may reduce some of the potential retention and workforce attachment benefits that may be achieved at full income replacement.

Paid parental leave – a normal part of employment

In the draft inquiry report the Productivity Commission notes the importance of the 'normalcy' of parental leave, its impact on workplace retention and "signaling that looking after children while still being employed is just a normal part of life."⁵ The

³ Whitehouse, G., Baird, M., Diamond, C. and Hosking, A. (2006) *The Parental Leave In Australia Survey: November 2006 Report* (available at: www.uq.edu.au/polsis/parental-leave/level1-report.pdf).

⁴ Of the total survey respondents 25.4% of women and 23.4% of men answered that they were likely or very likely to leave their current position in the next twelve months. Engineers Australia (2008) *Valuing the Difference: An update on the progress of women in the engineering profession* (available at: http://www.engineersaustralia.org.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=7DA323DA-E3CC-A6FB-8DB3-4D97EFFBBEEF&siteName=ieaust)

⁵ Productivity Commission 2008 *Paid Parental Leave: Support for Parents with Newborn Children* Draft Inquiry Report, Canberra, p.xviii

report states that “a scheme that intends to signal such normalcy should be structured like other normal leave arrangements, such as those for recreation, illness and long service leave, rather than being structured as a social welfare measure.”⁶

APESMA strongly supports the Productivity Commission in recognising the importance of the ‘normalcy’ of paid parental leave as part of a person’s working life and acknowledges that this has been recognised in the recommendation for a scheme in itself and in parts of the structure of the scheme. However APESMA is concerned that whilst the provision of payment by the employer provides some of the structure of normalcy the recommended entitlement does not. Whilst there are a number of differences between what is recommended and a person’s normal leave arrangements the greatest difference is the rate of pay. This difference is one which may erode some of the ‘normalcy’ that could be achieved if the scheme was adjusted to recommend an entitlement at full salary, including the extent of the impact on retention and greater lifetime workforce attachment.

3. Protection of current entitlements

APESMA is concerned that without explicit and clear protection of current paid parental leave entitlements some employers may make attempts, or apply pressure on employees, to not maintain their current schemes. This concern was recently reinforced when it was stated in *The Daily Telegraph* that some major employers “refused to commit to keeping their [current paid parental leave] schemes once the Government introduced its own.”⁷

In the event that part, or all, of current employee paid parental leave entitlements were absorbed into the new scheme employees would, in many instances, be worse off (no longer receiving the Baby Bonus and eligibility to Family Tax Benefit B during the statutory paid parental leave). This is clearly not the intention of the scheme and therefore must be prevented by sufficient protection of current entitlements.

It is essential that existing entitlements, whether in enterprise agreements, company policy, common law employment contracts or elsewhere are explicitly protected by legislation providing a guarantee that there will be no disadvantage, with the statutory scheme in addition.

⁶Productivity Commission 2008 *Paid Parental Leave: Support for Parents with Newborn Children* Draft Inquiry Report, Canberra Ibid, p.xxiii

⁷ Rehn, A., 9.10.08 “Business doubts over private maternity leave schemes” *The Daily Telegraph*.

4. Conclusion

APESMA supports the introduction of a paid parental leave scheme and appreciates the work of the Productivity Commission in conducting its inquiry. An entitlement of eighteen weeks paid parental leave for mothers or primary care givers is a good start and there are many aspects of the scheme that APESMA strongly supports.

APESMA urges that the Commission recommend that paid parental leave be included in the 2009 Federal Budget.

However, there are some areas of concern, particularly in relation to the scheme not being paid a full income replacement and requiring sufficient protection of current entitlements.

APESMA supports the recommendations of the ACTU and urges the Productivity Commission to amend the proposed scheme to reflect these recommendations.

5. Supplementary Submission: Test for eligibility of self-employed and independent contractors

Connect

APESMA has around 3,500 members registered with Connect, a special interest group for independent contractors and consultants. Connect provides a range of information, advice and services targeted at the particular needs of its self-employed contractor members, and is therefore well placed to comment on issues affecting them.

Eligibility Test Format

The Productivity Commission's draft report requested feedback on possible formats and wording for a test to establish the eligibility of self-employed contractors to paid parental leave (refer to Recommendations and Section 2.5 of the draft report).

The issue in relation to an entitlement to paid maternity leave for self-employed contractors is to develop an equivalent of the "employment or hours of work test" which applies to employees whereby a primary caregiver has an average of at least seven hours employment a week (with one or more employers) on a continuous basis for the six months prior to the expected birth date of the child (as per the recommendations of the ACTU regarding eligibility).

Definition of self-employed contractors and reference to common law

While establishing an equivalent test is the focus of the Productivity Commission's request for feedback rather than the need to distinguish between employee and independent contractor, APESMA recommends that reference to the common law definition of independent contractor be included in the test in order to provide for the complexity of arrangements which may require determination. The Department of Innovation, Industry, Science and Research publishes a Fact Sheet (available at <http://www.innovation.gov.au/General/OSB-AccessSection/Pages/Whoiscoveredbytheindependentcontractorlaws.aspx>) which usefully summarises the common law indicia as they currently stand.

Statutory declaration

To prevent the eligibility test adding to the red tape burden for both the Agency charged with its administration, and the self-employed contractors applying for the leave payment, a Statutory Declaration is regarded as an appropriate basis of a mechanism for establishing eligibility. The Statutory Declaration would reflect the

conditions required to satisfy the test and include reference to the requisite supporting documentation.

Supporting documentation

The nature of the supporting documentation should be at the discretion of the self-employed contractor. It should provide evidence that the individual's method and hours of operation have been in accord with the common law indicia set out in the Statutory Declaration for an average seven hours per week for the previous six months to the satisfaction of the relevant Agency's assessing officer.

Proposed test

APESMA proposes a four-part test supported by a Statutory Declaration, a draft of which is set out as follows, and related documentation. The Statutory Declaration includes an abridged version of the common law indicia. All four conditions of the test would need to be satisfied, and the requisite documentation provided, to be eligible to access paid parental leave as a self-employed contractor.

Test for eligibility of self-employed contractors (including independent contractors) to paid parental leave

Self-employed contractors are eligible to access paid maternity leave where they satisfy all four conditions of the following self-employed contractor test.

To be eligible for the parental leave payment, the self-employed contractor (the applicant) must:

- (1) be operating as a self-employed contractor as defined at common law on an ongoing basis;*
- (2) be currently or will be a primary caregiver, father or partner of a primary care giver;*
- (3) have had a minimum of an average seven hours engagement as a contractor per week either directly with one or more clients, through a labour hire agency or agencies, or a combination thereof, in the six months preceding the expected birth date of the child; and*
- (4) provide documentation as follows:*
 - (a) a medical certificate setting out the expected period of confinement*
 - (b) a completed Statutory Declaration as set out in Form A signed by the contractor and made before an appropriate person to the effect that the contractor satisfies all four conditions of this test and agrees to providing further supporting documentation; and*
 - (c) material which documents the applicant's status as a self-employed contractor engaged as such for an average minimum seven hours per week over the previous six months.*

Commonwealth of Australia
FORM A - STATUTORY DECLARATION
ELIGIBILITY FOR PAID PARENTAL LEAVE - SELF-EMPLOYED CONTRACTORS
Statutory Declarations Act 1959

1 *Insert the name, address and occupation of person making the declaration*

I,

make the following declaration under the *Statutory Declarations Act 1959*:

2 *Set out matters declared*

THAT I operate on an ongoing basis as a self-employed contractor in line with all or most of the following common law indicia:

Results-based contract for service

My contracts for service are for a given result. I work on my own account.

How the work is performed

I enter into a contract for a specific tasks or series of tasks.

I maintain a high level of discretion and flexibility as to how the work is to be performed.

Risk

I bear commercial risk and stand to make a profit or loss on the task.

I bear the responsibility and liability for any poor work or injury sustained in the performance of the task.

I carry my own insurance policies as required by the relevant authorities in my state.

Place of performance

I provide all my own assets necessary to completion of the results set out in my contract for service.

Hours of work

I generally set my own hours of work.

Leave entitlements

I do not accrue leave entitlements.

Payment

Payment is based upon the performance of the contract.

Expenses

I am responsible for my own expenses.

Appointment

I advertise my services to the public at large.

Termination

Termination options are limited. My contracts for service can generally only be terminated without penalty where I have not fulfilled the conditions of the contract.

Delegation

I may delegate all or some of the tasks to another person and may employ other persons.

Equipment

I supply the tools and equipment necessary to achieve the results set out in the contract for service.

Method of payment

I invoice the person who engages me for my services.

Taxation

I deal with my own tax.

AND THAT

I am/will be a primary caregiver/father/partner of a primary care giver

AND THAT I have had a minimum of an average seven hours engagement as a contractor per week either directly with one or more clients, through a labour hire agency or agencies, or a combination of both, for the six months prior to the expected birth date of my child

AND THAT I will provide (i) documentary evidence in relation to the above-mentioned indicia to support my claim to self-employed/independent contractor status and (ii) a medical certificate which states the expected period of confinement

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.

3 *Signature of person making the declaration*

3

4 *Place*

Declared at ⁴

on ⁵

of ⁶

5 *Day*

6 *Month and year*

Before me,

7 *Signature of person before whom the declaration is made (see below)*

7

8 *Full name, qualification and address of person before whom the declaration is made (in printed letters)*

8

Note 1 A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years — see section 11 of the *Statutory Declarations Act 1959*.

Note 2 Chapter 2 of the *Criminal Code* applies to all offences against the *Statutory Declarations Act 1959* — see section 5A of the *Statutory Declarations Act 1959*.