



SUBMISSION BY

The

**AUSTRALIAN COUNCIL OF TRADE UNIONS**

to the

**Senate Inquiry into the**

**The Exposure Draft of the**

**Paid Parental Leave Bill 2010**

**May 2010**

D No. 13/2010

**1. Work and family balance is a matter of longstanding interest to the ACTU and the 1.8 million working people and their families we represent.**

1.1 For more than a quarter of a century the ACTU has been advocating for appropriate leave and income support associated with the birth of a child.

1.2 In 1979 the ACTU won 12 months' unpaid leave for mothers in the Maternity Leave Test Case. In a series of cases since then, the ACTU has fought for the extension of this leave to include adoptive mothers (1985), fathers (1990) and casual employees (2001).

1.3 Our campaign history includes advocacy for paid maternity leave in the early nineties which resulted in the maternity allowance in 1993 and the Baby Bonus in 2005. In 2005 the ACTU achieved employees' right to request an extension of parental leave up to 24 months, the right to eight weeks of concurrent parental leave and additional allocation of leave for caring purposes.

**2. An Australian system of universal paid maternity leave is long overdue.**

2.1 Whilst workplace bargaining has delivered paid parental leave to one third of top earning women who have bargaining power in their workplaces, two thirds of Australian (mostly low-paid) mothers continue to have no access to paid maternity leave.

2.2 Fewer than half of all Australian babies under the age of six months receive any breast milk, with return to work the most significant factor for mothers weaning 6 weeks after birth.<sup>1</sup>

2.3 Australia remains in the lowest third of OECD countries in respect of workforce participation of mothers.<sup>2</sup>

2.4 The gender wage gap has stubbornly remained at 17.4% and women retire with half the amount of savings of men in their superannuation accounts.<sup>3</sup>

**3. The ACTU congratulates the Government on this Bill and is pleased to present a submission to the Inquiry.**

3.1 The ACTU supports the policy objectives of this Paid Parental Leave Bill 2010 to encourage and support women's participation in the paid workforce, foster a strong and productive economy, provide financial stability for families and the healthy development of children.

3.2 This Bill is a product of significant consultation, research and analysis by the Productivity Commission. Although not all our proposals were adopted by the Productivity Commission, we endorsed and supported the Commission's recommended paid parental leave model.

3.3 We acknowledge the substantial consultation process undertaken by the Government following the Productivity Commission's Report and although not all the

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<sup>1</sup> Cooklin, A., Donath, S., and Amir, L., Maternal Employment and Breastfeeding: Results from the Longitudinal Study of Australian Children, Acta Paediatrica.

<sup>2</sup> OECD Family database, Maternal Employment, November 2009

<sup>3</sup> Clare, Ross., Retirement Savings Update, 2008, Association of Superannuation Funds of Australia (ASFA) Research and Resource Centre, February 2008, available at [www.superannuation.asn.au](http://www.superannuation.asn.au)

improvements we sought to the model were adopted, we endorse and support the Paid Parental Leave 2010 Bill as a balanced, equitable and affordable scheme.

3.4 The ACTU has expressed its intention to pursue the improvements we seek to the scheme over time, both through bargaining and lobbying for future legislative reform to achieve:

- Payment of superannuation on paid parental leave to redress the inequity in retirement savings for women who have taken time out of the paid workforce in order to have and care for children;<sup>4</sup>
- Provision of paid paternity leave or secondary carer's leave to encourage a pattern of more equitable distribution of caring responsibilities within families;<sup>5</sup>
- Twenty-six weeks' paid parental leave, as recommended by various health organisations as the optimal period of paid leave in terms of child and maternal health; and
- Employer 'top up' of the government paid parental leave payments to full income replacement level.<sup>6</sup>

3.5 It is widely known that women are concentrated in occupations and industries with low bargaining power and often low union membership. As such it will be difficult for women to achieve these outcomes through workplace bargaining and we urge the Government to address these improvements through further legislative reform.

3.6 We note that it is the government's intention to undertake a comprehensive review of the scheme, in particular to consider the introduction of compulsory employer-funded superannuation and the introduction of a paid paternity leave by component which will commence in 2013. The ACTU welcomes the opportunity to further advance our arguments in that review and evaluation process.

**4 It is critical that the Paid Parental Leave scheme is fully operational by 1 January 2011.**

4.1 Approximately 148,000 families eligible for paid parental leave in 2011 will be budgeting now in preparation for the birth of a baby in 2011 and are relying on

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<sup>4</sup> Whilst women live longer than men, their retirement savings are half of that of men. Using an ASIC superannuation calculator, the ACTU estimates that an additional 3 months superannuation contribution to a balanced portfolio added over \$3,000 dollars to the final account balance. (Using standard ASIC assumptions about earnings on a balanced fund, based on data for a 30 year old woman earning \$50,000 pa on 12 months unpaid parental leave.)

<sup>5</sup> ABS statistics indicate that over half of fathers do not take unpaid parental leave despite being eligible. This is not surprising given the financial strain a mother's long term period of unpaid leave places on families. Dedicated paid paternity leave enables fathers to assist the mother during recovery and bond and help care for the newborn: *Bittman, M., Parenthood Without Penalty: Time Use and Public Policy in Australia and Finland, Feminist Economics 5 (3) 1999*. Ironically, the current regime of unpaid leave is associated with the increased hours of work for fathers of young children. Preliminary data from HILDA survey shows that fathers of young children work on average nearly 5 more hours than similar aged men without dependents: *Household Income and Labour Dynamics in Australia (HILDA), Australian Institute of Family Studies, Family Relationships Quarterly Issue 5, p.13*.

<sup>6</sup> The majority of working women earn less than, or close to, the federal minimum wage, with 70% of mothers earning less than \$40,000 pa. Only a small group of employees would require significant top up of wages and they are the most likely to already be receiving employer provided PPL. It should also be noted that in any one year, only 2% of female employees will take leave associated with the birth of a child. For a small business with 20 employees, this represents one employee taking PPL every 10 years.

receiving their entitlements at that critical time when family budgets are most stretched.

- 4.2 This Bill is fully budgeted for and its passage will ensure parents receive their Paid Parental Leave entitlements by 1 January 2011.
- 4.3 The Paid Parental Leave 2010 Bill outlines a responsible and affordable scheme, and the ACTU calls on the Senate to pass the Bill.
- 4.4 The ACTU also calls on employers to do their part and support the Paid Parental Leave Bill 2010, which balances the rights and obligations of government, employers and employees.

## **5. Comments on the key provisions of the exposure draft Paid Parental Leave Bill 2010**

- 5.1 The ACTU does not intend to cover ground already dealt with in the Productivity Commission inquiry nor the extensive consultation of key stakeholders conducted by the government. This submission does not re-traverse arguments regarding the desirability of the proposed Paid Parental Leave scheme, or the principles that should underlie the scheme.
- 5.2 Rather, this submission comments on the draft legislation and its capacity to give effect to the government stated principles of the proposed scheme.

### **6.1. Legislative framework**

- 6.1.1 The ACTU submission to the Productivity Commission proposed that paid parental leave should be contained in the Fair Work Act, alongside unpaid parental leave and other related entitlements. Although this remains our first preference, we support the government's decision to place the Paid Parental Leave laws in a stand-alone statute, rather than have them appear in welfare legislation. The stand-alone Bill confirms that paid parental leave is:
  - an employment-related right;
  - a measure that encourages workforce attachment; and
  - an entitlement which can be built upon through workplace bargaining.
- 6.1.2 However, given the location of unpaid parental leave and other related entitlements in the Fair Work Act, it would be appropriate to have a reference in the Paid Parental Leave Bill to the relevant provisions of the Fair Work Act to provide a link between the two pieces of legislation to ensure parents and employers are aware of all their parental leave entitlements and obligations.
- 6.1.3 The paid parental leave legislation will also interact with other workplace-based rights and obligations. Whilst the paid parental leave policy objectives signify that the paid parental scheme is not intended to replace existing employer-provided paid parental leave schemes regulated by the Fair Work Act, the ACTU proposes that the Paid Parental Leave Bill include a statutory object that clearly states that the government Paid Parental Leave scheme is intended to be in addition to all existing employer paid parental leave entitlements.

## 6.2 Eligibility

6.2.1 We support the broader work test for employees who have:

- Been engaged in paid work continuously for at least 10 out of the 13 months prior to the birth or adoption of the child; and
- worked at least 330 hours in the 10 month period

and we welcome the flexibility with respect to continuous service which includes breaks in service of not more than 56 consecutive days (8 weeks). This approach rightly recognises breaks in service as part and parcel of many workers' (particularly mothers') long-term participation in the labour force.

6.2.2 However, we are concerned that this eight week 'grace period' is insufficient to cover the significant number of casual and contract workers whose work is terminated as a result of semester breaks or seasonal breaks in the vicinity of 12 weeks, as occurs in the education sector and fruit picking industry.

6.2.3 The ACTU proposes consideration of either an extension of the 8 week grace period to 12-16 weeks for certain industries or an alternative work test period for workers in those industries designed to capture their long-term workforce connection over a longer period of time.

6.2.4 We also note that the eligibility test for unpaid parental leave under the NES requires 12 months' continuous service with same employer. In effect, this means that there will be a group of employees who will be eligible for paid leave, but not unpaid leave. These employees will have no right to return to work following their PPL. This situation undermines the policy objective of encouraging ongoing workforce attachment. The ACTU proposes that the eligibility for unpaid leave in the NES should be amended to reflect the PPL work test or, in the alternative, that provisions are made to ensure that those parents eligible for PPL will also be entitled to a corresponding period of unpaid leave.

6.2.5 We are also concerned about the potential unfairness of s. 33(1). This clause rightly provides a mother with the right to use the expected date of birth rather than the actual date of birth where she fails to meet the work test because she is required to leave work early or the baby is born late. However, the clause does not provide the same right for mothers who fail the work test because the birth occurs earlier than expected. This disadvantages women who give birth to premature babies, a scenario more common than the late arrival of babies. The ACTU recommends that the clause be amended so that mothers who would have met the work test but for the premature arrival of their baby may also use the expected date of birth for the purposes of eligibility for PPL.

6.2.6 The ACTU recommends that the definition of employee in s.6, which specifically excludes a person on a vocational placement, should reflect the more detailed description in s.12 of the FWA.

6.2.7 The ACTU has concerns regarding the definition of qualifying work in s. 34(b) which includes unspecified 'paid leave'. We note that s. 35(5) provides that the PPL Rules will prescribe what is, or is not, taken to be paid leave. We trust that the Rules will ensure that a prior PPL period is considered as service for the purposes of eligibility for the work test in subsequent PPL claims. A significant proportion of mothers will

- 6.2.8 Similarly, we trust that the Rules will ensure that employees who are ‘stood down’ through no choice of their own are still considered to be performing qualifying work for the purposes of eligibility for PPL.
- 6.2.9 The ACTU is also concerned to ensure that workers taking PPL continue to accrue basic service-related entitlements so that parents can accrue a ‘buffer’ of annual leave or long service leave. Without this, parents (especially mothers) would be forced to use their personal/carer’s leave to cover their children’s illness (particularly during the first years of child care), leaving them with insufficient leave in case of personal illness.
- 6.2.10 We note that there is no provision for the transfer of an employer’s PPL obligations following a transmission of business. It appears that where transmission of business occurs, the employer determination will cease and payment of PPL is transferred from the employer to the employee directly from the FAO. This approach is likely to be problematic in situations where the government PPL payment is absorbed into employer payments (such as for example, where an employer provides 26 weeks PPL at full pay and absorbs the government PPL payment). The ACTU recommends the adoption of the transmission of business principles contained in Division 2 of the Fair Work Act.
- 6.2.11 The wording in s. 31 (3) should be clarified. The clause provides that a parent is ineligible for PPL if a partner or former partner is also ‘entitled’ to the Baby Bonus. Many parents will be eligible for both PPL and the Baby Bonus. A clearer expression would be ‘has applied for or is receiving the Baby Bonus’ rather than ‘entitled’ to it.
- 6.2.12 In addition, the ACTU notes potential discrimination where employers do not renew a contract or set artificial ‘time-limits’ to a contract, in order to avoid an obligation to pay PPL. We recommend the inclusion of an anti-discrimination provision in relation to this clause which clearly stipulates that employers may not discriminate against employees on the basis of a workplace right (comparable to Div. 3 of the Fair Work Act) or discrimination on the grounds of pregnancy or family responsibilities (comparable to Division 5 of the Fair Work Act).
- 6.2.13 The Keeping in Touch provisions will allow employees to agree to attend the workplace for a maximum of 10 days per period of leave if “the purpose of performing the work is to enable the person to keep in touch with his or her employment or engagement in order to facilitate a return to that employment or engagement at the end of the period of leave” (s. 50 (a)).

Unions support the benefits of encouraging employers and employees to maintain contact during periods of parental leave. However, we are concerned that parents of newborn babies will be pressured into attending work to fill staffing gaps.

- 6.2.14 Whilst we acknowledge the requirement for mutual agreement, the reality of mothers on parental leave is that they have very little bargaining power. Most new mothers intend to request flexible work arrangements upon their return to work, often under the restrictions of limited childcare options.

- 6.2.15 To deal with this risk we propose that, first, the purpose of attendance at the workplace should be narrowed to the purposes of professional development, training or provision of information relevant to the employee's work. Second, we recommend that the law contain appropriate protections against employer pressure to attend, and potential discrimination against women who decline to attend.
- 6.2.16 The draft Bill provides that Keeping in Touch days may not occur within 14 days of birth. In the context of the above concerns regarding new mother's low bargaining capacity, 14 days may be too short a period. S. 78 of the Fair Work Act provides that parents of still born babies or babies that die shortly after birth return to work no earlier than 6 weeks post birth. This timeframe recognises standard maternal recovery period. The keeping in touch provision should allow for women to choose their keeping in touch days, with attendance within the first 6 weeks of the birth at the mother's initiation only.

### **6.3 Making an application**

- 6.3.1 The responsibility for lodging an application for Paid Parental Leave with the family Assistance Office (FAO) falls entirely upon the employee (Div 2, ss. 52-61). This places great importance on effective dissemination of information to prospective parents. The ACTU proposes that it is appropriate to place an obligation on employers to provide information to employees in an accessible format, similar to an employer's obligation to disseminate the Fair Work Information Statement under s. 125 of the Fair Work Act.
- 6.3.2 Employers have no formal obligations until they receive notification from the FAO regarding the employee's application. Employers will then be required to provide the relevant information to the FAO. We propose that employers should be obliged to meet reasonable time limits by which the relevant information is to be provided to the FAO.
- 6.3.3 Similarly, the ACTU recommends an appropriate timeframe be set within which employees should receive confirmation in respect of an employer determination.

### **6.4 Payment**

- 6.4.1 Section 11(4) is complex and should be clarified. It should make it clear that parents have 28 days to lodge a valid claim and verify the birth of the child, but they can start to receive payments immediately after these steps are taken.
- 6.4.2 The verification process should be accessible from the hospital, easy to complete and quick to process. There should also be an appropriate timeframe in which the FAO must make a determination about eligibility and commence payments.
- 6.4.3 For parents who are workers, we recommend that the rules contained in s. 67(1) about employer deduction from payments should mirror s. 324 of the Fair Work Act. PPL payments to employees should be treated as wages.

## **6.5 Obligations of employers**

- 6.5.1 In many cases there will be a delay between the receipt of the payment by the employer and its forwarding to the employee. The ACTU maintains its concern about misappropriation of funds. We propose an obligation that employers must not appropriate the moneys for any other purpose, with penalties available for breach of this obligation.
- 6.5.2 The employer will be obliged to notify the employee of the Paid Parental Leave payments made and keep appropriate records. However, the employee does not appear to have any right to access these records. We recommend that employees be provided with a right of access, with an obligation on the employer to provide access within an appropriate timeframe.

## **6.6 Compliance**

- 6.6.1 We support the comprehensive dispute settlement and compliance components of the Paid Parental Leave Bill. In particular, we welcome the capacity of the FWO to inquire into and investigate referred matters, issue compliance notices, infringement notices and commence proceedings in a relevant jurisdiction. FWO involvement supports workforce attachment and efficient resolution of claims, minimising the burden on parents of newborn babies during a stressful time.
- 6.6.2 We support the mechanism in the Bill that ensures regular payments are made to employees during the investigation and compliance process. It is of critical importance that parents of a newborn baby (who have limited free time and resources) are not disadvantaged by an employer's breach of an obligation.
- 6.6.3 We support the sanctions attached to breach of obligations, including the civil penalty orders for individuals and corporations.
- 6.6.4 Many employees' paid parental leave entitlements will involve an integration of the government Paid Parental Leave payment (such as where an employer provides 26 weeks' paid parental leave at full pay and absorbs the government payment). The law should make clear (perhaps in a note) that employees are able to pursue remedies simultaneously for breaches of such paid parental leave entitlements – for example, by making complaints to the FAO in respect of the government component and by initiating an action for breach of contract or enterprise agreement.

## **6.7 Implementation**

- 6.7.1 Whilst not strictly within the remit of the draft Bill, we note that the successful operation of the scheme depends on:
- Effective dissemination of appropriate and accessible information on the scheme to ensure parents and employers are aware of their rights and obligations;
  - Establishing adequate support systems for parents and employers (such as online lodgment facilities);



- Proper resourcing of relevant authorities charged with administration and support of the scheme; and
- Comprehensive baseline data being collected from both employee applicants and employers in order to facilitate meaningful review and evaluation of the scheme.