

Ai GROUP SUBMISSION

Inquiry into the Fairer Paid
Parental Leave Amendment Bill
2015

**SENATE COMMUNITY AFFAIRS
LEGISLATION COMMITTEE**

30 July 2015



About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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Summary

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Community Affairs Legislation Committee's inquiry into the *Fairer Paid Parental Leave Bill 2015 (the Bill)*.

The Bill reflects the Federal's Government's most recent paid parental leave (**PPL**) policy as announced in the May 2015 Budget. Previously, the Federal Government had proposed an extremely generous Government funded paid parental leave scheme to be partially funded by a 1.5 per cent levy on larger businesses. Ai Group urged the Government to abandon the proposed "gold plated" scheme and the proposed levy on businesses, and we were very pleased when the Government decided not to proceed with the proposal. We also welcomed the emphasis within the Budget on lifting workforce participation by improving the availability of childcare and improving incentives for employers to hire new employees.

Whilst recognising the Budgetary constraints upon the Government at the present time, Ai Group is concerned about the potential adverse effects on workforce participation of reducing or removing Government parental leave payments to many parents. In addition to this broad concern, we have a number of specific concerns about the provisions of the Bill, as currently drafted, which are outlined in this submission.

If the Bill is passed in its current form, it will be important that the impact of the Bill is closely monitored and changes made to address any adverse effects.

Ai Group's involvement in the development of the existing PPL scheme

For the past 13 years, Ai Group has been heavily involved in the public debate about PPL in Australia. Throughout this time we have strongly supported a Government funded PPL scheme providing payments at the level of the National Minimum Wage. The scheme implemented through the *Paid Parental Leave Act 2010 (PPL Act)* had many common features to the model proposed by Ai Group in its many submissions on this topic.

Our submissions on PPL include:

- **July 2002** – submission to the Human Rights and Equal Opportunity Commission in response to its discussion paper *Options for a Paid Maternity Leave Scheme in Australia*;
- **July 2002** – submission to the Senate Employment, Workplace Relations and Education Legislation Committee during its inquiry into the *Workplace Relations (Paid Maternity Leave) Bill 2002* – a bill introduced into Parliament by the Australian Democrats;
- **June 2008** – submission to the Productivity Commission during its inquiry into paid maternity, paternity and parental leave in Australia;

- **November 2008** – submission to the Productivity Commission in response to its draft inquiry report on PPL;
- **May 2010** – submission to the Senate Community Affairs Legislation Committee during its inquiry into the exposure draft of the *Paid Parental Leave Bill 2010*.
- **June 2013** – submission to the Paid Parental Leave Scheme Review conducted in accordance with section 307A of the PPL Act.

In addition to making submissions and appearing at public hearings in the abovementioned inquiries, Ai Group is a member of the Government's Paid Parental Leave Implementation Group that was extensively involved in the development of the PPL Act and the 2013/14 Review of the Act.

The paid parental leave scheme in the PPL Act provides many social and economic benefits. Like most developed countries, Australia is facing substantial demographic challenges. These challenges have implications for economic growth and living standards.

Increased workforce participation is vital to the success of the Australian economy, particularly as Australia's aging population continues to rise. The Federal Government's *Intergenerational Report* identifies that there are many opportunities to increase workplace participation including those designed to support women and parents.¹ Paid parental leave is one such measure.²

Ai Group's views on the existing PPL Act

The current Government PPL scheme is underpinned by important community and economic objectives, as expressed in the objects of the PPL Act:

"The object of parental leave paid is to provide financial support to primary carers (mainly birth mothers) of newborn and newly adopted children, in order to:

- (a) Allow those carers to take time off work to care for the child after the child's birth or adoption; and*
- (b) Enhance the health and development of birth mothers and children; and*
- (c) Encourage women to continue to participate in the workforce."*

¹ 2015 Intergenerational Report Australia in 2055, pages xxi and 21.

² 2015 Intergenerational Report Australia in 2055, page 21.

The 2013/14 Review of the Act concluded that these community and economic objectives are being met by the current scheme. The Review also concluded that the PPL scheme enables employers to better retain female employees and provides better return to work outcomes following parental leave.³

During the 2013/14 Review Ai Group expressed the view in its submissions that the PPL Act was operating effectively in accordance with its objectives and no changes were needed. Ai Group maintains this view.

During the development of the PPL Act and during the 2013/14 Review, Ai Group expressed support for the manner in which the Act interacts with employer-specific parental leave schemes. The following comments have been extracted from Ai Group's June 2013 submission to the 2013/14 Review:

"Interaction with employer-specific entitlements

The Government Parental Leave Payments can be received by a primary-carer together with any employer-specific parental leave payments.

In Ai Group's experience, where an employer had a company-specific paid parental leave scheme before the PPL Act came into operation, the employer has typically maintained its scheme.

The design of the Government's PPL Scheme means that no changes need to be made to company-specific paid parental leave schemes.

When an employer provides a particular amount of paid parental leave under a company scheme (say, 12 weeks), employees are often given the choice of:

- Receiving the company's parental leave payments for the first 12 weeks of parental leave and then receiving Government Parental Leave Payments for a further 18 weeks; or*
- Receiving both the Government Parental Leave Payments and the company payments for the first 12 weeks, and then receiving the Government Parental Leave Payments for a further 6 weeks."*

The interaction arrangements between the existing PPL Act and employer-specific PPL schemes are simple and effective. The arrangements recognise that:

- Employers should be discouraged from winding-back existing PPL schemes as a result of the implementation of the Government's PPL Scheme. (This is addressed in subsection 3A(3) and section 99A of the Act);

³ <https://www.dss.gov.au/our-responsibilities/families-and-children/benefits-payments/review-of-the-paid-parental-leave-scheme/paid-parental-leave-review>

- Some employees prefer to receive the Government parental leave payments after the employer parental leave payments have been taken, to provide some income during all or most of the period of parental leave; and
- Some employees prefer to receive both the Government parental leave payments and the employer parental leave payments at the early stages of the parental leave when costs are typically higher due to the expense of an obstetrician, the hospital, the purchase of a cot, a pram, and so on.

In Ai Group's experience, the implementation of the PPL Act did not typically result in employers abolishing or winding back their existing employer-specific PPL schemes. The interaction arrangements were important in this respect.

Ai Group's views on Schedule 1 of the Bill

Ai Group supports section 11A in Item 11 of the Bill which would implement more generous backdating arrangements for parents who are entitled to parental leave payments.

However, Ai Group does not support the other provisions in Item 11 of the Bill which would have the effect of reducing or removing Government parental leave payments for employees who are entitled to employer parental leave payments.

Whilst recognising the Budgetary constraints upon the Government at the present time, Ai Group is concerned about the potential adverse effects on workforce participation of reducing or removing Government parental leave payments to many parents. In addition to this broad concern, we have a number of specific concerns about the provisions of the Bill as currently drafted which are outlined below.

1. The definition of "primary carer pay" in section 11F within Item 11 of the Bill would create significant uncertainty

Subsection 11F(1) states (emphasis added):

"Primary carer pay for a child means an amount that an employer is legally obliged to pay an employee, under the terms of the employee's employment, because the employee is on primary carer's leave for the child."

In many circumstances, it will be very difficult to determine whether or not the employer is "*legally obliged to pay*" the employee the parental leave payments under the employer PPL scheme.

Where an employer's PPL scheme constitutes a company policy (as is often the case), in considering whether the policy is a legal entitlement of the employee it will be necessary to consider:

- The terms of the policy;

- Any exclusions or disclaimers in the policy and the policy manual;
- Whether the policy is referred to in the employee’s written contract of employment (if such a written contract exists);
- How the policy is referred to in the employee’s written contract of employment;
- If not an express term of the employee’s employment contract, whether the policy is an implied term of the employee’s contract of employment.

The issue of whether or not a company policy forms part of an employee’s contract of employment in a particular case can be extremely complex. This issue has been the subject of many court cases. For example:

- In *Goldman Sachs JB Were Services Pty Limited v Nikolich* [2007] FCAFC 120, Mr Nikolich successfully argued in the Full Federal Court that certain terms of a company policy entitled “*Working With Us*” formed part of his employment contract and that, in not following the policy, the employer had breached the employment contract.
- In *Yousif v Commonwealth Bank of Australia* (2010) 193 IR 212, Ms Yousif did not succeed in proceedings before the Federal Court that a policy entitled “*Appointment to Roles*” was binding as a term of her employment contract. She failed because of a disclaimer in the Human Resources Manual which stated that policies do not form part of employment contracts.
- In *Barker v Commonwealth Bank of Australia* [2012] FCA 942, Mr Barker initially succeeded with his arguments before the Federal Court that a breach by CBA of its redeployment policy could constitute a breach of an implied term of mutual trust and confidence in the employment contract. The Federal Court decisions were ultimately overturned in the High Court (*Commonwealth Bank of Australia v Barker* [2014] HCA 32).

Employers and employees (large and small) cannot be expected to understand the current status of complex and highly contested principles of employment and contract law when determining whether the payments under an employer’s PPL scheme meet the definition of “primary carer pay”.

The uncertainty inherent in the definition of “primary carer pay” would be unfair to employers and employees because penalties of up to 60 penalty units (\$51,000) apply for breaches of the PPL Act (see sections 146 and 147).

The uncertainty would also impose very significant challenges for the Fair Work Ombudsman in investigating breaches of the PPL Act.

We acknowledge that subsection 11F(2) enables the PPL Rules to prescribe classes of payment that are, or are not, to be taken to be “primary carer pay”. However, this creates further uncertainties and complications. Given that the definition of “primary carer pay” is central to the

operation of the legislative changes in the Bill, it is clearly not possible for any party to adequately assess the impact of the Bill until the proposed Rules are provided. Further, it would not be appropriate for a PPL Rule to be made deeming a class of payment to be “primary carer pay” when that class of payment is inconsistent with the definition of “primary carer pay” in the Bill.

2. Employers who have implemented “top-up” PPL Schemes

Some employers have implemented PPL schemes since the PPL Act came into operation.

Some of these schemes “top-up” the Government’s parental leave payments. For example, an employer may have agreed to “top up” the Government’s payments of 18 weeks at the level of the National Minimum Wage to 18 weeks at the employee’s full wage.

The Bill will create significant complications for these companies. For example:

- The amendments to the PPL Act are likely to generate industrial claims for the employer to meet the cost of the Government’s current parental leave payments, as well as the “top up” payments.
- Where these “top-up” arrangements have been included in an enterprise agreement, the employer will face significant difficulties in varying the agreement (particularly prior to expiry) to address the changes in the Bill.

Ai Group’s views on Schedule 2 of the Bill

Ai Group supports the provisions of Schedule 2 in the Bill.

These changes would generally require that payments to employees be made by the Department of Human Services but an employer would be able to opt-in to provide parental leave pay, by agreement with the employee.



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