



## Paid Parental Leave Bill 2010

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### Contents

Purpose .....	3
Background.....	3
Paid Parental Leave in Australia .....	3
Historical background.....	3
More recent background .....	5
The Baby Bonus.....	7
Post 2007 election.....	8
Pros and Cons of a national PPL scheme.....	10
International context.....	11
Committee consideration.....	14
Key issues .....	14
Duration of leave.....	14
Stay at home mothers .....	15
Value of benefit.....	16
Who should pay?.....	18
Position of significant interest groups .....	19
Human Rights Commission (HRC) .....	19
National Foundation for Australian Women.....	20
Australian Council of Trade Unions (ACTU).....	20
Australian Chamber of Commerce and Industry (ACCI) .....	21

Business Council of Australia (BCA) .....	22
Australian Industry Group (AiG) .....	23
Professor Andrew Stewart, School of Law, University of Adelaide .....	24
Coalition/Greens/Family First/ policy position/commitments .....	24
Financial implications .....	25
Main provisions .....	25
Eligibility.....	25
The work test.....	27
The residency test.....	28
Primary carer .....	28
Return to Work.....	28
Payment of Instalments .....	28
Concluding comments .....	30

## Paid Parental Leave Bill 2010

**Date introduced:** 12 May 2010

**House:** House of Representatives

**Portfolio:** Families, Housing Community Services and Indigenous Affairs

**Commencement:** 1 October 2010

**Links:** The [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

This Bill establishes a Government-funded Paid Parental Leave (PPL) scheme from 1 January 2011. The scheme will provide parental leave pay of up to 18 weeks at the national minimum wage to eligible primary carers who have or adopt a child on or after 1 January 2011 and who can satisfy work, income and residency tests.

### Background

Currently, while Australia provides some financial assistance to assist with the costs associated with newborn or adopted children (discussed below), it is one of only two Organisation for Economic Cooperation and Development (OECD) countries without a national paid parental leave scheme.

Parental leave encompasses maternity leave, paternity leave and adoption leave. A recent Parliamentary Library publication, *Paid Parental Leave*, provides background to the issue of parental leave.<sup>1</sup> This Digest draws on that publication.

### Paid Parental Leave in Australia

#### Historical background

In Australia, the pursuit of maternity leave as an industrial entitlement followed earlier initiatives to promote the interests of working women, such as the abolition of the

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1. S O'Neill, *Paid Parental Leave*, Background Note, 11 May 2010, Parliamentary Library, Canberra, 2010, viewed 21 May 2010, <http://www.aph.gov.au/Library/pubs/BN/eco/PaidParentalLeave.pdf>

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marriage bar in the Australian Public Service (1966) and the equal pay cases (1969–74) conducted before the Australian Conciliation and Arbitration Commission.

The advancement of maternity leave in Australia has most often been pursued in the context of the application of the International Labour Organisation's Convention Concerning Maternity Protection (ILO, No.103, Revised 1952), and whether employment conditions expressed in industrial awards complied with that instrument. Note however that Australia has not ratified this convention or its successor convention, No 183: Maternity Protection Convention 2000. This has been due, in part, to concerns regarding the compatibility of the conventions' articles and local industrial practices. For example, Article 4.8 of the 1952 convention prevented individual employers from bearing the cost of benefits (paid leave) due to women employed by the employer, while certain Australian employers in the private sector did provide for paid maternity leave, and continue to do so, either as a result of bargaining with employees and unions, or offering the leave as part of human resource (HR) policy.

In an exercise to ascertain whether Australian employment conditions could comply with the 1952 Maternity Protection Convention, a survey of industrial awards conducted by the federal Department of Labour in 1972 failed to identify any federal awards containing maternity leave provisions.<sup>2</sup> The same survey criticised factory and shop legislation of the major states for failing to specify a period of leave for pregnant female employees. Rather, these Acts prohibited the pregnant employee from working during specified periods immediately before and after childbirth (termed the period of confinement). This was the context that led unions and the ACTU to make claims for maternity leave for employees under federal awards. The Commonwealth's response was to introduce legislation for paid maternity leave for Commonwealth employees of 12 weeks for female employees and paid paternity leave of one week for male employees.<sup>3</sup>

Provisions to allow unpaid maternity leave of 52 weeks following the birth of a child (where the employee had 12 months continuous services with the one employer) were inserted into federal awards as a result of an Australian Conciliation and Arbitration Commission test case in 1979. The case resulted ultimately in approximately 1.5 million women employed under federal awards being granted the right to unpaid leave.<sup>4</sup> Thus, the 1979 test case and resulting award maternity leave provisions were significant milestones.

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2. Women's Bureau, Department of Labour, 'Maternity provisions', *Women and Work No. 10*, AGPS, Canberra, 1973, p. 8.
  3. *Maternity Leave (Government Employees) Act 1973*, viewed 25 May 2010, <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/3A679BB50F862B56CA25713E001FF710>
  4. S Deery, D Plowman and C Fisher, *Australian industrial relations*, McGraw-Hill, Sydney, 1980, p. 219.

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State jurisdictions followed the 1979 Arbitration Commission decision, either through award variations by state tribunals, or through legislation. For example, provisions for 12 months unpaid maternity leave were inserted into the *Industrial Arbitration Act 1940* (NSW) in 1980, predating similar federal provisions by fourteen years. On the other hand, state governments were less inclined to introduce paid maternity leave for their own employees at the same standard as that applying in the Commonwealth.<sup>5</sup>

The 1979 maternity leave provisions formed the basis of a ‘last resort’ national standard of unpaid parental leave and implemented legislatively in the federal *Industrial Relations Act 1988* (from 1994), carried over to the *Workplace Relations Act 1996*, and to the *Fair Work Act 2009* under the Act’s National Employment Standards.<sup>6</sup>

### More recent background

There has been a general assumption in Australia that paid maternity leave (and thus paid parental leave) should be the responsibility of employers.

The revised Maternity Protection Convention (2000) qualified the 1952 prohibition on employers paying benefits. Article 6.8 states that:

In order to protect the situation of women in the labour market, benefits in respect of the leave referred to in Articles 4 and 5 shall be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. An employer shall not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her without that employer's specific agreement except where:

(a) such is provided for in national law or practice in a member State prior to the date of adoption of this Convention by the International Labour Conference; or

(b) it is subsequently agreed at the national level by the government and the representative organizations of employers and workers.<sup>7</sup>

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5. The differing paid maternity leave standards applying to Commonwealth and State Governments in 2002 is documented in the Joint Submission by the Department of the Prime Minister and Cabinet, the Department of Employment and Workplace Relations and the Department of Family and Community Services to the Senate Employment, Workplace Relations and Education Committee reviewing the Workplace Relations Amendment (Paid Maternity Leave) Bill 2002, July 2002, viewed 8 June 2010, at: [http://www.aph.gov.au/Senate/committee/eet\\_ctte/completed\\_inquiries/2002-04/wrpaiddmatl02/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2002-04/wrpaiddmatl02/submissions/sublist.htm) (submission 20)
  6. *Workplace Relations Act* (now repealed) at section 170KA and Schedule 14; *Fair Work Act* at sections 67 to 85.
  7. ILO, Maternity Protection Convention 2000, Article 6, viewed 8 June 2010, <http://www.ilo.org/ilolex/english/convdisp1.htm>

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Regardless, industrial tribunals have been reluctant to insert paid maternity leave provisions into industrial awards by way of arbitration. Until 2006, in circumstances where employers and unions agreed to paid maternity leave provisions being inserted by consent, federal awards could be varied providing for such leave. At the time of the Senate inquiry into paid maternity leave in 2002, 87 federal awards contained provisions for paid maternity leave. It is now more common for paid maternity leave schemes to be provided as a result of enterprise bargaining, giving the entitlement legal enforceability or through human resources policies of employers. Nevertheless, where such paid maternity leave provisions cannot be secured through these avenues, low paid women in particular are likely to be at a disadvantage when commencing their families. For this reason the Australian Council of Trade Unions (ACTU) indicated its intention to seek the introduction of maternity leave assistance measures in discussions with the then Federal Government in their review of the ACTU-ALP Accord in 1993-94.

The 1995 Commonwealth Budget subsequently introduced a payment termed the Maternity Allowance. It was to be a lump sum payment (then \$840.60) equivalent to six weeks of the Parenting Allowance and available from February 1996. To qualify for the new allowance, a family had to be eligible to receive the then Family Payment (similar to the current Family Tax Benefit Part A) within 13 weeks of the birth. Working and non-working mothers could access the benefit.

Thereafter the case for reviewing options to broaden access to paid maternity leave was put by the Human Rights and Equal Opportunity Commission (HREOC) in its pregnancy and discrimination report, *Pregnant and productive*.<sup>8</sup> The report's recommendations included, amongst others, a proposed review jointly undertaken between HREOC and the Department of Employment and Workplace Relations of funding options for paid maternity leave.

The revised ILO Maternity Protection Convention of 2000 (No 183) includes 14 weeks paid maternity leave of at least two-thirds of the woman's previous earnings (where she had been working). Australia has not ratified the Convention.<sup>9</sup> However, Article 11.2(b) of the United Nations' Convention on the Elimination of all forms of Discrimination Against Women commits signatories to introduce 'maternity leave with pay or with comparable social benefits'.<sup>10</sup> Australia has ratified this convention but maintained (and still maintains) a reservation to Article 11.2(b), which pertains to paid maternity leave.

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8. HREOC, *Pregnant and productive, It's a right not a privilege to work while pregnant*, 1999, pp. 226–229, viewed 25 May 2010,

[http://www.hreoc.gov.au/sex\\_discrimination/publication/pregnancy/report.html](http://www.hreoc.gov.au/sex_discrimination/publication/pregnancy/report.html)

9. ILO Convention 183, articles 4, 5 and 6, viewed 25 May 2010,

<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C183>

10. United Nations, *Convention on the Elimination of all forms of Discrimination Against Women*, viewed 25 May 2010, <http://www.austlii.edu.au/au/other/dfat/treaties/1983/9.html>

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The paid maternity leave debate has been raised frequently in Parliament, initially through questions of non-government parties seeking the Howard Government's response to *Pregnant and productive*. In turn, the Howard Government supported certain recommendations of *Pregnant and productive*, reflected in its Sex Discrimination Amendment (Pregnancy and Work) Act 2003. At issue has been whether a paid parental leave entitlement should be provided to all workers, or by an enterprise to enterprise approach. Community pressure to resolve the paid maternity leave issue was clearly building.

HREOC's former Sex Discrimination Commissioner Pru Goward presented five options for extending paid maternity leave in an interim report, *Valuing parenthood*, in April 2002, followed up by a final report, *Time to value*, later that year.<sup>11</sup> The Australian Democrats developed a paid maternity leave proposal for the 2001 election, and tabled the Workplace Relations Amendment (Paid Maternity Leave) Bill in May 2002 as a proposed amendment to the Workplace Relations Act.

### The Baby Bonus

A tax concession termed the First Child Tax Refund, referred to as the Baby Bonus at the time and administered by the Australian Taxation Office, was introduced in 2002. It provided mothers with tax refunds of up to \$2500 per annum for five years after the birth of their first child.

From July 2004, a new Maternity Payment replaced both the Maternity Allowance and the First Child Tax Refund. The Maternity Payment was paid as a lump sum of \$3000 for each newborn child and each child adopted at less than 26 weeks of age. No means test or work attachment test applied. The rate of payment was increased to \$4000 in July 2006 and to \$5000 in July 2008. The Maternity Payment was introduced as the centrepiece of the 2004 Commonwealth Budget and was seen as the Howard Government's response to the HREOC reports calling for paid maternity leave, as well as a response to the then Opposition's proposal for a universal Baby Care payment.<sup>12</sup>

Both major political parties were reserved on maternity policy in the course of the 2007 federal election debates. The issue of paid parental leave remained a key political issue over the past decade, and despite the focus on the issue, the percentage of female employees receiving some form of paid maternity leave only increased from 38 per cent of female employees in 2000 to 44.9 per cent in 2008.<sup>13</sup>

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11. HREOC (now Human Rights Commission) *Valuing parenthood: options for paid maternity leave—Interim paper 2002*, viewed 26 May 2010  
[http://www.hreoc.gov.au/sex\\_discrimination/paid\\_maternity/pml/index.html](http://www.hreoc.gov.au/sex_discrimination/paid_maternity/pml/index.html)
  12. S O'Neill, *Paid parental leave*, op.cit.
  13. *Ibid*, p.13.

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## Post 2007 election

Upon winning the 2007 election, the new Rudd Government referred an inquiry into means of parental assistance to the Productivity Commission in early 2008. The Productivity Commission released a draft report in 2008, recommending that the Government introduce 18 weeks of publicly-funded paid postnatal parental leave to be shared between parents, plus two weeks paid leave for fathers or same sex partners.<sup>14</sup>

The Rudd Government announced on Mothers' Day 2009 that it would introduce Government-funded PPL. The announcement took the form of the Government's response to the Productivity Commission's draft PPL report.<sup>15</sup> The 2009 Commonwealth Budget consequently provided \$731 million over five years to fund the new paid parental leave (PPL) scheme. The proposed funding for the scheme is based on the beneficiary trading off a number of payments, particularly the Baby Bonus (the Maternity Payment was formally renamed the Baby Bonus in 2007). Key points of the proposed PPL scheme are:

- as noted above, the scheme is to commence from 1 January 2011 and pays 18 weeks PPL at the minimum wage (\$569.90 from 1 July 2010) for primary care givers earning less than \$150 000 annually. A person receiving PPL for 18 weeks would receive \$10 258.20
- the estimated cost of the scheme is \$260 million a year, with an anticipated 148 000 primary care givers to be eligible each year
- in most cases the new statutory PPL scheme will be delivered through employers, with the Government to pre-pay them to 'avoid cash flow pressures'. To be eligible, parents would need to have worked continuously for at least 10 of the 13 months prior to the expected birth or adoption date
- part-time workers will receive the full weekly rate of payment and low income earners should pay little, if any, tax on PPL. The weekly payments will be treated as taxable income and will affect entitlement to family assistance payments, but not to income support payments such as the parenting payment, disability support payment and Newstart allowance and

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14. Productivity Commission, *Paid parental leave: support for parents with newborn children*, draft inquiry report, 29 September 2008, viewed 18 May 2010, [http://dpl/Books/2008/PC\\_parentalsupport.pdf](http://dpl/Books/2008/PC_parentalsupport.pdf)
  15. J Gillard, W Swan and J Macklin, *Australia's paid parental leave scheme: supporting working Australian families*, joint media release, 10 May 2009, viewed 15 June 2010, <http://www.deewr.gov.au/Department/Publications/Documents/PPLBooklet.pdf>. The Productivity Commission's final report, *Paid parental leave: support for parents with newborn children*, Report No. 47, 28 February 2009, [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0003/86232/parental-support.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0003/86232/parental-support.pdf) was released on 12 May 2009.

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- parents receiving PPL will be ineligible for the \$5000 Baby Bonus (except for multiple births), Family Tax Benefit Part B, dependant spouse, child-housekeeper and housekeeper tax offsets for the 18 weeks.

The Government intends to review the scheme after two years and will then consider any Productivity Commission recommendations that it did not adopt first time around. These include the two weeks paid leave for the child's secondary carer and the proposal that employers make superannuation contributions on the payments.

The Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin provided additional details related to the Rudd Government PPL scheme in her second reading speech for the Bill. These included:

- in any one year, nine per cent of businesses a year would be involved in the scheme, and only three per cent of small businesses
- the Government's scheme could be taken in addition to existing employer funded schemes, either at the same time or consecutively. The Government's scheme is designed to complement and enhance the existing family-friendly arrangements that many employers already offer.
- employers would only provide the parental leave pay for their long-term employees - those with at least 12 months of continuous service. Other women would receive the benefit from the Family Assistance Office (FAO). FAO would determine an applicant's eligibility for the benefit
- employers would not have to change their employee's usual pay cycle, set up any special bank accounts or report back to the FAO. They would have to pay the parental leave to their employee with the appropriate tax deducted
- arrangements allowing employers to opt-out of participation in the scheme until July 1 (six months after the commencement of the scheme) will be introduced in a consequential amendment bill
- parental leave would not result in employees accruing any additional paid leave entitlements, nor would it affect the calculation of notice periods or severance payments, or workers' compensation or accident insurance premiums
- state and territory governments are being consulted to ensure paid parental leave is not subject to payroll tax.<sup>16</sup>

The Federal Opposition released a substantially more generous paid parental leave scheme on 8 March 2010. The policy proposes to provide new mothers with 26 weeks PPL at her full wage or salary capped at an income level of \$150 000. This is to be funded through a

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16. J Macklin, 'Second reading speech: Paid Parental Leave Bill 2010', House of Representatives, *Debates*, 12 May 2010, p.11, viewed 13 May 2010, [http://parlinfo/parlInfo/genpdf/chamber/hansardr/2010-05-12/0044/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo/parlInfo/genpdf/chamber/hansardr/2010-05-12/0044/hansard_frag.pdf;fileType=application%2Fpdf)

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1.7 per cent levy on the taxable income of 3200 companies paying company tax of more than \$5 million—expected to raise \$2.7 billion.<sup>17</sup>

### Pros and Cons of a national PPL scheme

The then Human Rights and Equal Opportunity Commission (now Human Rights Commission) presented five options for extending paid maternity leave in its *Valuing parenthood* report. *Valuing parenthood* included a summary of the main arguments in favour of such a scheme:

- a national paid maternity leave scheme would go some way to addressing the male/female wage disadvantage and compensate for the period of childbirth and time shortly after when women take time off work or reduce their labour force activity
- maternity leave is generally restricted to long term, permanent employees. Industries with high proportions of women and casual workers, such as retail and hospitality, are generally less likely to offer paid maternity leave
- for couples who save money to afford each child, a period of paid leave would enable them to bring forward their decision to have a child. It may also encourage some couples to have an additional child
- paid maternity leave would assist with the direct costs of having children, especially the increased costs faced at the time of the birth of a child
- paid maternity leave encourages women to participate in the labour force and promote their economic security by enabling them to retain skills and expertise and maintain income and
- paid maternity leave would assist to reduce attrition rates, particularly for women, and would encourage women who have had babies to maintain their attachment to the workforce (benefiting the employer by reducing retraining and staff replacement costs).<sup>18</sup>

Examples of arguments made against PPL include:

- on the issue of fertility rates, there is no evidence that paid maternity leave increases the fertility rate—and further, Australia is already in a better position than many other nations to maintain its fertility rate and

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17. Liberal Party of Australia, *The Coalition's direct action plan on paid parental leave*, March 2010, viewed 25 May 2010, <http://www.liberal.org.au/~media/Files/Policies%20and%20Media/Community/Paid%20Parental%20Leave.ashx>
  18. Human Rights and Equal Opportunity Commission, *Valuing parenthood: options for paid maternity leave—Interim paper 2002*, viewed 4 June 2010, [http://www.hreoc.gov.au/sex\\_discrimination/paid\\_maternity/pml/index.html](http://www.hreoc.gov.au/sex_discrimination/paid_maternity/pml/index.html)

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- paid maternity leave would be a major new burden on taxpayers. As such, there is little justification for taxpayers contributing an additional half a billion dollars to mothers in the paid workforce while ignoring all other mothers.<sup>19</sup>

### International context

The OECD released a review of the pros and cons for parental leave (both paid and unpaid) as well as the practices pertaining to the provision of such assistance across OECD countries in its seminal report, *Babies and Bosses*.<sup>20</sup> Since then through the OECD Family Database in the OECD Social Policy Division's Directorate of Employment, Labour and Social Affairs, updates to the 2002 work have been provided.<sup>21</sup>

In most countries it is up to parents to decide which parent takes parental leave. The median period of maternity leave taken (at previous earnings) is about 18 weeks across OECD countries. Maternity leave taken in Australia is shown as about 6 to 7 weeks and recorded, perhaps incorrectly, as unpaid leave (supplemented with employer 'top-ups' as noted below).<sup>22</sup> Some countries, to achieve gender equity objectives (Norway, Iceland and Sweden), have introduced a 'father quota' in parental leave systems. The report also noted that differences in other national child-related policies affect international comparisons of leave systems. These differences include:

- the role of other child payments. For example Australia is one of two OECD countries without paid maternity leave but makes lump-sum payments at childbirth and income-tested family tax benefit payments to families with one earner
- some countries have additional high child benefits to families with very young children or 'home-care payments' to families with very young children who do not use public childcare facilities (Austria, Finland and Norway)
- local governments can provide additional financial support for parents on leave such as the US states of California and New York. In Germany, some jurisdictions make leave payments for a third year above the payments for the first two years provided at Federal level

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19. N Minchin, *Minchin reiterates opposition to taxpayer-funded paid maternity leave and embryonic stem cell research*, media release, 16 August 2002, viewed 6 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FW5776%22>

20. OECD, *Babies and bosses: reconciling work and family life: Volume 1 Australia, Denmark and the Netherlands*, Paris, OECD, 2002, viewed 3 June 2010, [http://dpl/Books/2002/OECD\\_BabiesBosses.pdf](http://dpl/Books/2002/OECD_BabiesBosses.pdf)

21. OECD, *Key characteristics of parental leave schemes* (updated as at 29 March 2009), viewed 3 June 2010, <http://www.oecd.org/dataoecd/45/26/37864482.pdf>

22. *Ibid.*, Chart PF7.1.

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- employer-provided top-up payments are not accounted for and these can sometimes be significant and vary greatly across the OECD.

Notwithstanding the difficulties in comparing countries described above, the PPL scheme proposed by this Bill has a number of important aspects of its design that make it different to most schemes in other OECD countries. These include:

- it is primarily located within the social security system, rather than as part of a workplace based contributory scheme such as social insurance
- it is funded through general taxation revenue, rather than a combination of individual, employer, and government contributions
- it is paid at the minimum wage, rather than at a certain percentage of wage replacement (most OECD countries set a certain percentage of wage replacement, ranging from 50 per cent to 100 per cent of wages)<sup>23</sup>
- it is means tested (to be eligible an applicant's adjusted taxable income must be \$150 000 or less), rather than universal (available to all, regardless of income)

Further, while the proposed Australian scheme is to be paid at around the OECD average of 18 weeks, this is considerably shorter than a number of countries, including Lithuania (88.3), Hungary (72.8), Estonia (62), Sweden (52.8 weeks), Czech Republic (50.3) and South Korea (42.3).<sup>24</sup>

On the one hand, most of the differences outlined above could be said to indicate that the PPL scheme proposed in this Bill is modest by international standards. However, such differences largely could be said to reflect substantial differences between Australia's welfare system and those of other comparable countries.

Broadly speaking, Australia's welfare system has traditionally been based around what is sometimes called the 'Robin Hood' objective: taking from the rich to give to the poor.<sup>25</sup> This objective tends to be associated most strongly with targeted (means tested) approaches to welfare on the grounds that it allows expenditure to be concentrated on those most in need.

In contrast, the primary objective of most other welfare states is what has been called the 'piggy bank' objective.<sup>26</sup> This refers to the objective of providing income maintenance aimed

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23. S Tanaka, 'Parental leave and child health across OECD countries', *The Economic Journal*, vol. 115, 2005, p. 7, viewed 2 June 2010, [http://parlinfo/parlInfo/download/library/jrnart/VY3O6/upload\\_binary/vy3o63.pdf;fileType=application/pdf#search=%22parental%20leave%22](http://parlinfo/parlInfo/download/library/jrnart/VY3O6/upload_binary/vy3o63.pdf;fileType=application/pdf#search=%22parental%20leave%22)
  24. OECD, *Key characteristics of parental leave systems* (updated as at 18 May 2010), OECD family database, viewed 3 June 2010, <http://www.oecd.org/dataoecd/45/26/37864482.pdf>
  25. N Barr, *The welfare state as piggy bank: information, risk, uncertainty and the role of the state*, Oxford University Press, Oxford, 2001.
  26. Ibid.

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at addressing adverse life contingencies (for example, unemployment, disability, sickness). It also refers to redistribution across the life-cycle, either to periods when individuals have greater needs (for example, when there are children), or would otherwise have lower incomes (such as in retirement).<sup>27</sup> The idea is that individuals, either through taxation or participation in social insurance, effectively ‘save’ throughout their lives in order to ensure they are protected against the various risks to their incomes that occur throughout the life course.

Broadly, the piggy bank objective is most associated with universalist and/or encompassing, rather than targeted, welfare systems. Universalism refers to ‘services and benefits available to everyone as a right, or at least to whole categories of people for example, the ‘aged’’.<sup>28</sup> The term, ‘encompassing’, is used to describe welfare approaches that combine universal access with earnings-related benefits (that is, not only do the non-poor participate but this participation is at a level intended to more or less replaces the recipient’s previous income).

The difference between Australia’s welfare state objectives and those of other western countries is reflected in differences in the design features of these systems. Australia’s social welfare programs are provided on a flat rate basis and funded from general taxation, rather than from contributions from workers (as in most other OECD countries). The Australian system of income support differs from those in most other welfare states in that it is not based around social insurance, whereby, for example, the old, unemployed and sick are protected by earnings related income replacement schemes. Further, Australia is unique among Western countries for the extent to which its social welfare programs are means tested. Consequently, Australian welfare benefits are generally lower than in other welfare states.<sup>29</sup>

The international context outlined above, helps to explain many of the tensions, contradictions and controversies surrounding the debate about PPL in Australia. Broadly speaking, PPL fits more directly within the piggy bank approach to welfare in that it is concerned with redistribution across the life cycle (income protection at a time when a parent is unable to work), rather than redistribution from those on high incomes to those on low incomes. As such, an important task for policy makers has been to develop a model of PPL that fits within the existing Australian welfare system framework—or, where it does not, to provide a rationale for any exceptions to the general rule.<sup>30</sup>

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27. P Whiteford, ‘Targeting, redistribution and poverty reduction in OECD countries’, Conference paper, *Welfare state feedbacks: from outcomes to inputs*, Store Restrup Herregaard, Aalborg, Denmark, January 31-February 2 2007, p. 4.
  28. A Elliot, *Is Medicare universal?*, Research note, no. 37, 2002–03, Parliamentary Library, Canberra, 2003, p. 1, viewed 3 June 2010, <http://www.aph.gov.au/library/pubs/rn/2002-03/03rn37.htm>
  29. P Mendes, *Australia’s welfare wars revisited*, UNSW Press, Sydney, 2008, p. 15.
  30. For a discussion of this issue in the context of the ‘middle class welfare’ debate, see L Buckmaster, *Money for nothing? Australia in the global middle class welfare debate*, Research paper, no. 31, 2008–09, Parliamentary Library, Canberra, 2009, viewed 4 June 2010, <http://www.aph.gov.au/library/pubs/rp/2008-09/09rp31.pdf>

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## Committee consideration

The Bill was been referred to the Senate Community Affairs Legislation Committee for inquiry and report by 3 June 2010. The Bill was considered with the Exposure Draft of the Bill (referred to the Senate on 18 March 2010) and the Committee reported on the two references conjointly. Evidence provided in relation to the Exposure Draft was considered and taken into account for both of the inquiries. Details of the inquiry are at [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/index.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/index.htm)

## Key issues

### Duration of leave

As noted above, the Opposition's proposed alternative PPL scheme is for 26 weeks, in contrast to the 18 weeks proposed by the Government. The Australian Greens have also proposed a 26 week scheme.<sup>31</sup>

A scheme of this duration would be consistent with the Productivity Commission's finding that:

- the evidence is most compelling that there are child health and wellbeing benefits from exclusive parental care in the first six months of life and
- leave period for maternal recovery after birth should generally be longer than 12 weeks and could potentially be up to six months.<sup>32</sup>

However, the Commission also argued that there were considerable financial constraints on schemes of six months and longer:

Some participants proposed paid leave of six months to one year. However, while there would probably be some gross benefits from longer leave periods, they entail a substantial increase in the financial burden on those funding the scheme or displace other expenditures by government, including spending on other facets of child welfare and health. Each additional week of leave would cost taxpayers around a net \$50 million after taking account of increased income tax receipts and reduced income-tested welfare payments (and \$115 million for each additional week *before* clawback of such offsets). At some point, the incremental gross benefits would not be worth the

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31. S Hanson-Young, *Six months plus super is the way forward*, media release, 15 March 2010, viewed 7 April 2010, <http://greensmps.org.au/content/media-release/six-months-plus-super-way-forward>. The Australian Greens introduced a Fair Work Amendment (Paid Parental Leave) Bill 2009 to the Australian Senate to provide for 26 weeks paid parental leave at the minimum wage on 13 May 2009. Senate, *Debates*, p. 2640, viewed 3 June 2010, <http://www.aph.gov.au/hansard/senate/dailys/ds130509.pdf>
32. Productivity Commission, *op. cit.*, p. 2.44.

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additional costs of forgone spending in other areas such as higher quality child care or a better health system.

Accordingly, the role for government should be in that period where the evidence of gains is most apparent.<sup>33</sup>

Nevertheless, one avenue to extend the 18 weeks PPL scheme, as noted by the Productivity Commission and reinforced by the Government, is to combine employer-based PPL schemes with the Government's incoming legislative scheme.

Under this combined arrangement it may be possible for the primary care giver to access more than 18 weeks PPL, derived from the proposed legislative scheme and from employers in the form of PPL provisions in enterprise agreements or HR/employer policy. A potential problem facing this strategy is the actual wording of PPL provisions in thousands of agreements or employer policy manuals. Some of these have, for example, made the final week or fortnight's PPL payment conditional on the resumption of duties. Other PPL schemes provide different eligibility criteria to the Government's planned model, such as making PPL accessible once an employee has 2 year's service, in contrast to the Government's planned 10 month service criteria.

### Stay at home mothers

Some contributors to the PPL debate have argued that the Government's scheme should be extended to include mothers not in the paid workforce.<sup>34</sup> While mothers in this category will continue to have access to the Baby Bonus and Family Tax Benefit B (subject to means test), this will be around \$2000 less than the benefit available to mothers in the paid workforce. Note also that while PPL is to be means tested on the mother's income, the Baby Bonus and Family Tax Benefit B are means tested on *family* income. The argument is that this unfairly discriminates between stay at home mothers and those in the paid workforce.

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33. Ibid., p. 2.47.

34. For example, see P Karvelas, 'Boost sought for stay at home mums', *The Australian*, 21 May 2010, viewed 3 June 2010, <http://www.theaustralian.com.au/in-depth/budget/boost-sought-for-stay-home-mums/story-e6frgd66-1225869378041>; S Dunlevy, 'Women divided over paid parental scheme', *Daily Telegraph*, 1 June 2010, viewed 3 June 2010, <http://www.dailytelegraph.com.au/news/national/women-divided-over-paid-parental-scheme/story-e6freuzr-1225873752877>; A Shanahan, 'The mummy wars are far from finished', *The Australian*, 29 May 2010, viewed 3 June 2010, <http://www.theaustralian.com.au/news/opinion/the-mummy-wars-are-far-from-finished/story-e6frg6zo-1225872417200>; J Brown and J Sammut, 'Equal help for stay at home and working mums', *The Australian*, 28 May 2010, viewed 3 June 2010, <http://www.theaustralian.com.au/news/opinion/equal-help-for-home-and-working-mums/story-e6frg6zo-1225872280227>

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The main argument against the proposition that differential treatment of mothers not in the paid workforce is unfairly discriminatory is that PPL is not a form of family assistance but rather a workplace entitlement similar to paid annual or personal leave.<sup>35</sup>

One problem with this argument is that, while employers will be required to disburse payments under the scheme, the model of PPL in this Bill will function more like a traditional social security benefit than a workplace entitlement. That is, it will be funded entirely from general taxation revenue and provided by the Commonwealth Government. Further, it has no direct relationship with actual leave available to women in their workplaces in that it does not provide a statutory entitlement to 18 weeks leave for new mothers. As such, one commentator has described the scheme as essentially a higher baby bonus with a work test.<sup>36</sup>

### Value of benefit

As noted above, the Government's PPL scheme differs from most overseas schemes in that it is to be paid at the minimum wage, rather than at a certain percentage of wage replacement. It also differs from the Opposition's scheme which would be paid at full wage replacement, capped at \$150 000.

One rationale for a wage replacement approach is that, if the main purpose of PPL is to support women during the period in which they have left work to care for a newborn child, the closer this support is to full wage replacement, the more effective this support should be in ensuring a relatively smooth transition between work, home and back to work again. Further, if PPL is to be understood as a workplace entitlement, wage replacement is consistent with the approach to other forms of leave (which are generally paid at full wage, rather than a specified lower rate such as minimum wage).

One argument against the wage replacement model is that it is inconsistent with the general Australian approach to welfare payments outlined above in which benefits are paid at a flat rate and targeted to those most in need. This again highlights the difficulties associated with providing PPL from within the social welfare system. A system in which statutory PPL was provided entirely through employers with generous tax concessions may have made it possible to introduce a scheme with partial or full wage replacement were such an approach regarded as a priority. This is because it would have more clearly emphasised the role of PPL as a workplace entitlement than is possible under the proposed Government scheme.

The Productivity Commission has highlighted the greater redistributive effect of a minimum wage based scheme by noting that such a scheme would provide the most benefit to those on lower incomes. However, it also suggests that there are important

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35. For example, see S O'Brien, 'Maternal pay is not for all, says Susie O'Brien', *Herald Sun*, 1 June 2010, viewed 3 June 2010, <http://www.heraldsun.com.au/opinion/maternal-pay-is-not-for-all/story-e6frfhqf-1225873718216>;

36. A Shanahan, op. cit.

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incentive effects from this, associated with ensuring the most benefit achieved from the money expended. That is, a wage replacement scheme would:

... entail support for high-earning women, who already have strong attachment to the labour force, often receive privately negotiated paid maternity leave, and usually have better access to resources to self-finance leave.<sup>37</sup>

While, on the other hand, a flat rate scheme would ensure that:

... low-income female employees are better off under a paid parental leave scheme than they would be on welfare payments, providing stronger incentives for labour supply by mothers with weaker attachment to the labour force.<sup>38</sup>

Further, the Productivity Commission argues:

For the lowest income earners, paid parental leave of 18 weeks would actually exceed their usual annual income. (A workable scheme must have this consequence for the lowest income people as otherwise they would simply opt out because of the incentives posed by the tax and welfare system.)<sup>39</sup>

Nevertheless, some commentators have suggested that the incentive effects of the Government scheme for low income earners may not be particularly strong. Family policy commentator, Peter Apps has argued that there is not a great difference between the proposed PPL scheme and the Baby Bonus for women at or close to the minimum wage, as the Government's proposed PPL scheme replaces the Baby Bonus but PPL is to be taxed and reduces family tax benefits whereas the Baby Bonus payment does not affect these other entitlements:

For these women (on the minimum wage), the net amount of maternity leave is not much more than the Baby Bonus. If they can't afford to take time off now, paid maternity leave won't help.<sup>40</sup>

In other words, female employees may find the Baby Bonus an attractive alternative to the foreshadowed PPL scheme, depending on their income levels.

A further argument that has been advanced against the full wage replacement scheme proposed by the Opposition is that it will undermine existing employers' schemes. It is

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37. Productivity Commission, op. cit., p. 2.6.

38. Ibid.

39. Ibid., p. 2.7.

40. P Apps, 'Both sides offer poor value for money', Letter to the Editor, *The Australian Financial Review*, 23 March 2010, viewed 4 June 2010, [http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/T79W6/upload\\_binary/t79w60.pdf;fileType=application/pdf#search=%22peter%20apps%22](http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/T79W6/upload_binary/t79w60.pdf;fileType=application/pdf#search=%22peter%20apps%22)

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likely that under the Opposition's scheme, employers would probably seek to terminate private sector PPL schemes, perhaps replacing these with other schemes to assist with child-care such as working from home where feasible and similar arrangements. Businesses would in effect implement the statutory scheme.<sup>41</sup> Public sector PPL schemes could be similarly redrafted (with difficulty) to conform to the incoming legislated scheme, presumably matching the higher quantum of leave with the employee's regular rate of pay.

### Who should pay?

Currently, all PPL in Australia is funded by employers. As noted above, there has been a general assumption that, because it is a workplace entitlement, funding of PPL is the responsibility of employers. However, the Productivity Commission recommended against full direct employer financing for their employees under a national scheme on the grounds that this 'would pose serious risks for businesses, especially small ones, that employed higher proportions of females, and exacerbate discrimination against women of reproductive age'.<sup>42</sup>

The Commission also examined other models such as income-contingent loans and pooled funding drawn from a hypothecated payroll tax but ultimately recommended that a government-financed scheme 'has the virtue of simplicity, spreads the burdens across the whole community, and reduces some of the risks posed by other models'.<sup>43</sup> The scheme recommended by the Commission and adopted by the Government funds PPL from general taxation revenue and offsets from funds not expended on the Baby Bonus and Family Tax Benefit B. Again, this approach is broadly consistent with that applying to other welfare payments in Australia.

The Opposition's scheme would also be Government funded but through a 1.7 per cent levy on large businesses, rather than through general revenue. This probably reflects the need to cover the very substantial additional cost of the more generous (26 week/wage replacement) scheme than it does a rejection of the notion of funding through general revenue. According to the Liberal Party's PPL policy document:

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41. Representatives of the AiG, Woolworths, the Business Council of Australia, the ACTU and Human Rights Commission discussed the future of employer-based PPL schemes in the context of the incoming legislated PPL scheme. J Macklin, *Australia's first Paid Parental Leave scheme—fair for families and fair to business*, media release, Melbourne, 4 May 2010, viewed 15 June 2010, [http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/ppl\\_families\\_business\\_4may2010.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/ppl_families_business_4may2010.aspx)
  42. Productivity Commission, *op. cit.*, p. 2.13.
  43. *Ibid.*

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The Coalition would prefer to fund our Paid Parental Leave scheme from a Budget surplus, but this is not possible due to the large debt and deficits run up by the Rudd Labor Government. Labor's debt and deficits mean that funding the Coalition's Paid Parental Leave scheme through a levy of up to 1.7 per cent on a small number of larger companies is the only way for Australia to achieve a decent Paid Parental Leave scheme in the near future. The next Coalition Government's priority will be to repay Labor's debt. After that we will set about reducing taxes more generally, making it possible that the levy would only be temporary.<sup>44</sup>

Nevertheless, a wage replacement scheme funded entirely from general revenue through the social security system would most likely raise questions about how such a scheme is consistent with Australia's overall welfare framework.

### Position of significant interest groups

#### Human Rights Commission (HRC)

The HRC supports the Bill as 'a sound first stage of achieving a beneficial and equitable scheme of paid leave entitlements for parents in Australia'.<sup>45</sup>

However, the Commission believes that there are gaps in the proposed scheme that must be addressed—some now and some in the near future. These include:

- the Commission would like to see the initial scheme of paid leave independently reviewed after two years in order to measure the impacts of the new scheme, make any necessary improvements and to develop and implement a second stage of paid leave measures over time (the Government proposes a review after three years)
- the Commission would like to see that these reviews are undertaken not only to measure progress and evaluate the impact of the scheme against its objectives, but that they are undertaken with a view to implementing a more substantial package of paid leave measures over time. Where the scheme is to be extended, this would include a review of the funding model
- as part of the review, a second stage of paid leave measures should be assessed to ensure that over time the total scheme provides for:
  - a minimum of two weeks paid leave for fathers and other supporting parents;
  - a full year of paid parental leave that can be shared between parents, to ensure that children receive the care they need at this important early stage

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44. Liberal Party of Australia, *op. cit.*, p. 3.

45. Human Rights Commission, *Inquiry into the Exposure Draft of legislation implementing the Government's announced Paid Parental Leave Scheme*, 13 May 2010, viewed 8 June 2010, [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/submissions.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/submissions.htm) (Submission 86)

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- the year's paid leave to include a minimum of four weeks paid leave for fathers and supporting parents on a 'use it or lose it' basis, to enable more men to be involved in caring during the first year of their child's life and
- leave paid at the rate of at least two thirds of the parent's income, so that more families can afford to take the leave
- the Commission is disappointed with the Government's decision to defer consideration of compulsory superannuation contributions during the period of PPL until a review of the scheme is conducted three years after implementation.

### National Foundation for Australian Women

The Board of the National Foundation for Australian Women generally supports the scheme and recommends that the Bill be passed.<sup>46</sup> It adds that the scheme be clearly identified and agreed as the basic building block onto which future improvements will be added over time as the economy permits. These improvements should include:

- an extension of time to 26 weeks, and the payment of the compulsory superannuation guarantee
- the position of Parliamentary Secretary for Paid Parental Leave and Work-Life Balance be created, supported by a dedicated policy unit;
- the role of the Implementation Working Group be clarified, and implementation issues be quickly identified and referred, if that is the planned role.
- concerns relating to eligibility for all women who have been in the workforce when they become pregnant should be further examined by the Department. Efforts should be made to simplify processes to the extent possible.
- there should be future development of an employer funded system, set firmly in the industrial relations context, payments at income replacement level made from a pool of income from employers and government, with a Government contribution ensuring equity for low income earners.

The Foundation considers that a scheme taking into account these proposals would be workable, equitable and politically defensible.

### Australian Council of Trade Unions (ACTU)

The ACTU supports the Bill but raised the differences in the proposed PPL scheme's 10 month service eligibility requirement compared to the requirement for unpaid parental leave under the National Employment Standards which is 12 months' continuous service

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46. National Foundation for Australian Women, *Submission to Senate Community Affairs Committee inquiry into Exposure Draft PPL Bill*, May 2010, viewed 8 June 2010, [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/submissions.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/submissions.htm) (Submission 14).

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with the same employer.<sup>47</sup> The difference in eligibility means there may be a group of employees eligible for paid leave but not unpaid leave (those employees with more than 10 months service but less than 12 months service), and with no right to return to work following their PPL. It proposes that the eligibility for the National Employment Standards be amended to reflect the PPL work test or alternatively, that changes be made to ensure that those parents eligible for PPL would also be entitled to a corresponding period of unpaid leave.

The ACTU is concerned at the possible interaction of PPL entitlements provided by the Bill and PPL entitlements derived from existing workplace PPL schemes (provided by employers through HR policies or enterprise agreements). It proposes that the Bill include a statutory object that clearly states that the legislated scheme is intended to be in addition to all existing employer paid parental leave entitlements.

The ACTU also contends that in the case of premature arrivals, the expected date of birth should be the key determinant for eligibility to the PPL scheme. It also wants the 'keeping in touch' provisions narrowed to avoid new parents being pressured into attending work to fill staffing gaps. It proposes that keeping in touch provisions apply only for the purposes of professional development, training or providing information relevant to the employee's work. The ACTU also believes that the Bill should include an anti-discrimination provision similar to that in the Fair Work Act to make clear that employers may not discriminate against employees on the basis of a workplace right.

The responsibility for lodging an application for PPL under the proposed scheme falls entirely on the employee, and the ACTU argues that employers should be obliged to provide information to workers on accessing the legislated PPL scheme, similar to information provided in the Fair Work Information Statement. The ACTU proposed that the Bill refer to the Fair Work Act to provide a link between the two pieces of legislation to ensure parents and employers were aware of all their parental leave entitlements and obligations.

The ACTU proposes that the Bill contain an obligation on employers not to appropriate the PPL money for any other purpose than paying the PPL, with penalties attached. Employees should have the right to access their PPL records.

### Australian Chamber of Commerce and Industry (ACCI)

Overall, the ACCI believes that the scheme is reasonable. It says the scheme appears measured, publicly funded, and consistent with what is affordable and necessary for an

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47. Australian Council of Trade Unions, Submission by the Australian Council of Trade Unions to the Senate *Inquiry into the Exposure Draft of the Paid Parental Leave Bill 2010*, May 2010, viewed 8 June 2010, [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/submissions.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/submissions.htm) (Submission 80)

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economy-wide scheme of this nature.<sup>48</sup> However it is opposed to the requirement on employers to be the scheme's paymasters. It also expresses concern at the inherent administrative red-tape and additional costs that will be imposed on firms, particularly on small and medium sized firms.

The ACCI argues that existing paid parental leave arrangements were separate to the proposed paid scheme and a matter for employers and employees to determine. In light of the incoming legislated scheme, however, some employers were likely to amend their existing PPL schemes.<sup>49</sup>

It may well be that some businesses might review and amend existing arrangements in some circumstances.

It proposes that instead of requiring employers to provide the payments to employees, they be allowed to opt-in to doing so. This would effectively extend the existing proposal to delay the requirement on employers until 1 July 2011. The ACCI argues that employers should be allowed to opt-in to the system when it suits their business needs and they are able to 'synergistically deal with the Family Assistance Office'.

If that is rejected, then a third alternative suggested by the ACCI is to provide a 'small-medium sized employer paymaster exemption', based on either annual turnover or fulltime equivalent employees.

### Business Council of Australia (BCA)

The BCA also claims that existing company arrangements will not be eliminated after the government-funded scheme begins on January 1 next year.<sup>50</sup> It argues that while some have argued that by introducing a taxpayer funded scheme, taxpayer dollars will replace employer dollars, the feedback from BCA members shows they are seeking to marry their existing schemes with the new government scheme to ensure benefits for their employees are maximised.

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48. Australian Chamber of Commerce and Industry, *Inquiry into the Exposure Draft of the Paid Parental Leave Scheme Bill 2010*, May 2010, viewed 8 June 2010, [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/submissions.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/submissions.htm) (Submission 65)
  49. The question of the interaction of existing workplace based PPL schemes with the incoming legislated scheme is discussed in the Parliamentary Library's Background Note *Paid Parental Leave*, cited in fn 1.
  50. Business Council of Australia, *Paid Parental Leave Exposure Draft inquiry*, 13 May 2010, viewed 8 June 2010, [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/submissions.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/submissions.htm) (Submission 20)

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The BCA notes that there is widespread acknowledgement of the need to boost participation in the workforce from currently underrepresented groups in the working age populations. One of the largest such groups is women of child-bearing age. Employers and governments alike should be seeking to ensure that both work and family is possible. This scheme is a sensible start and a development well overdue.

### Australian Industry Group (AiG)

The AiG notes that the Bill does not deal with the interaction between the PPL scheme and existing paid parental leave schemes and policies, and argues that the legislation should not venture into this area.

The AiG argues that the design of the PPL scheme means that no changes need to be made to company schemes and policies, and AiG anticipates that employers will not reduce the paid parental leave benefit which they currently provide.<sup>51</sup>

AiG also details the steps an employee needs to make in order to receive PPL:

- an eligible employee makes a claim in the approved form, including providing information about their employer and their employment (section 56)
- after receiving the claim, if a payability determination or an initial payability determination is in force and the [Family Assistance Office] Secretary is satisfied the employer meets the criteria in the legislation, then the Secretary must make an employer determination (section 101)
- if this is made, the Secretary must give the employer and the claimant a written notice advising them of the determination (section 102)
- within 14 days after the date on the written notice of the determination, the employer must give the Secretary an acceptance notice (including bank account details and other required information) or apply for a review of the employer determination (sections 103 and 104)
- an employer declaration does not come into force until the employer gives the Secretary an acceptance notice or its bank account and pay cycle information (section 107)

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51. Australian Industry Group, *Inquiry Into the Exposure Draft of the Paid Parental Leave Bill 2010*, 11 May 2010, viewed 8 June 2010, [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/submissions.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/submissions.htm) (Submission 66)

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- after an employer declaration has come into force the employer must pay the employee the required instalment on each pay day, provided that the employer has been paid enough by the Secretary to fund the instalment (section 72)
- employers must keep records in the prescribed form and provide a record of payment to the employees who are paid instalments (sections 80 and 81).

### Professor Andrew Stewart, School of Law, University of Adelaide

Professor Andrew Stewart argues that the title of the Bill is a misnomer, since the proposed scheme does not confer any entitlement to paid leave, as that concept would generally be understood.

He further argues that, if the intent of the legislated scheme is not to relieve an employer of an obligation to make a payment under an existing industrial instrument—or if employers could choose to reduce their own financial obligation via the Government payment—then either course should be spelled out in the legislation.<sup>52</sup>

Professor Stewart adds that if the intention is that employers may not offset any money received against existing obligations it does seem to have the consequence that an employee could take a period of paid leave funded by their employer and then insist on receiving the government payment in addition, unless there is something in the legislation to prevent this as it would run counter to the stated intention of encouraging the employee to take extra time off.

### **Coalition/Greens/Family First/ policy position/commitments**

As noted above, the Coalition has proposed an alternative scheme to that of the Government but has indicated that it will allow the Bill to pass the Senate.<sup>53</sup>

The Australian Greens have criticised the Government's scheme on the grounds that:

- 'it won't give parents an actual right to leave from their jobs or guarantee them their job back'
- it should be 26 weeks and
- it should include superannuation.<sup>54</sup>

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52. A Stewart, Senate Community Affairs Committee *Inquiry into the Paid Parental Leave Bill 2010*, May 2010, viewed 8 June 2010, [http://www.aph.gov.au/senate/committee/clac\\_ctte/paid\\_parental\\_leave/submissions.htm](http://www.aph.gov.au/senate/committee/clac_ctte/paid_parental_leave/submissions.htm) (Submission 92)

53. 'Call for clarity on parental leave payment', *The Australian*, 3 June 2010, viewed 4 June 2010, <http://www.theaustralian.com.au/news/nation/call-for-clarity-on-parental-leave-payment/story-e6frg6nf-1225874726634>

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The Greens have announced that they will move amendments to the Government's scheme in the Senate designed to 'get a better outcome for parents on this issue'.<sup>55</sup>

Senators Xenophon and Fielding have each indicated that they support the concept of PPL but will seek to make changes to the Government's scheme by amending the Bill in the Senate.<sup>56</sup> It is not clear what amendments they will be seeking to make, though Senator Fielding has made it clear that he favours the inclusion in the scheme of mothers not in the paid workforce.<sup>57</sup>

## Financial implications

According to the Explanatory Memorandum, the PPL scheme will have a *net* cost to the Government of \$1.042 billion over five years.

2009-10	2010-11	2011-12	2012-13	2013-14
\$13.6m	\$196.7m	\$269.8m	\$279.0m	\$283.3m

## Main provisions

The Bill provides for the introduction of the *Paid Parental Leave Act 2010*.

### Eligibility

**Clauses 8 to 10** provide that parental leave pay is payable to a person if the Secretary has made a determination. The determination can only be made if the person is eligible and has made a claim.

Claimants can be primary, secondary or tertiary claimants as set out in **clause 54**. Primary claimants will usually be the birth mother or adoptive parent. Secondary claimants will usually be the partner of the primary claimant who is taking over care of the child at some point during the 18 weeks of PPL. Tertiary claimants will be a person who takes over from a secondary claimant in exceptional circumstances. However both primary and secondary

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54. S Hanson-Young, *A strong Paid Parental Leave scheme*, media release, 25 May 2010, viewed 8 June 2010, <http://sarah-hanson-young.greensmps.org.au/content/strong-paid-parental-leave-scheme>

55. Ibid.

56. J Kelly, 'Abbott playing politics with paid parental leave, Rudd warns', *The Australian*, 10 March 2010, viewed 7 June 2010, <http://www.theaustralian.com.au/politics/abbott-playing-politics-with-paid-parental-leave-rudd-warns/story-e6frgczf-1225839164646>

57. P Karvelas, 'Call for clarity on how parental leave scheme will work', *The Australian*, 3 June 2010, viewed 7 June 2010, <http://www.theaustralian.com.au/politics/call-for-clarity-on-how-parental-leave-scheme-will-work/story-e6frgczf-1225874732948>

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claimants could also be people who are not the usual claimants due to exceptional circumstances.

**Clause 11** provides that the determination must specify the period (PPL period) over which the parental leave pay is payable. The PPL period must be between the day of the child's birth and the day before their first birthday. If the claim by the primary claimant is made before the child is 28 days old the PPL period may start on the day of the child's birth or on a date nominated by the claimant, provided the birth has been verified. If the claim is made later, the PPL period starts on the date of the claim or on a date nominated by the claimant, provided the birth has been verified.

The PPL period ends 125 days after the start of the period or on the day before the child's first birthday, depending on which comes first.

**Clause 13** provides that a primary claimant must be eligible on each day of their PPL period. Consequently the PPL period may be shorter than the maximum allowed if for example the primary claimant returned to work.

**Clauses 14 to 17** provide for situations where secondary and tertiary claims are made.

**Clause 18** provides that PPL is not payable if the birth of a child has not been verified. In most cases this would involve registration of the birth with the relevant State or Territory authority.

**Clause 20** provides that in the case of a multiple birth PPL can only be paid once.

**Clause 31(2)** provides that a person is eligible for PPL on a day if:

- they satisfies the work test, and
- they satisfy the income test, and
- they satisfy the residency test, and
- they are the primary carer of the child, and
- they have not returned to work, and
- neither they, their partner nor a former partner was entitled to a baby bonus for the child.

**Clause 31(3)** provides that a person is also eligible for PPL if the child was stillborn and they were otherwise eligible for PPL.

**Clause 31(4)** provides that a person is eligible for PPL if:

- they satisfies the work test, and
- they satisfy the income test, and

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- they satisfy the residency test, and
- they satisfy the conditions prescribed by the PPL rules made by the Minister under section 298.

The PPL rules allows for eligibility criteria to be made to provide for exceptional circumstances.

## The work test

**Clause 32** sets out the method for working out whether a person satisfies the work test.

Step 1 is to work out the person's 'work test period' under **clause 33**. It is the 392 days immediately before the day the child is born. The day the child was expected to be born can be used if it is born later than that day or if the primary claim is made before the expected date of birth. For secondary claimants the period is 392 days before the person became the primary carer of the child.

Step 2 is to work out the number of days in the work test period that the person has performed 'qualifying work' as defined in **Clause 34**. Qualifying work is at least one hour of work or paid leave on a day. **Clause 35** sets out what is paid work. It is broadly defined to include self-employment, and 'work for another entity for remuneration or other financial benefit'. The PPL rules will prescribe what qualifies as paid work and paid leave in more detail.

Step 3 is to work out whether any days in the work test period that were not work days fall within a 'permissible break' as defined in **Clause 36**. A permissible break between two qualifying work days can be from one to 56 days long.

Step 4 is to work out if there is a 'qualifying period' of 295 consecutive days within the work test period that consists of days on which qualifying work was performed or are permissible breaks.

Step 5 is to work out whether there were 330 hours of work in the qualifying period.

The work test is satisfied if all these steps are met.

## The Income Test

**Clauses 37 to 41** set out the income test. The adjusted taxable income of the person claiming PPL must be below a PPL income limit of \$150 000 per annum. The definition of adjusted taxable income for this income test is the same as it is for the Family Tax Benefit and other family assistance income tests. It includes:

- taxable income,
- the value of any adjusted fringe benefits,

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- target foreign income (including tax exempt foreign employment income),
- total net investment loss,
- tax free pension or benefit and ,
- reportable superannuation contributions.

It excludes 100 per cent of the individual's child maintenance expenditure.

The income year to be tested is that which ended before the earlier of the date of claim or the date of the birth of the child (or the date that a secondary claimant became the primary carer of the child).

**Clauses 42 to 44** provide for the indexation of the PPL income limit on 1 July each year in line with movements in the Consumer Price Index (CPI).

### The residency test

**Clauses 45 and 46** provide for eligibility to be limited to people who are Australian residents, special category visa holders (usually New Zealand citizens) and holders of visas that allow qualification for Special Benefit (those for humanitarian and safe haven purposes).

If a person has been absent for over three years from Australia that would not be eligible.

### Primary carer

**Clause 47** provides for the primary carer of a child to be the person who has care of the child and meets the child's physical needs more than anyone else during the period that they are claiming PPL.

### Return to Work

**Clause 48** provides that a person has returned to work if they perform one hour of paid work unless it is:

- one of up to ten 'keeping in touch' days allowed to person who is not self-employed, or
- is for the purposes of overseeing a business or an occasional administrative task for a business where the person is self-employed.

### Payment of Instalments

**Clauses 63 and 64** deal with the payment of PPL in instalments by employers or the Family Assistance Office (FAO). PPL must be paid in instalments which should be paid

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on the person's usual payday if paid by an employer. If paid by the FAO instalments will be fortnightly.

**Clause 65** specifies the amount of instalments. Instalments would be the total of the daily national minimum wage amounts for each weekday during the instalment period that are also PPL days (those days that are within the person's PPL period of eligibility). The daily amount should be 7.6 times the hourly rate of the national minimum wage in operation on each day.

**Clauses 66 to 70** deal with deductions from instalments. The following deductions are permitted:

- A deduction authorised by the person,
- PAYG income tax withholdings,
- Child Support, and
- Deductions from secondary claimant instalments to repay primary claimant debts to the Commonwealth.

**Clauses 72 to 74** specify that employers must pay instalments if an employer determination is in force and the employer has been paid enough by the FAO to fund the instalment.

**Clauses 80 to 82** set out the obligations of employers with regard to recordkeeping, information provision to employees receiving PPL and notification of change of circumstances to the FAO.

**Clauses 86 to 89** set out the situations where the FAO would pay instalments. They are:

- No employer determination has been made,
- The employer determination is under review,
- The employer determination has been revoked, or
- The Secretary has referred a contravention by an employer relating to payment of instalments to the Fair work Ombudsman.

**Clause 99** provides that a period of unpaid leave should not be considered paid leave just because PPL is being paid. This ensures that entitlements such as annual leave or redundancy rights do not accrue unless the person is receiving paid leave.

**Clauses 100 to 115** set out the mechanics of making employer determinations.

**Chapter 4, clauses 116 to 157** deals with various measures relating to compliance and enforcement of the proposed Act. Protection of information and confidentiality are dealt with, and it will be an offence for a person to obtain protected information if that person is not authorised to obtain that information (**clause 129**).

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The Secretary can refer matters to the Fair Work Ombudsman for investigation if the Secretary has reason to believe that an employer has not complied with certain provisions (**clause 143**), and the Fair Work Ombudsman can commence proceedings if a person has contravened clause 70 (unauthorised deductions from instalments) or Part 3-2 (payment of instalments by an employer). (**clause 141**).

Chapter 4 also provides the mechanisms for recovery of debts due to overpayment or mispayment, and for the writing off and waiver of debts.

**Chapter 5** is the review of decisions Part of the Bill, and provides for internal review of decisions initially, and then for the Social Security Appeals Tribunal to have jurisdiction for review of certain decisions. It sets out the procedures to be followed by the Tribunal. Appeals can be made to the Federal Court on a question of law or questions of law can be referred to the Federal Court (**clause 259**). The Administrative Appeals Tribunal can review certain decisions of the Social Security Appeals Tribunal (**clauses 260-269**).

**Clause 275** sets out how the provisions of the proposed Act are to be read in the case of adoption. In general references to date of birth are to be read as references to date of placement of the child with adoptive parents. The child must also be under the age of 16 years as at the date of adoption.

**Clauses 298 and 299** provide the Minister with the authority to make the PPL rules by legislative instrument. The PPL rules will mainly cover unusual and exceptional circumstances not specifically catered for in the main act so that people do not miss out on entitlement to PPL unnecessarily. The PPL rules will also cover minor administrative matters.

## Concluding comments

This Bill proposes to establish Australia's first national PPL scheme. Currently, while the Australian Government provides some assistance for the costs associated with newborn or adopted children, it is one of only two OECD countries without a specific PPL scheme.

There has been significant debate about certain aspects of the scheme, including:

- the duration of leave—for example, the Opposition and the Australian Greens have argued that the scheme should be 26 weeks, rather than 18 weeks
- eligibility—for example, Senator Fielding has argued that the scheme should include mothers not in the paid workforce
- the value of the benefit—for example, the Opposition has argued for a wage replacement scheme, in contrast to the Government's proposal to pay at the level of the minimum wage

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- the question of how the scheme should be funded—for example, the Opposition has proposed a 1.7 per cent levy on large businesses, in contrast to the Government’s proposal to fund from general tax revenue.

Further, significant interest groups and other commentators have highlighted the lack of clarity about the interaction of the PPL scheme in this Bill with existing employer provided parental leave entitlements (both paid and unpaid).

While the Opposition has proposed an alternative scheme, it has indicated that it will allow the Bill to pass the Senate.

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