

FAIRER BUT NOT CLEARER – CONFUSION AHEAD FOR PAID PARENTAL LEAVE

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On 15 September 2015, the Senate report (report) into the Fairer Paid Parental Leave Bill 2015 was tabled. The report contained two recommendations:

1. the Senate pass the Bill
2. a comprehensive consultation process be conducted to ensure concerns are resolved to provide clarity to parents around the effect on their statutory entitlements to paid parental leave (PPL).

The fact the report draws attention to the lack of clarity in the current drafting of the Bill, but stops short of providing any further recommendations on ways to fix this, means the next round of consultation, should it occur, will be critical not only for employees potentially effected by the Bill. It will also be critical for employers who will need to review their current policies and practices before the Bill becomes law.

INTERACTION WITH EMPLOYER-PROVIDED PPL POLICIES

Likely Effect on Employers

One of two key measures implemented by the Bill is that employees who receive PPL from their employer will have their statutory entitlement reduced by the same amount. Those employees whose employers provide over the statutory cap of 18 weeks (at minimum wage) will not be entitled to any statutory payment. Employees who are paid under the cap will be eligible for a top up.

The concern most commonly raised by interest groups skeptical of the Bill is that if the legislation reduces the amount of statutory PPL received by an employee where they already receive employer parental leave payments, this may result in employers reducing or scraping their own PPL policies. As paid parental leave is a cost to a business, where it is a choice of 'one or the other', employers will rely on the government PPL scheme.

Earlier this year we wrote a [legal insight](#) suggesting that change to the government PPL scheme may create an expectation on employers to compensate their employees for any PPL lost due to the reduction in the statutory entitlement. This still may be an issue, particularly where there is industrial pressure from unions during enterprise agreement negotiations to provide additional parental leave benefits.

However, most employers who have existing PPL policies do so because they believe in the benefit of supporting and retaining talented staff. It is a key differentiator for employers when seeking to recruit employees and assists in creating a family friendly culture. Scrapping existing PPL policies is likely to be seen as being a backward step for organisations who invest in their employees and who seek to be an 'employer of choice' in the market place.

The fact is, initiatives such as PPL are a focus for employers and will continue to be when they seek to recruit and retain talented staff. The question employers should be asking themselves is – *given the limitations of the government PPL scheme, what can we do to continue to provide the commensurate compensation or benefit?*

Which Employer Payments Count?

At present, one of the major sources of confusion in the Bill is how to determine which employer payments will need to be deducted from the statutory cap.

The Bill requires that 'primary carer pay' must be deducted. This is defined as an amount the employer is 'legally obliged' to pay the employee under the terms of their employment because they are on primary carer leave.

Our view, which is shared by numerous interest groups and echoed in the report, is that the current phrasing of the Bill is ambiguous. It leaves open the option for employers to pay the following kinds of payment without that reducing an employee's statutory entitlement:

- payments which are not 'legally obliged' such as those made under a workplace policy, instead of pursuant to a contract or enterprise agreement
- payments made on an employee's return to work from parental leave (the traditional 'incentive' payment provided upon return to work).

Employers could simply redesign their PPL policies to replace the existing PPL with an additional benefit for new parents to avoid any adverse impacts of the Bill on their employees.

This could be done in a number of ways including those outlined above, or by a company removing any entitlement to PPL under an enterprise agreement or contract and enabling employees to obtain the benefit of the government PPL scheme, while at the same time developing other incentives, benefits or entitlements.

EMPLOYERS ARE NO LONGER THE PAYMASTER

In a change that has received mixed commentary in the report, the paymaster provisions of the Bill now mean that the Department of Human Services (Department) will be responsible for payment of statutory PPL, unless the employer opts in to administer the payment. Many submissions supported this on the grounds that it removed red tape, while others criticised it for weakening the relationship between an employer and an employee while on parental leave. It is an interesting change in light of the fact that the majority of employers have found it easy to organise their own payments without the need for a third party. Furthermore, it is estimated that having the Department administer payments will mean an increased cost of AUD7 million over five years.

WHAT NEXT?

We anticipate that further amendments or guidance will be provided by the government to give employers more certainty around what is and is not 'primary carer pay'. This will be particularly important because the Bill in its current form contains penalties of up to 300 penalty units (currently AUD54,000) for non-compliance.

With about six months to go before the Bill becomes law, we will watch to see if guidance emerges from the Department's consultation process. Without further clarity, we question how effective the Bill will be in reducing the red tape, with many employers needing to seek detailed advice on how payments made under their own policies will affect their employees' statutory entitlements.

We continue to watch this space and will provide you with any relevant updates. In the meantime, please contact our Labor, Employment and Workplace Safety team should you wish to hear more about this issue.

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