



SUBMISSION ON BEHALF OF THE AUSTRALIAN FEDERATION OF  
EMPLOYERS & INDUSTRIES (AFEI)

**PRODUCTIVITY COMMISSION INQUIRY INTO PAID MATERNITY,  
PATERNITY AND PARENTAL LEAVE: POST DRAFT REPORT SUBMISSION**

**AFEI**  
Australian Federation of  
Employers & Industries

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## 1. Parental leave as a work related entitlement

1.1 *"... the commission recognises the value of paid parental leave being seen as being like other leave."*<sup>1</sup>

1.2 In the proposed scheme design for paid parental leave the Productivity Commission ("the Commission") is concerned to present parental leave as a workplace entitlement. We have consistently objected to this approach and continue to do so.

1.3 The Commission has sought to promote social reform and firmly entrench family issues into employer obligations under the theme of *"increased linkage to the workplace"* in the scheme's objectives. In so doing, the Commission is seeking to alter the legal status of parental leave, conferred by legislation, as an entitlement to be absent from work without being in breach of the contract of employment to a workplace entitlement arising from having a child. This is not a work related matter. It is not an accrued employment entitlement, such as annual leave, long service leave or sick leave.

1.4 Entitlements to paid leave and superannuation are determined by the hours worked and earnings of employees while they are employed. The entitlement to parental leave is not derived from the employee's work but from a statute conferred right to be absent from work.

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<sup>1</sup> Productivity Commission 2008 *Paid Parental Leave: Support for Parents with Newborn Children*, Draft Inquiry Report, Canberra p 8.31.

- 1.5 In converting the right to be absent from work to a mandated "earned right" arising from the fact of being employed, the Commission and those supporting this proposition are requiring employers to provide a benefit for a condition or circumstance over which they have no control and which has no relevance to the purpose of the enterprise. It cannot be "earned" in the same manner as other forms of leave and superannuation, which are contingent upon the employee's period of service and earnings.
- 1.6 Where employers provide parental leave and payment benefits on a negotiated (or in most cases) voluntary basis because it suits their interest to do so, the benefits remain precisely that, benefits conferred by way of individual or collective negotiation or the contract of employment, not an accrued, earned, entitlement.
- 1.7 It has been a long held view of various governments through taxation policy that caring for children is not an employment matter or an employers responsibility; characterised as a personal expense, neither relevant nor incidental to the production of the taxpayer's assessable income. If caring for children was regarded as a feature of employment, a work based responsibility, why does the government not allow child care expenses to be deductible? If the government proposes to treat child care as work related, then to be consistent, child care expenses should be deductible.

## **2. Payment for parental leave as welfare**

- 2.1 While proposing that payment for parental leave be primarily tax payer funded, the Commission gives weight to the view that payment for maternity leave should not be seen as a welfare payment or a taxpayer liability. It consequently strives to create a greater workplace connection and additional obligations for employers through more indirect mechanisms. Each of the propositions carries the clear potential for a widening of employer obligations and substantial cost increases.
- 2.2 By creating a package of new employer costs, it is also a means of trying to assuage those who argue employers should pay directly for parental leave.
- 2.3 Those who object to the categorization of payment for parental leave as welfare, along with those who point to schemes overseas as providing more generous role models for paid parental benefits than current Australian provisions, do not acknowledge the role of public funding in those overseas schemes. Nor is the contribution paid by employees emphasized.

2.4 As noted by HREOC in an earlier report, the majority of these schemes are firmly set in the social welfare/social insurance framework within these countries, with parts of the tax and social welfare payments contributed by employees, government and employers.<sup>2</sup>

2.5 In contrast, only six of Australia's major trading partners require employers to pay for maternity leave: China, Korea, Malaysia, Indonesia, Hong Kong, and Saudi Arabia.

2.6 Parental leave and its payment is a social welfare and community issue, not a workplace issue. Further the UN agency of the International Labour Organization (ILO) Convention C183, adopted in 2000, does not mandate employer paid maternity leave, expressly stating that an employer shall not be individually liable for the direct cost of paid benefits unless this is already provided for in national law or subsequently agreed at the national level by government and representative organisations of employers and workers.<sup>3</sup>

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<sup>2</sup> The Australian Human Rights Commission, *Valuing Parenthood: Options for Paid Maternity Leave: Interim Paper 2002*, Sydney, 2002, pp 32-34.

*"Social insurance is a scheme run by the state whereby employed and self employed people pay contributions from their earnings into a social insurance fund. Employers and the state also contribute to the social insurance fund. Members may claim from the fund if various contingencies occur.*

*Nine of Australia's trading partners provide either a social insurance or social security funded paid maternity leave scheme: Canada, France, Germany, Italy, Japan, the Netherlands, Taiwan, the United Kingdom and Vietnam. Twenty four OECD member countries fall into this group: Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxemburg, Mexico, the Netherlands, New Zealand (as of 1 July 2002) Norway, Poland, Portugal, Spain, Sweden, Turkey, and the United Kingdom." Germany, Switzerland, India, Thailand and Singapore have employer contribution schemes.*

<sup>3</sup> C183 Maternity Protection Convention, 2000, Article 6.

### **3. Payment of superannuation while on parental leave (Draft Recommendation 2.1)**

3.1 We reject this recommendation and its rationale.

3.2 It is a contrivance adopted to “normalise” paid parental leave as a workplace entitlement. While the Commission has not recommended employers pay for parental leave (primarily for reasons of disadvantaging women) the proposal for payment of superannuation (and accrual of entitlements while on leave) opens the way forward through suggested legislative changes.<sup>4</sup> These will enable further avenues for employer payments while on parental leave.

3.3 The Commission itself notes that payment of superannuation contributions and other leave entitlements while an employee is on paid or unpaid parental leave “are not currently normal” and suggests legislative change to assist the process of normalisation of employer paid benefits while on parental leave.<sup>5</sup> The cost implications for employers are said to be minimal. We see no reason why an employer should face any further cost increases, whether or not minimal in aggregate, because an employee is on parental leave and do not agree that parental leave should be “normalised” as a workplace entitlement.

3.4 The Commission argues that the burdens on employers of super contributions would also be reduced because they would be:

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<sup>4</sup> Draft Inquiry Report p 8.29.

<sup>5</sup> *ibid* p 8.28.

- *paid only at the statutory 9 per cent rate*
- *subject to ceilings, commensurate with the cap imposed on the government funded cash contribution and only paid to those with an existing entitlement*
- *subject to tax deductions as for business expenses generally, so that the Australian Government would bear a proportion of the costs equivalent to the relevant tax rate.*

3.5 How is a burden reduced when employers currently do not pay super while the employee is on leave, and few private sector employers pay above the 9% statutory rate in any case?

3.6 Employers are to be placated because these costs are tax deductible, or will be offset in the longer term by passing the costs onto employees in the form of lower wages. The latter is a theoretical argument, and assumes that labour market conditions will allow this outcome, including that there will be no employee resistance to the implicit reduction in disposable income.



3.7 For a business, no matter how much of a cost is deductible, the cost has to be incurred and there are the associated costs and administrative inefficiencies of making the payments and claiming the deductions. Any value in tax deductibility will be more than offset by the much broader potential for cost increases this measure will introduce. In addition, no attention has been paid to the fact that there is considerable pressure for the statutory rate to be raised and for employers to increase their rate of contributions well above 9%. This is set to be a major bargaining issue once the Fair Work Australia legislation is in place.

3.8 The Commission has costed only the direct impact of payment for superannuation for those employees on taxpayer provided parental leave, not the payments which will have to be made to employees if the definition of ordinary time earnings under the Superannuation Guarantee Legislation is amended to allow for any payments which are made while an employee is on parental leave.

3.9 The proposition that taxpayer funded payments form part of ordinary time earnings is inconsistent with the principle that an employer is charged with the obligation to make superannuation contributions on the basis of payments made by the employer, not other parties. On this basis, payments made for workers compensation where no time is worked are not included as ordinary time earnings. Superannuation is not charged on workers compensation payments made to workers, even

though these payments are derived from the premiums paid by employers into the workers compensation funds.

3.10 Why would a distinction in superannuation entitlements be made between workers whose earnings are reduced because they are ill or injured, and those whose earnings are reduced because they are in receipt of paid parental leave?

3.11 It is also inconsistent with the Commission's proposition that employees are to be legally regarded as not being on paid leave while on taxpayer funded leave.<sup>6</sup> For purposes of superannuation, the payments are to be regarded as made by the employer and forming part of ordinary time earnings. When it comes to accrual of leave, the payment is not to be treated as an employer payment but a taxpayer payment. In any case, what will be the legal status of these employees is not at all clear, and is subject to the legislative changes to emerge in the Fair Work Australia substantive legislation and the interaction of proposed changes in the National Employment Standards and modern awards. As the Commission itself invites, anything is possible through legislative change.<sup>7</sup>

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<sup>6</sup> ibid p 8.28, footnote 16.

<sup>7</sup> op cit 8.29. *"Of course, the law could be changed to make superannuation and accrual of other leave entitlements during all parental leave absences mandatory, and therefore, normal."*

## 4. Accrual of other leave entitlements while on parental leave

- 4.1 A period of parental leave, while not breaking continuity of service, does not count toward service under the current (soon to be replaced) *Workplace Relations Act*:

### *Section 316 of the WR Act*

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

- 4.2 In general, accrual is linked to any paid period of leave. If it transpires that paid parental leave, regardless of the source of that payment, is to be counted as a period of service, there will be significant cost implications for employers.
- 4.3 It is also possible that, with changes in the substantive legislation and the introduction of the 10 National Employment Standards on 1 January 2010, periods of unpaid parental leave will also count as “service” for the accrual of other forms of leave. This raises issues of the rate of pay at which leave will be accrued- the rate immediately prior to taking leave, or the rate of payment while on leave.
- 4.4 As employees will now have the “right to request” an extension of parental leave for an additional 12 months, employers could well be confronted with the costs of annual leave accrual of up to 8 weeks (over two years) payable at the employee’s ordinary time earnings rate.
- 4.5 The extension of the period of service via payments for parental leave also has implications for long service leave entitlements, periods of notice and severance payments, and the rate at which these are to be calculated.

- 4.6 With a high level of uncertainty as to the detail of the substantive legislation, the content of modern awards and the interaction with the NES, no propositions should be forthcoming from the Commission on periods of service or leave accrual.

## **5. Payments to be made by employers: objection to draft recommendation 2.3**

- 5.1 If there is to be a re-organisation of current public funding for families, any new scheme should be taxpayer funded, and be paid directly by the government to the individual beneficiary. Employers, for the reasons advanced above, should have no part in this process.
- 5.2 We re-emphasise that caring for children is not an employment matter or an employer's responsibility. Government provided payment for parental leave is just that — a public social welfare payment and should be treated as such. Similarly, work based leave entitlements are precisely that, work based, derived from time worked, accrual and income earned.
- 5.3 We do not agree with the scheme objective of making statutory paid parental leave mirror leave arrangements more generally.

## **6. Increasing costs in a time of legislative and economic change**

- 6.1 Costs incurred from parental leave are not “transitional” or isolated costs. Employers are currently facing a changing legislative environment in which labour costs are likely to be substantially increased.
- 6.2 The process of award modernisation, while not intended to increase costs to employers, is also required to not disadvantage any employee. It is apparent that the process of welding together a large number of often disparate awards will create additional costs and complexities for employers. The content of modern awards has also been expanded to increase the range of employer obligations.
- 6.3 The new industrial framework also makes it clear that modern awards and the National Employment Standards are to be minimum standards only; bargaining is to establish the actual wage and conditions regime. With the award modernisation process lifting the underlying platform of employment costs to create a high base from which future wage increases, statutory and bargained, will be set, cost effects will remain for years.

- 6.4 The detail of the substantive legislation for Fair Work Australia is not yet known. However, it is clear from government announcements that employers will again be facing the costs and uncertainties of unfair dismissal claims. Unions are gearing up for major industrial campaigns on a number of fronts once the new collective bargaining legislation is in place, and will be able to bargain on a much broader range of issues.
- 6.5 Award modernisation and the introduction of the new industrial legislative framework with its substantial changes is taking place against a background of downturn and considerable uncertainty in the economy. While award modernisation and the new legislation have a longer term horizon to the 2010 commencement, likely outcomes on wage costs will be factored into business costs almost immediately.
- 6.6 Aggregate costs increase from the raft of changes in the Forward with Fairness package – including parental leave – will be with us for a decade or more. There will not be merely a modest short term transitional friction as we find a new equilibrium. It only takes 1% - 2% cost increase in delivering products to customers for significant disequilibrium to be set in place. Nervousness, risk aversion, falling investments and job losses follow quickly. The Commission's proposals for payment of superannuation, using employers as the means of making a social welfare payment to beneficiaries and greater integration of parental leave with workplace entitlements needs a significant rethink.