

Paid maternity leave in Australia - Productivity Commission interim report

The Australian Productivity Commission has recommended the federal government pay new parents for 18 weeks of parental leave.

The commission published its interim report into maternity, paternity and parental leave on 29 September 2008, setting the groundwork for a national scheme.

In particular it has recommended that the government adopt a taxpayer-funded leave scheme that would pay the *primary care giver* (i.e. either parent) the minimum wage rate, currently \$544 a week. It has also recommended the \$5,000 baby bonus be scrapped and replaced with a non-means tested maternity allowance.

The report lists 11 recommendations including the suggestion that employers would pay the parent's superannuation during the period of paid parental leave.

The report has been issued for consultation and the public are invited to examine this draft report and make written submissions to the Productivity Commission by close of business on Friday 14 November 2008.

The Commission is seeking views on the following:

- an effective arrangement to deal with the definition of the self employed/contractors and that would ensure appropriate compliance
- the practicality and merit of allowing paid parental leave to be taken part-time
- whether (and if so, how) the scheme could provide fathers with more equal access to paid parental leave, without risks of unintended consequences
- the likely disruption burdens for employers associated with employees taking longer periods of leave
- the patchwork of government programs that support parents with children under two years of age, and in particular:
 - gaps in services

- learning from the existing policy measures
- policy measures that would increase the effectiveness of existing programs, including coverage, the triggers for parents' access to services, resourcing, and service delivery.
- whether other leave entitlements, such as sick, recreation and long service leave, should accrue during the period of paid parental leave, having regard to its costs and appropriateness
- the costs involved in mandating the provision of (capped) employer superannuation contributions while an employee is on paid parental leave

The Australian Government has supported the general proposition but has refused to commit to a specific time table for the scheme to be introduced.

[\[More\]](#)

Unfair dismissals laws return to small business in 2009

The Australian Government has announced the return of unfair dismissal obligations to businesses that employ 100 or fewer employees will occur on 1 July 2009.

Julia Gillard, Deputy Prime Minister and Minister for Education, Training and Workplace Relations described the new system "Forward with Fairness" to the National Press Club in Canberra on 17 September 2008.

Small businesses are defined as employing less than 15 employees and different rules will apply to these employers. In particular there will be:

- (1) A doubling of the qualifying period from six to 12 months, during which time employees cannot take a claim for unfair dismissal; and
- (2) A six-paragraph *Fair Dismissal Code* which, if followed by the small business owner, will ensure a dismissal is not unfair.

The Fair Dismissal Code is an attempt to minimise the cost of resolving claims of unfair dismissal on small business. However, the code has no application to businesses that employ between 15

and 100 employees who will once again be faced with the prospect of having to defend expensive claims at Fair Work Australia.

The government has published a series of *fact sheets* on its planned introduction of the Forward with fairness amendments to the Workplace Relations Act.

Over the next editions of Employee Relations MONTHLY we will discuss the impact of the changes including the re-introduction of unfair dismissal laws for small and medium enterprises.

[\[More\]](#)

Superannuation lodgement and reporting dates

Key lodgement and reporting dates for super funds (including self-managed super funds) for 2008-09 have been published by the Australian Tax Office.

[\[More\]](#)

Award modernisation – exposure draft of awards

The Australian Industrial Relations Commission has released for comment a series of what it describes as *exposure drafts of modern awards*. There are 14 drafts released for comment covering the industries and occupations that were considered to be of the highest priority.

The following exposure drafts provide the first glimpse of what awards will look like on 1 January 2010.

- Clerks—Private Sector Award 2010
- Coal Mining Industry Award 2010
- Higher Education Industry—Academic Staff—Award 2010
- Higher Education Industry—General Staff—Award 2010
- Horse and Greyhound Training Award 2010
- Hospitality Industry (General) Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010
- Mining Industry Award 2010
- Racing Clubs Events Award 2010
- Racing Industry Ground Maintenance Award 2010
- Rail Industry Award 2010

- Retail Industry Award 2010
- Security Services Industry Award 2010
- Textile, Clothing, Footwear and Associated Industries Award 2010

[\[More\]](#)

Increase to federal pay scales 1 October 2008

A reminder to employers that from 1 October, employers will need to adjust their payroll to take into account the \$21.66 per week increase in the standard Federal Minimum Wage and increases to the rates prescribed under relevant pay scales. The actual increase takes effect from the first pay period on or after 1 October.

[Further information - see updated pay scales](#)

Increase to federal award allowances 1 October 2008

Employers should also note that in conjunction with the increases to minimum rates prescribed under Australian pay scales, award based allowances such as meals, travelling, first aid, and similar expense based allowances have also been progressively adjusted by the Australian Industrial Relations Commission. Check the awards applicable to your business for the new rates with the [Australian Industrial Relations Commission](#). If they have not been published yet contact Maguire Consulting for assistance.

Bosses ignore employee mental health

A national survey of 1,000 workers found 70 per cent of respondents' workplaces do not offer programs to support employees' mental and emotional wellbeing.

Half of respondents said they often felt stressed and one quarter often felt depressed.

Half of respondents thought drinking alcohol was a good way to maintain or improve their mental health, while four in five believed watching television positively impacted on mental health. The unhappy age group was 40 to 49-year-olds, with people in that age bracket most likely to feel stressed and depressed and the least likely to look after their physical and mental health.

The online survey was conducted by Sweeney Research for the Super Friend Industry Funds Forum Mental Health Foundation.

TIP OF THE MONTH: Forward with fairness – planning for the change to agreements

In an address to the National Press Club on 17 September 2008, the Deputy Prime Minister, the Hon Julia Gillard MP outlined further details of the Government's workplace relations reforms. The speech, which seems to be part of a deliberate strategy to gradually release information ahead of the substantive parliamentary bill has been supplemented by the publication of ten 'Fact sheets' outlining the new measures to be introduced under the *Forward with fairness* amendments scheduled to commence in 2009 and 2010.

In the next editions of *Employee Relations MONTHLY* we will analyse the impact of these new measures on employers. The analysis is partly speculative as the full details of the changes will be included in the Bill due to be released later this year. Nevertheless, there is sufficient information publically available to allow an educated assessment of some of the key changes.

This month we address the question of workplace agreements and the decision whether or not to renew, renegotiate or initiate them before 2010.

Individual Transitional Employment Agreement

We already know that from 28 March this year, no new Australian Workplace Agreements could be made. The Individual Transitional Employment Agreements (ITEA) that replaced this option is only available to employers that applied AWA's prior to 28 March and have to be made within 7 days of new employees commencing employment.

The use of an ITEA to make an agreement with an eligible employee will cease on 1 January 2010 and the notional expiry date of an ITEA can be no later than 31 December 2009. However, there is nothing within the current information released by the government to suggest that the ITEA cannot continue in force beyond that date if it is not terminated by the parties.

Therefore it is possible to continue to use the ITEA and existing AWA's (at least until 31 December 2009) to establish a base set of terms and conditions of employment to replace awards. Future benefits and wage increases could be paid through simple common law contracts to operate alongside the ITEA.

There are, of course, several factors militating against the use of this strategy.

The first is the application of the *No Disadvantage Test* introduced in March of this year. It significantly reduced the flexibility to make an agreement at variance to the terms of a relevant award. All of the terms of a relevant award are taken into account when assessing whether the employee is disadvantaged.

Secondly, once the nominal expiry date passes an employee may provide 90 days notice to terminate the ITEA. The employee will revert to a relevant award and the employer is not entitled to terminate the person's employment even if the decision results in considerable cost or disruption the business.

The third reason is the dynamic nature of employment. Regular staff turnover means that as employees come and go the employer will have to maintain multiple employment arrangements. Some employees may be employed under pre-*Fairness test* agreements, others under an ITEA and those employed from 2010 under an award.

Finally, the current administrative uncertainty and delays for approval of an ITEA by the Workplace Authority tends toward the conclusion that the use of this instrument is at best an interim strategy.

Content of agreements

Prohibited content i.e. the list of subjects that must not be included in a workplace agreement, will be deleted in the next set of changes due to commence 1 July 2009.

There are currently 22 items listed under prohibited content in the Act and regulations, most of which proscribe union related benefits.

Is the abolition of these prohibitions a good reason to act now to make a collective agreement?

The answer depends upon an analysis of the particular arrangements that will replace the current restrictions.

Commencing on 1 July 2009 agreements will be able to include matters pertaining to the relationship between:

- A. the employer and the employees; and
- B. the employer and any union to be covered by the agreement.

The concept of '*matters pertaining to the relationship of employer and employee*' has been the subject of decisions of the High Court of Australia.¹

¹ Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40; 221 CLR 309

It generally includes only those matters that directly relate to the relationship of an employer as employer and the employee as employee. In other words, the agreement could not include conditions that didn't relate directly to their mutual rights and responsibilities under the common law contract of employment.

However, sub-paragraph (B) above, suggest that agreements may include the deduction of union fees and other 'commercial' arrangements between the employer and the representative union.

Unlike the matters related to employer and employee, the concept of agreements that pertain to '*the relationship with the employees' union as representative*' has no precedent in Australian employment law. Prior to the decision of the High Court in *Electrolux Home Products v Australian Workers Union* all such arrangements if included in agreements, were permissible only if they were incidental or ancillary to the matters pertaining to the employment relationship.

The fact sheet published by the government states that agreements could include deductions from salary for any purpose authorised by an employee such as salary sacrifice or deduction of union fees as well as terms dealing with the operation of the agreement. Matters that do not pertain to the employment relationship or the relationship with the employees' union as representative cannot be the subject of protected industrial action. If terms in agreements do not meet these criteria, they will be void and unenforceable.

Unless the government explicitly exclude matters such as bargaining agent fees (as it has promised) then it is possible that all sorts of arrangements could be included in agreements to support the role of a union to '*represent*' employees. For example, trade union training leave, payment of union delegates, paid time off work to attend union meetings and so on.

If you believe that you are vulnerable to these types of issues in the negotiation of your businesses workplace agreement(s) then there may be some advantage in making an agreement before next July.

Bargaining in good faith

According to the government the good faith bargaining obligations for the making of an agreement will be:

- attending and participating in meetings at reasonable times;
- disclosing relevant information in a timely manner, subject to appropriate protection for commercial in confidence information;

- responding to proposals made by a party in a timely fashion;
- giving genuine consideration to the proposals of the other parties and providing reasons for their responses; and
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

There is considerable scope in these arrangements for judicial interpretation and one could expect an expansion of the obligations through creative judicial intervention in disputes.

Where an employer refuses to bargain, employees or their representatives can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. Fair Work Australia will be able to determine whether there is majority employee support by whatever method it considers appropriate, such as a ballot or a petition.

If Fair Work Australia determines there is majority employee support for pursuing an enterprise agreement, the employer will be required to bargain collectively with the relevant employees.

Employers may be intimidated by these arrangements. The issue of good faith bargaining orders by Fair Work Australia may push some employers to make an agreement that they don't want. Nevertheless, there is not anything within these terms to suggest an employer would ever be compelled to enter into an agreement.

Good faith bargaining will not require parties to make concessions or sign up to an agreement where they do not agree to the terms.

Approval of agreements

All agreements will need to be approved by Fair Work Australia before they commence operation. The grounds for approval will essentially be the same grounds that apply under the No Disadvantage Test. However, it will be called the '*Better off overall*' test. Agreements will be approved if the employees are better off overall as compared to the relevant award and the terms do not contravene the ten National Employment Standards.

An agreement will come into operation seven days after Fair Work Australia approves it or a later date if one is specified in the agreement.

Individual flexibility clause

One of the more intriguing aspects of the new rules is the requirement to provide for individual flexibility arrangements between the employer and employees.

The aim of the clause is to ‘... enable individual arrangements which are genuinely agreed by the employer and an individual employee.’²

The most recent fact sheet indicates that the parties to an agreement will be able to negotiate such clauses to meet their particular circumstances but where an agreement is silent on these matters, the terms of a model clause (to be based on the Australian Industrial Relations Commission’s general award clause) will be deemed to be incorporated.

The bad news is that the model flexibility clause drafted by the Industrial Relations Commission is not particularly flexible. It is limited to the arrangements for when work is performed, overtime, penalty rates, allowances and leave loading. The agreement must not ‘on balance’ leave the employee worse off compared to the award and any collective agreement applicable to them. The agreement must be in writing and detail how the agreement does not disadvantage the employee. It may be terminated by either party by providing notice of four weeks.

We can draw the reasonable conclusion from the policy statements that the flexibility clause will be useful for the employee that may need to adjust their working hours to suit family responsibilities or the employer that needs an employee to work longer or more frequent hours for short periods to meet some operational demand. However, the inability to ‘lock in’ the individual arrangements for longer periods will inhibit most employers from using the clause to meet changing operational demands.

We may have to wait and see what arrangements are allowed when the substantive bill is introduced.

Consultation clauses

Workplace agreements must also contain a clause obliging the employer to consult employees (and representative unions) on the introduction of major changes to the workplace. Once again, the parties are able to agree on arrangements to suit their particular circumstances but if the agreement is silent then a model clause based on the model clause drafted by the Australian Industrial Relations Commission for modernised awards will apply automatically.

The model clause under the modernised awards will oblige employers to

- a. Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have

significant effects on employees notify the employees who may be affected by the proposed changes and their representative, if any.

- b. Significant effects include termination of employment, major changes in composition, operation or size of the employer’s workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs. Provided that where the award makes provisions for alteration of any of the matters referred to herein an alteration is deemed not to have significant effect.

The employer must discuss the change with employees and their representatives and provide written information on the nature of the change, the impact on employees and measures to mitigate the adverse impact.

This obligation will need to be replicated in workplace agreements.

Conclusion

The pendulum has well and truly swung. The new system for making agreements under the *Forward with Fairness* amendments due next July ensure that employees will not only be paid no less than the award rates and enjoy the same or better conditions applicable under an award, it imposes additional administrative burdens through the obligation to consult and record any individual variations to the norm. There is little room for innovative variations or differences from the award and national employment standards.

What should employers do?

Ignore the bleating from the ACTU and suggestions that this is ‘*Workchoices Lite*’. The unions will have all the tools they need to conduct successful bargaining campaigns on behalf of their members.

Employers will either have to live with the awards that bind them or improve their negotiation skills to develop employment structures and conditions that suit their business within a very tight regulatory structure.

The decision to initiate agreements now or in 2010 will largely depend upon the number and complexity of awards currently binding the employer. It will also depend upon the nature of any agreements currently in place.

² K Rudd, J Gillard, *Forward with Fairness – Policy Implementation Plan* August 2007 p14

There may be some virtue in waiting for the award modernisation to be completed if only to minimise the number of awards that will apply under the *Better off overall* test. This may be particularly attractive to businesses that operate across more than one Australian state.

On the other hand, the new rules for bargaining will leave employers that work within unionised industries such as construction, manufacturing, health, retail and hospitality vulnerable to a raft of new claims imposed through well orchestrated industry wide campaigns. We should not underestimate the power of good faith bargaining orders to intimidate small and medium enterprises into making an agreement. Employers will also not want the additional costs associated with paid union training leave and other union related issues.

An agreement made with employees before 1 July next year will avoid those problems. There are also some opportunities to extend the operation of agreements made before 27 March 2006 if they are still suitable.

Please give me a call to discuss if you want to consider the best option for your business.

AROUND THE STATES - What's making news in State jurisdictions?

New South Wales

Implementation of State Wage Case

On 27 June the Industrial Relations Commission of New South Wales awarded a 4% increase in wages, work related allowances and junior rates. The Commission also established a new minimum rate of pay for all adult workers in NSW. This is now \$552.70 per week (or \$14.54 per hour).

In order to check a NSW award for the date on which the increase comes into effect, please visit Awards Online or phone 131 628.

[\[More\]](#)

Victoria

Discrimination extended to include family responsibilities

For Victorian employers that may not have read the August edition, the Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Act) took effect in Victoria 1 September 2008. The amendment to the Act imposes new obligations on employers to

accommodate 'family friendly' arrangements with their employees.

It is now unlawful in Victoria for employers to unreasonably refuse to accommodate an employee's responsibilities as a parent or carer. Importantly, not every request for flexible work arrangements on the basis of parental or carer's responsibilities must be agreed to by employers. What constitutes 'unreasonably' refusing to accommodate responsibilities involves a balancing of all the relevant facts and circumstances.

[\[More\]](#)

Queensland

State Wage Case Decision

Queensland Wageline has developed award wage summary sheets for selected Queensland state awards as a quick reference guide only for employers and employees. This follows the State Wage Case decision to increase Qld award rates effective from 1 September 2008 by \$23.60 per week.

[\[More\]](#)

South Australia

Minimum standard of remuneration

The Minimum Standard for Remuneration (MSR) for a full time adult will be \$546.65 per week from the first pay period to commence on or after 1 October 2008.

The Minimum Wage applies to all employers and employees who are covered by the South Australian Industrial Relations system and prevails over a contract of employment and existing State Award wages and conditions to the extent that the terms of the Minimum Wage are more favourable to an employee.

[\[More\]](#)

Tasmania

Expect an Inspector Campaign

The "Expect an Inspector" campaign is a 12 month campaign launched in July 2008. Workplace Standards Inspectors are conducting workplace inspections in the North West of Tasmania. Targeting all sectors of industry, the campaign is aimed at working together with industry to reduce the frequency and severity of workplace accidents.

[\[More\]](#)