



Submission to the Productivity Commission on Paid Parental Leave

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Executive Summary

- AMMA represents all major minerals, coal and hydrocarbons producers as well as significant numbers of construction and maintenance employers in the resources sector. AMMA is uniquely able to articulate the workplace relations needs of the resources sector.
- The resources sector was forecast to contribute minerals and energy exports in the order of \$108 billion in the last 12 months.¹ This represents approximately two thirds of Australia's total commodity export earnings. In 2007-08 this contribution is forecast to increase to \$115 billion.²
- AMMA supports the key social objectives of the inquiry that concentrate on the health and wellbeing of Australian families during childbirth and the period after childbirth, the decrease of the fertility rate in Australia, and its consequences for Australia's economy. However, AMMA believes the delivery of these numerous social benefits are based on fundamental goals of the Australian community as a whole and should not be the responsibility of Australian employers.
- Access to parental leave by employees has traditionally been an industrial matter primarily regulated by the industrial relations legislation and supplemented by the award system. In the Commonwealth Government's Forward with Fairness model an employee's entitlement to access leave will be provided under the National Employment Standards. These standards will be finalized by 30 June 2008.
- AMMA contends that an entitlement to parental leave is a pre-condition to receive any payments in respect of that leave.

¹ ABARE Economics, *Australian Commodities*, Vol 14, 4, December Quarter 2007.

² ABARE Economics, *Australian Commodities*, Vol 15, 1, March Quarter 2007

- The various benefits ascribed to the introduction of compulsory paid parental leave will benefit not just employers but the entire Australian community and thus the cost should be spread across the entire Australian community.
- A compulsory paid parental leave scheme ought to be introduced only if funded by the Australian Government.
- The duration and quantum of payment under a government funded model should be determined by affordability, and assessed on the basis of Australia's economic capacity and competing interests for government revenue.
- A compulsory Government funded scheme to provide payment during periods of parental leave should apply to employees universally, regardless of the employment jurisdiction and the occupation of industry in which work is performed. AMMA contends that such a scheme be implemented via legislation and not the award system.
- The administration of the scheme should be a function of Government agencies.
- AMMA contends that payments in respect of periods of parental leave ought not to be an allowable award matter.
- AMMA contends that protected industrial action should not be available in respect of claims which include a claim relating to payments during periods of parental leave. This would include claims for 'top-up' payments or those from employees who do not qualify for parental leave.

- With respect to a non-compulsory employer funded parental leave, AMMA acknowledges the right of an employer and its employees in individual workplaces to negotiate work and family issues through mutually beneficial workplace agreements. To the extent that additional employment based parental benefits are considered relevant by employers and employees in particular enterprises, voluntary enterprise bargaining is the best measure to progress these considerations. Employers should not however, be obliged to participate in compulsory arbitration on these matters and protected industrial action should not be available in claims concerning the payments made during parental leave.

About AMMA

AMMA is the national employer association for the mining, oil and gas and associated processing and service industries. It is the sole national employer association representing the employee relations and human resources management interests of Australia's onshore and offshore resources sector and associated industries.

AMMA member companies operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Coal mining
- Oil and Gas
- Associated services such as:
 - Construction and maintenance
 - Diving
 - Transport
 - Support and seismic vessels
 - General aviation (helicopters)
 - Catering
 - Bulk handling of shipping cargo

AMMA represents all major minerals, coal and hydrocarbons producers as well as significant numbers of construction and maintenance employers in the resources sector. AMMA is uniquely able to articulate the workplace relations needs of the resources sector.

Resources Sector Profile

The resources sector was forecast to contribute minerals and energy exports in the order of \$108 billion in the last 12 months.³ This represents approximately two thirds of Australia's total commodity export earnings. In 2007-08 this contribution is forecast to increase to \$115 billion.⁴

In 1996 the mining industry employed just 56,529 employees; today it directly employs 138,400 employees.⁵ This represents a 144% increase in employment compared to the all industry increase in the order of 25 per cent. Approximately 553,000 employees are indirectly employed as a result of activity in the mining sector.⁶ Of approximately 138,400 workers, 18,700 (13.5 per cent) are female employees and 119,700 are male.

In the hard rock mining sector, the level of union membership is 11 per cent. This is significantly lower than the average level of unionisation in the private sector of 15 per cent.⁷

Industrial disputation in the resources sector is now a thing of the past. In 1996 the resources sector suffered 7,761.9 days of industrial action per 1000 employees (coal industry was responsible for 86 per cent of this result). In the September Quarter of 2007 there were no recorded days lost in the non-coal mining sector; the coal sector recorded a loss of 1.5 days per 1000 employees. Both results are excellent.⁸

³ ABARE Economics, *Australian Commodities*, Vol 14, 4, above n 1

⁴ ABARE Economics, *Australian Commodities*, Vol 15, 1, above n 2

⁵ Australian Bureau of Statistics, *Australian Labour Market Statistics*, Cat. No. 6105.0, Jan 2008.

⁶ Based on a 1:4 ratio.

⁷ Australian Bureau of Statistics *Employee earnings, Benefits and Trade Union Membership*, January 2007 (6310.0) ABS, Canberra.

⁸ Australian Bureau of Statistics, *Industrial Disputes Australia* September 2007, (6321.0.55.001)

The average total earnings per week in the resources sector has increased from \$1153.70 in February 1996 to \$1917.80 in November 2007, almost \$100,000 per annum. This is 65% higher than the all industry average.⁹

⁹ Australian Bureau of Statistics, *Average Weekly Earnings*, November 2007 (6302.0)

Terms of Reference

Social benefits

In announcing this inquiry, the new Federal Government highlighted the need to ensure strong economic growth whilst adjusting to the needs of an ageing population, promote a work/life balance and support families. The terms of reference for the inquiry annexed to the Issues Paper released by the Productivity Commission state the following:

The Australian Government wants to consider how to improve support for Australian parents with newborn children. The context for this is the need to ensure strong and sustainable economic growth, adjust to the imperatives of an ageing population, promote the early development of children and support families in balancing work and family commitments.¹⁰

AMMA asserts that the objectives outlined above are all social benefits aimed to increase the quality of life of all Australians. In this context, AMMA contends that a paid parental leave benefit should be the responsibility of all Australians, and not just one sector of the economy, such as employers. Although some peripheral objectives such as the maintenance of a mother's longer term attachment to the workforce (thereby helping to stem the effects of the skill shortage and reducing workplace costs relating to turnover, training and recruitment) may exist, AMMA submits that the overwhelming intentions of a paid parental leave scheme are fundamental goals of the Australian community as a whole.

AMMA wishes to highlight the comments of Julia Gillard, Jenny Macklin and Tanya Plibersek when they announced, in a joint media release in July 2007, that a Rudd government would examine reforms to support parents with new born

¹⁰ Inquiry into Improved Support for Parents with Newborn Children, Productivity Commission, April 2008, Attachment B: Terms of Reference.

children.¹¹ It was proclaimed that any examination would include consideration of the following:

- the cost effectiveness of different options and their impact on business;
- preventing the imposition of additional financial burdens or administrative complexity on small businesses;
- preventing the discouragement of the employment of women; and
- preventing the marginalization of women in the workforce.¹²

This submission is framed around the criteria listed above, and the factual considerations outlined below.

Maternity, Paternity and Parental Leave

Paid Maternity Leave is defined as income replacement to compensate for the leave from paid employment necessary around child birth.¹³ It is women who bear children and take time out of the workforce to do so. However, AMMA accepts that it would be naïve to assume any paid parental leave scheme would be restricted to one gender, and therefore confined to maternity leave. A recent survey of AMMA's membership revealed the majority of respondents were in support of paid parental leave benefits being made available to both male and females, when the primary caregiver. AMMA contends nonetheless that in the event there is access for both genders to receive paid parental leave, there should be no 'double dipping' and the monetary benefit received should not exceed the total entitlement. Consequently, the term 'parental' leave is used throughout this submission and includes maternity, paternity and adoption leaves.

¹¹ ALP Ministers Joint Media Statement, 13th July 2007, Paid Maternity Leave

¹² Ibid.

¹³ HEREOC, "Valuing Parenthood": Options for Paid Maternity Leave", *Human Rights and Equal Opportunity Commission Interim Paper*, Sydney, Sex Discrimination Unit, 2002, p 13

Existing unpaid parental leave

Employment conditions, including those pertaining to parental leave may be derived from a number of sources. These include both federal and state workplace relations laws, and industrial awards and agreements. The primary legislative instrument at the federal level is the *Workplace Relations Act 1996* (Cth) which provides 52 weeks unpaid maternity leave to permanent full time and part time employees with 12 months continuous service with their employers. Some casual workers have also been provided this benefit since 2001 via federal awards. The vast majority of federal awards contain provisions for unpaid parental leave as a result of the Test Case standards.¹⁴ The current arrangements allow parents to share in the 52 weeks of unpaid leave, however but for one week, parents cannot take leave simultaneously.

An employee's entitlement to access leave will be provided in the National Employment Standards, as outlined in the Federal Government's Forward with Fairness model. These standards will be finalized by 30 June 2008, and AMMA proceeds in its submission on the basis that the treatment of parental leave will not change. Thus, AMMA contends that an entitlement to parental leave under the NES will be a pre-condition to receive any payments in respect of that leave.

Existing paid parental leave

Research undertaken by the Department of Employment and Workplace Relations in 2002 showed 82 federal awards, and 7 per cent of all current agreements provided for paid maternity leave (with an average duration of seven weeks).¹⁵ Most awards were in the government sphere, and some in private

¹⁴ See discussion in: Joint submission by Department of the Prime Minister & Cabinet, Department of Employment and Workplace Relations and Department of Family and Community Services, *Inquiry into the Workplace Relations Amendment (Paid Maternity Leave) Bill 2002*, July 2002, p 7

¹⁵ *Ibid*, p 8

industry, with the highest proportion in the film, broadcasting and journalism sector. Additionally, a number of employers provide paid parental leave to their employees, with varying conditions. As stated in the Productivity Commission's Issues Paper, 44% of working women and 35% of working men had access to paid parental leave in 2005. Similar benefits are often provided by the discretion of an employer and may be incorporated in less formal personnel manuals or company policies.¹⁶

Australia's international obligations

Australia has no specific legal obligations under international law to provide paid parental leave. The international standards relevant to paid parental leave include:

- 1979 United Nations Convention on the Elimination of Discrimination Against Women (CEDAW);
- International Labour Organisation (ILO) Convention 183, Maternity Protection, 2000 (C183); and
- ILO Recommendation 191, Maternity Protection, 2000 (R191)

Of the two binding international agreements, the 1979 CEDAW convention and C183 (whereas ILO Conventions are treaties, ILO Recommendations are not and therefore are not open to ratification), Australia has ratified only the UN Convention. This was ratified with a reservation against article 11.2 which deals with the introduction of 'maternity leave with pay or with comparable social benefits'.¹⁷ As a result, Australia is not bound by the document until this provision is ratified and legislated in Australia.

¹⁶ For further discussion see: Steve O'Neil, *Work and Family Policies as Industrial and Employment Entitlements*, Information and Research Services Parliamentary Library Research paper, No. 2 2004-05, 9 August 2004

¹⁷ Ibid. It should be noted that CEDAW is silent on the length of the leave to be taken, the conditions under which leave should be taken, and the level of pay provided.

Concerns

Unpaid parental leave is a long standing employee entitlement. Furthermore, public support for paid parental leave is high, with over three quarters of all Australians in favour of working women having access to some form of paid maternity leave.¹⁸ Aside from the well documented health benefits for mothers, infants and children, a paid parental leave scheme has the potential to assist employers by increasing levels of employee engagement and labour market attachment whilst reducing some costs of recruitment and staff turnover.¹⁹ This is particularly relevant in today's tight labour market. The results of the recent member survey demonstrated that 96 per cent of respondents saw the encouragement of retention of workers and employee engagement as a primary objective of a paid parental leave scheme. However, AMMA contends that notwithstanding potential secondary effects such as these, paid parental leave is not an exclusively work related entitlement, and should not be treated as such by the Productivity Commission in its inquiry. Importantly, AMMA notes the ILO Committee of Experts has taken the view that maternity leave falls under the scope of 'maternity protection standards' rather than 'workers with family responsibilities standards'.²⁰ It is from this perspective that the majority of AMMA's concerns come.

¹⁸ Barbara Pocock, *A Time to Act: Paid Maternity Leave for All South Australian Women*, Supplementary Submission to the Select Committee on Balancing Work and Life Responsibilities, August 2007, www.unisa.edu.au/hawkeinstitute/cwl/default.asp, p 5

¹⁹ Marian Bird, Deborah Brennan & Leanne Cutcher, 'A Pregnant Pause: Paid Maternity Leave in Australia', *Labour & Industry*, vol. 13, No. 1, August 2002, pp 1- 19

²⁰ See discussion of "Report of the Committee of Experts on the Application of Conventions and Recommendations: General Report and observations concerning particular countries, Report III (Part 4A), International Labour Conference, 81st Session, 1994", International Labour Office (ILO), Geneva, 1994 in Steve O'Neil, *Work and Family Policies as Industrial and Employment Entitlements*, above n 16

Employer funding

A national scheme for national objectives

It is clear from both the terms of reference and discussion in the Productivity Commission's Issues Paper that there is a broad range of likely objectives for a paid parental leave scheme. These cover a number of social, economic and productivity based issues. Possibilities include the following:

- improvement of health outcomes for both mother and child;
- an increase in the national fertility rate;
- the maintenance of the mother's longer term attachment to the workforce;
- the provision of financial support to families, and in particular the parents of newborn children; and
- increased productivity and economic growth of the Australian economy.

In 2002, the Human Rights and Equal Opportunity Commission's (HEREOC) interim paper on a national paid maternity leave scheme focused the debate on Australia's total fertility rate, which was below replacement level.²¹ Similarly, it has been argued that birth rates are falling because women are having fewer children overall, more women are having no children, and more women are entering the paid workforce.²² AMMA acknowledges this, but contends that any policy to resurrect population and fertility trends of Australia should not fall within the responsibility of employers.

AMMA equally contends it is not an employer's obligation to fund parenthood, or the health and wellbeing of all Australians, nor is it an employer's responsibility to ensure continued productivity and fiscal growth of the Australian economy.

²¹ The paper stated: 'Addressing the declining national birth rate and its consequences for Australia as a society in the future, and its future tax and economic base is a key objective of any paid maternity leave scheme'. See HEREOC, "Valuing Parenthood": Options for Paid Maternity Leave", above n 13 p 37

²² Marian Bird, and Leanne Cutcher, 'One for the Father, One for the Mother and One for the Country': An Examination of the Construction of Motherhood Through the Prism of Paid Maternity Leave', *Hecate*, vol. 31, Iss. 2, 2005, pp 103-113, p 106

Parents in recent years have had the opportunity to receive numerous forms of federal government funded financial assistance following the birth of a child. Such benefits include the following:

- a lump sum payment available for each child born in recognition of the costs incurred at the time known as the Maternity Allowance;
- Family Tax Benefit Part A and B, providing income-tested help with the cost of raising children. There is a range of additional payments that may be provided as part of the FTB(A) including the Large Family Supplement, Multiple Birth Allowance and Rent Assistance;
- the Parenting Payment which provides income support for the primary caregiver of a dependent child under 16;
- the Child Care benefit, paid where registered child care is used;
- support services for families providing for a range of family relationships and parenting support programs to help provide a better environment for raising children; and
- the 'Baby Bonus' which was introduced in 2002 to provide further financial relief.²³

It is AMMA's position that any further financial assistance associated with the birth of a child shall be funded and administered as the responsibility of government agencies like the programs listed above so as not to place additional pressure and costs on employers. Consequently, AMMA believes paid parental leave as the forced responsibility of employers is unjustified and an employer-funded paid parental leave scheme is strongly opposed. Additionally, AMMA submits any rationalization of social welfare payments should be left to the Federal Government in light of funding and responsibilities.

²³ Joint submission by Department of the Prime Minister & Cabinet, Department of Employment and Workplace Relations and Department of Family and Community Services, Inquiry into the Workplace Relations Amendment (Paid Maternity Leave) Bill 2002, July 2002, p 24

Existing company paid parental leave schemes

AMMA strongly rejects the view that the existing enterprise outcomes for paid parental leave in some workplaces should determine that payments from employers should be universally applied. This would naively and incorrectly suggest a 'one size fits all' model was suitable. The provision of any additional benefits above the legislated minimum should be left to bargaining at the enterprise level, as what is suitable, cost effective and productive for one workplace is not always similarly beneficial to another. Survey respondents demonstrated that the desire and ability of employers to provide paid parental leave will vary in accordance with the company's ability to provide paid leave, their location and other factors deemed important to consider when attracting and retaining workers.

As to the prevalence of paid parental leave within AMMA's membership, 30 per cent of respondents to the recent AMMA survey on paid parental leave currently have some form of paid parental leave policy in place. The models differ in length and rate of benefit, ranging from approximately 6 to 32 weeks with varying rates of payments. Similarly, motivations for the schemes vary between companies, although almost all companies cited the attraction and retention of workers as a main objective. In AMMA's view, this is demonstrative of a lack of consensus on key issues and evidence that a national, solely employer funded paid parental leave scheme could not be imposed as a 'one size fits all' model. The utility of voluntary enterprise based schemes varies company by company.

Hence, AMMA supports an approach which provides scope for workplace level agreement making which allows for the differing views and financial abilities of employers and does not impose a one-size fits all arrangement. A compulsory obligation for employers to provide fixed paid parental leave benefits is not beneficial for Australian industry, however companies should be free to provide additional benefits (above any compulsory universally applied paid parental leave

scheme) if they so desire. (The commitment of AMMA to enterprise bargaining at the workplace level is described in more detail below.)

Equal Employment Opportunity

Women's' overall participation in the labour force has increased from 50.60 per cent in 1978 to 70.2 per cent in 2008,²⁴ and participation in the key child bearing years (15-34) has increased by 61 per cent in 1986 to 70 per cent in 2001.²⁵ Consequently, female participation rates are now almost equal to those of men in the same age group. Yet, it is still overwhelmingly women who care for children in the first 12 months.²⁶ AMMA wishes to ensure female members of the industry are not disadvantaged. Of approximately 138,400 employees in the Mining industry, a mere 13.5 % are female workers.²⁷ An employer funded scheme has the potential to create an incentive to discriminate against women, and particularly those in their key child-bearing years in all industries. AMMA notes the ILO discourages employer funded paid maternity leave schemes for this very reason.²⁸

An employer funded model would simply be inequitable for those employers with a large number of female employees and would not reach the parents who are self employed but similarly deserving of financial assistance. Any further potential inequities should be avoided wherever possible.

²⁴ Australian Bureau of Statistics, Australian Labour Market Statistics, April 2008, 6202.0.55.001

²⁵ Australian Bureau of Statistics (2003) *Australian Social Trends, Work: National Summary Tables*. Canberra: ABS

²⁶ See Australian Bureau of Statistics, *2006 Time Use*, ABS cat. No. 4153.0

²⁷ Australian Bureau of Statistics, Australian Labour Market Statistics January 2008, 6105.0

²⁸ This is conceded by the ACTU. See: ACTU, Submission No: 18, *Workplace Relations Amendment (Paid Maternity Leave) Bill 2002*, July 2002.

Government funding

It is essential that any universally applied Australian paid parental leave scheme be wholly funded by the federal government.

A government funded scheme would build upon existing tax and administrative structures, thereby not placing undue pressure on the workloads of Australian businesses. This framework would have low transaction costs whilst simultaneously drawing on the taxation revenue gained from both employer and employee contributions.²⁹ The introduction in New Zealand of a government-funded paid maternity leave scheme in July 2002 is testament to the benefits of such a scheme.³⁰ The New Zealand scheme is entirely government funded and paid at the rate of the employee's ordinary weekly earnings or average weekly earnings (whichever is greater), up to a maximum payment. The benefit is paid up to 14 weeks from the start of the employee's leave and ends upon the employee returning to work, resigning or contract completion.³¹

Administration

AMMA members believe any payments must be administered by federal government agencies, directly to the recipients of paid parental leave. The roles and responsibilities of administering such a scheme are not attractive to employers, as are the risks and costs of its organisation and management.

²⁹ This framework was suggested by Barbara Pocock in her submission on paid maternity leave to the South Australian Government in August 2007. She cites this as an approach Australians favour according to opinion polls. See: Barbara Pocock, *A Time to Act: Paid Maternity Leave for All South Australian Women*, above, n 18.

³⁰ Marian Bird, Deborah Brennan & Leanne Cutcher, 'A Pregnant Pause: Paid Maternity Leave in Australia', 2002, above n 19, p 1

³¹ NZ Department of Labour Fact Sheet, Information on taxpayer-funded paid parental leave. See www.dol.govt.nz

Duration and level of payment

Any government funded scheme should be subject to ongoing review. Duration must have primary regard to budgetary affordability, and the competing priorities for government revenue. Equity and budgetary considerations imply a payment of full pre-maternity earnings is unrealistic, and some form of single rate capped at an appropriate level is more appropriate. AMMA contends the Government is to decide on a quantum of payment suitable in the circumstances.

AMMA strongly rejects any proposal that a paid parental leave scheme be in any way funded by employers. However, in the event that a wholly government funded model is rejected, it is submitted that the entitlement be available for an appropriate period at a level that is not financially burdensome on employers.³² The recent AMMA survey revealed inconsistency in views on the period of paid parental leave benefits, with respondents showing support for periods ranging from 4 to 26 weeks (in relation to a government funded model). AMMA submits the period of benefit should not be more than the unpaid leave entitlement.

A matter for enterprise bargaining, not disputation

In 2002, HREOC left unresolved the way in which their proposed paid maternity leave model would form part of Australian industrial relations policy. Specifically, the way in which their model would integrate and interact with the existing industrial relations framework was left untouched.³³ An analysis of the HREOC recommendation demonstrates the potential for a two-tiered system. Essentially, all employees would have access to a universal payment (i.e. capped at average weekly earnings or the minimum wage) provided by the federal government, and

³² See AMMA Supplementary Submission on Paid Maternity Leave, September 2002 at <http://www.amma.org.au/publications/AMMA%20Supplementary%20Submission%20-%20Paid%20Maternity%20Leave%20September%202002.pdf>

³³ Marian Baird, 'Orientations to Paid Maternity Leave: Understanding the Australian Debate', *Journal of Industrial Relations*, Vol. 46, Iss. 3, September 2004, pp 259-273, p 262

where this amount does not cover an employee's pre-leave income, enterprise bargaining or company policy could be used to supplement ('top up') the payment to an income replacement level.³⁴ In light of the 2002 report and the current debate, AMMA seeks clarification from the Productivity Commission on these important issues, and wishes to voice its concerns.

AMMA anticipates that all Unions will call for employers to make-up the gap between federally funded payments and pre-leave incomes.³⁵ This is an approach strongly opposed by AMMA, which is particularly concerned to ensure a paid parental leave scheme for Australia is appropriate by not placing undue responsibility and cost on employers whilst being productive for both the resources sector and Australian workplaces generally. AMMA supports voluntary bargaining at the enterprise level however is keen to offset any requirement that employers be obliged to participate in compulsory negotiations and/or arbitration.

Since 1991 a system of enterprise-based bargaining has increasingly operated in Australia at the federal level. This increase has arguably come about as a consequence of the proliferation in ways for employers, employees and their unions to determine terms and conditions of employment.³⁶ AMMA is not opposed to the provision of mechanisms that increase flexibility via negotiations at the workplace level. As outlined above, many companies presently have a paid maternity leave scheme in place, providing replacement level income.³⁷ Approximately half of survey respondent member companies would make up the

³⁴ See: HEREOC, "Valuing Parenthood": Options for Paid Maternity Leave", above n 13, and its discussion in Marian Baird, 'Orientations to Paid Maternity Leave: Understanding the Australian Debate', 2004, above n 33 p 262

³⁵ This approach was taken by the ACTU in 2002, see: ACTU, Submission No:18, *Workplace Relations Amendment (Paid Maternity Leave) Bill 2002*, July 2002, and has been advocated already in response to the Productivity Commission's Issues Paper of April 2008, see: 'NSW Unions begin campaign for 28 weeks paid maternity leave', *Workplace Express*, 30 April 2008

³⁶ These negotiations result in awards, union and non-union enterprise agreements and individual workplace agreements. See: Marian Bird, Deborah Brennan & Leanne Cutcher, 'A Pregnant Pause: Paid Maternity Leave in Australia', *Labour & Industry*, vol. 13, No. 1, August 2002, pp 1-19, p 7

³⁷ See discussion in: Marian Baird, 'Orientations to Paid Maternity Leave: Understanding the Australian Debate', 2004, above n 13 p 263

difference in pay if a government paid parental leave benefit was less than the employee's earnings. However, AMMA seeks to ensure that the desire and ability of some employers to provide these entitlements in order to remain employers of choice, does not justify the imposition of unnecessary burdens on all employers. The option to provide additional benefits should be left to negotiations between the parties at the workplace level. It is constantly acknowledged by members of the business community that collective bargaining carries both risks and opportunities. Agreements need to be fair, but also able to provide gains in productivity. Pattern bargaining against multiple employers in an industry should not occur because each business has different productivity and competitive challenges.³⁸ The malleability of any approach to this issue is to be a matter for individual workplaces and employer-employee relationships.

Interaction with awards

From the perspective outlined above, AMMA has concerns that if the Government completely opens up agreement making as advocated by the ACTU,³⁹ it may put at risk historically low levels of industrial disputation in the mining sector. Consequently, if paid parental leave was to be included as an eligible matter for bargaining within awards, the levels of industrial disputes are likely to rise considerably. AMMA submits that paid parental leave should be a prohibited award matter and a specific limit on the scope to use the award system to advance additional claims, including top up claims for paid parental leave above a universal government funded scheme, should be legislated.

³⁸ For further discussion see: Opinion piece by ACCI (former) Workplace Policy Director Peter Anderson, "Balance Part of Industrial Bargain", Friday 4/1/2008, *Sydney Morning Herald*, at www.acci.asn.au

³⁹ ACTU Secretary Jeff Lawrence has recently stated unions would argued forcefully for the removal of restrictions on workplace bargaining. This comes from a recent request to allow employees and employers to agree on adopting climate change initiatives in the workplace. See 'Lawrence tells employers to "get on board" with bargaining reform', *Workforce*, Issue 1632, May 9 2008

If a government funded paid parental leave scheme was introduced and entitlements were provided for in federal awards there are inherent risks to employers. It is not questioned that there will be pressure from the ACTU to allow the AIRC/Fair Work Australia to arbitrate or inquire into top up payments in modern awards. Prior to the introduction of formal agreement making in 1992, the industrial award system put in place a range of minimum standards on an occupational or industry basis. The minimum standards could be varied by the Commission on application subject to meeting the requirements of any principles as required.⁴⁰ Test cases seeking to increase, expand or include a new minimum standard were a predominant feature of the industrial landscape during this period.⁴¹ As a result, awards were regularly varied to insert test case provisions, including annual wage reviews.⁴² Similar cases, if allowed, would be entirely detrimental and unqualified consequences of a paid parental leave scheme.

The draft National Employment Standard (NES) contemplates modern awards building on entitlements contained in the NES, which means the AIRC/Fair Work Australia will have the capacity to build on the NES to legislate minimum levels for employees covered by a modern award. This is of concern to AMMA, as it appears to provide a return to the 1990s approach where minimum standards could be varied upon application of an award party, with the Commission empowered to arbitrate on the claim and vary the award. The current proposed NES includes parental leave, implying that paid parental leave could also be a future inclusion. Existing parental leave provisions contained in federal awards have evolved through a process of test cases before the AIRC. Significant cases

⁴⁰ See AMMA Submission, National Employment Standards, Exposure Draft Submission, March 2008 at

http://www.amma.org.au/home/publications/AMMA_NES_Submission_Final_31March2008.pdf

⁴¹ See *Maternity Leave Test Case* (1979) 218 CAR 120, *Adoption Leave Test Case* (1985) 298 CAR 321, *Parental Leave Test Case* (1989) 361 IRI, *Family Leave Test Case* (1994) 57 IR 121 and *Personal/Carer's Leave Test Case* (1995) 621 IR 48. The parental leave test case clause granted certain employees, but not casual employees, unpaid maternity, paternity and adoption leave. The basic entitlement embodied in that test case clause is that after 12 months' continuous service parents are entitled to a combined total of 52 weeks' unpaid parental leave on a shared basis

⁴² See Gillian Whitehouse, 'Industrial Agreements and Work/Family Provisions: Trends and Prospects under Enterprise Bargaining', *Labour & Industry*, vol. 12, No. 1 August 2002

include the 1979 Maternity Leave test case,⁴³ the 1985 Adoption Leave test case⁴⁴ and the 1990 Parental Leave test case.⁴⁵

It is important that employers be aware of how a paid parental leave scheme would interact with awards so as to prepare for amendments and their effects on workplaces.

Top Up claims

If paid parental leave is provided for by a government funded scheme, and it is excluded by awards as prohibited content, it is similarly important that there is no obligation put on employers to be subject to other forms of industrial claims aimed at increasing benefits as the similar concerns remain. Concerns include:

- claims for the employer to make up full pre-maternity earnings under a scheme where everyone receives a legislated amount;
- claims to add to the number of weeks of entitlements; and
- claims from those employees not entitled to paid parental leave.

There have been numerous examples of claims for 'top up' payments in the past 20 years, instigated by trade unions. Some of these claims have been related to the following work related benefits:

- workers' compensation;
- superannuation; and
- employee entitlements on insolvency.

It has been reported that some union organisations are pushing for 28 weeks of paid leave, supported by compulsory employer contributions. Knowledge of these policies has increased the concern of employer groups and the need to curb further policy development in this direction.

⁴³ (1979) 218 CAR 120

⁴⁴ (1985) 298 CAR 321

⁴⁵ (1989) 361 IRI

Any payments to voluntarily 'make up' a paid parental leave benefit should be left to the discretion of employers, and determined through workplace level negotiations rather than arbitrated claims.

Industrial disputation and link to productivity

Industrial disputation in the resources sector is now a thing of the past. In 1996 the resources sector suffered 7,761.9 days of industrial action per 1000 employees (coal industry was responsible for 86 per cent of this result). In the September Quarter of 2007 there were no recorded days lost in the non-coal mining sector; the coal sector recorded a loss of 1.5 days per 1000 employees. Both results are excellent.⁴⁶ Changes to levels of industrial disputation in Australia have largely contributed to the high levels of success and productivity seen in the resources sector in recent years.

Any government supported paid parental leave scheme should be developed in acknowledgement of the recent productivity levels in the resources sector and their effect on wider industry in Australia. The taking of 'protected action' in relation to paid parental leave matters should be clearly prohibited. The introduction of a workplace related scheme such as this with any mechanism for potential use in industrial dispute should be strongly discouraged by the Productivity Commission in its recommendation to the Australian Government.

⁴⁶ Australian Bureau of Statistics, *Industrial Disputes Australia* September 2007, (6321.0.55.001)

AMMA position

If the Productivity Commission recommends the Government introduces legislation on this issue AMMA would recommend any paid parental leave scheme include the following features:

- An entitlement to and administration of compulsory paid parental leave that is part of the range of social entitlements provided by the federal Government, of which entitlement to unpaid parental leave is a precondition.
- The payment would be funded out of existing revenue sources and not increase taxation levels on business.
- Recognition that existing unpaid leave could be taken simultaneously by both parents to the extent provided by the proposed NES. Further, AMMA supports the proposal that paid parental leave could similarly be paid concurrently, subject to an overall cap.
- The scheme would prohibit awards from including provision for paid parental leave related provisions, or alternatively prohibit industrial action on paid parental leave award matters.
- A prohibition on the AIRC or Fair Work Australia arbitrating on matters relating to paid parental leave, including claims for 'top up' payments by employers during a period of paid parental leave, and prohibiting the taking of 'protected action' in respect of matters relating to paid parental leave.
- Employers and employees could *voluntary* reach and certify agreements that could provide for paid parental leave at a level higher than that provided as a universal, social benefit but free from industrial action.