

Ai GROUP SUBMISSION

Inquiry into the Fairer Paid
Parental Leave Amendment Bill
2016

**SENATE COMMUNITY AFFAIRS
LEGISLATION COMMITTEE**

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Ai
GROUP

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 (**Committee**) inquiry into the *Fairer Paid Parental Leave Bill 2016 (the Bill)*.

The Bill reflects the Federal Government's 2015/2016 Budget measure, previously introduced in 2015 as the *Fairer Paid Parental Leave Bill 2015*. The Explanatory Memorandum for the Bill explains that the Bill introduces a revised package which “*responds to community concerns and addresses feedback provided by relevant stakeholders*”.

Ai Group filed a submission dated 30 July 2015 in respect of the Committee's inquiry into the *Fairer Paid Parental Leave Bill 2015 (Ai Group's July 2015 submission)*. Within that submission, Ai Group expressed support for the ‘*employer opt out*’ provisions and the backdating arrangements for parents entitled to parental leave payments. However, we expressed various concerns about the proposal to limit the payment of paid parental leave to employees receiving a workplace parental leave benefit.

The current Bill goes some way towards addressing various concerns that Ai Group expressed in its Ai Group's July 2015 submission about the drafting of particular provisions of the Bill, but some ambiguity and uncertainty remains as identified below.

Ai Group understands that the Bill responds to budgetary challenges. If the Bill is passed, it is important that the impact of the Bill is closely monitored and changes made to address any adverse effects, including any adverse effects of workforce participation.

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

For the past 15 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*. We also appeared at the public hearings during this inquiry.
- **June 2013** – submission to the Paid Parental Leave Scheme Review conducted in accordance with section 307A of the PPL Act.
- **July 2015** – Ai Group’s July 2015 submission to the Committee in respect of its inquiry into the *Fairer Paid Parental Leave Bill 2015*.

In addition to participating 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 during the 2013/14 Review of the Act.

The paid parental leave scheme in the PPL Act provides significant social and economic benefits. Like most developed countries, Australia is facing important 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.³ The Review also concluded that the PPL scheme enables employers to better retain female employees and provided greater return to work outcomes following parental leave.⁴ 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.

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. 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.

Ai Group’s views on Schedule 1 of the Bill

Ai Group supports section 11A of item 8 of the Bill which would implement more generous backdating arrangements for parents who are entitled to parental leave payments.

However, Ai Group has a number of specific concerns about other provisions in Schedule 1 of the Bill, as currently drafted, including those outlined below:

1. The definition of “primary carer leave” (PC leave) in s.11E and “primary carer pay” (PC pay) in s.11F would create significant uncertainty

Sections 11E and 11F define PC leave and PC pay respectively. Each concept is premised on the “*terms and conditions of an employee’s employment*”:

“11E Primary carer leave (or PC leave) for a child

(1) If, under the terms and conditions of an employee’s employment, the employee is entitled to leave:

...

“11F Primary carer pay, paid PC leave and paid PC leave period for a child

(1) If, under the terms and conditions of an employee’s employment, the employer will pay an amount to the employee in respect of the employee’s entitlement to PC leave for a child of the employee.”

The Explanatory Memorandum states that a “*term and condition of employment*” includes “*any enforceable entitlement that is part of the employee’s terms or conditions of employment, including entitlements*”:

- that arise in an enterprise agreement;
- that arise in a modern award;

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

⁴ <https://www.dss.gov.au/our-responsibilities/families-and-children/benefits-payments/review-of-the-paid-parental-leave-scheme/paid-parental-leave-review>

- that arise in a workplace policy (incorporated by reference or impliedly in a contract of employments;
- that are implied by action; or
- from other sources.⁵

“Primary carer pay” was a term used in the *Fairer Paid Parental Leave Bill 2015*, but it was defined differently to how it is now proposed to be defined in the current Bill. Previously, it was proposed that “primary carer pay” be defined to mean “*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.*”

Ai Group raised a number of practical concerns with the previously proposed definition of “primary carer pay”. In particular, in its July 2015 submission Ai Group stated:

- *“In many circumstances, it will undoubtedly 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, including any exclusions or disclaimers;*
 - *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 in this case were ultimately overturned in the High Court (Commonwealth Bank of Australia v Barker [2014] HCA 32).*

⁵ See page 8 of the explanatory memorandum to the Bill.

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- *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 section 146).*
- *The uncertainty would also impose very significant challenges for the Fair Work Ombudsman in investigating breaches of the PPL Act.”*

The new definition of PC pay and the introduction of the new concept of PC leave in the current Bill responds to some of the concerns expressed by Ai Group. We note the use of the phrase “*under the terms and conditions of an employee’s employment*” in s.11E and s.11F of the Bill and the examples provided in the Explanatory Memorandum at page 8.

In some instances the terms and conditions of an employee’s employment can be quite clearly expressed in a contract or employment or enterprise agreement but entitlements implied into a contract of employment or otherwise implied by action are not as simple to identify. Therefore, despite the new phraseology, uncertainties would remain.

The case law examples in the extract from Ai Group’s 2015 submission reproduced above demonstrate that it is not always apparent to the employee or employer whether a workplace benefit is implied into a contract of employment. Uncertainty as to whether a workplace benefit translates into a term or condition of employment can be open to dispute between the employer and employees. The case law demonstrates that disputes concerning workplace benefits which are not clearly expressed or incorporated by reference into the contract or employment require an intricate understanding of employment law. It is noted that each of the above case law examples were resolved by superior courts of record following multiple appeals.

Also, given that under s.11F(3) the PPL Rules may specify classes of payment that are, or are not, to be taken to be PC pay, we are not able to adequately assess the impact of the Bill until the proposed Rules are provided.

Ai Group’s views on Schedule 2 of the Bill

Ai Group supports the changes in Schedule 2 of the Bill which would generally require that payments to employees be made by the Department of Human Services but would allow an employer to opt-in to provide parental leave pay, by agreement with the employee.