

**SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS  
COMMISSION**

**SUPPORTING WORKING PARENTS:  
PREGNANCY AND RETURN TO WORK NATIONAL REVIEW**

31 January 2014



# SUPPORTING WORKING PARENTS: PREGNANCY AND RETURN TO WORK NATIONAL REVIEW

## 1. Introduction

- 1.1 The Australian Industry Group ('Ai Group') makes this submission to the Australian Human Rights Commission ('AHRC') in response to the *Supporting Working Parents: Pregnancy and Return to Work National Review* ('Review').
- 1.2 Ai Group is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, and other industries. The businesses which we represent employ more than 1 million people.
- 1.3 The issues of pregnancy, parental leave and return to work are important to Ai Group and its members. This is demonstrated by the participation of Ai Group's Chief Executive, Innes Willox, on the reference group for the Review, and the active involvement of Ai Group members during the face-to-face consultations jointly facilitated by the AHRC and Ai Group in October and November 2013.
- 1.4 This submission specifically responds to the guiding questions set out in the online questionnaire for employer, business and industry associations, as well taking into account the objectives of the Review.

## **2. Employer experiences in relation to pregnancy, parental leave and return to work**

- 2.1 Ai Group strongly supports the elimination of discrimination in relation to pregnancy in the workplace, parental leave and return to work. This view is shared by our membership at large.
- 2.2 Nonetheless pregnancy, parental leave and return to work can present practical challenges to some of our member companies for which they seek our support and advice.
- 2.3 Ai Group provides support to employers about managing pregnancy, parental leave and return to work in a number of ways, including providing advice to those who seek it, running training sessions for employers and circulating information to employers via our publications and compliance advice services.
- 2.4 Employers often seek specialist advice from our workplace relations advisers to ensure that they comply with anti-discrimination and workplace relation laws when managing a pregnancy, parental leave or return to work issue, either because there is difficulty or some ‘shuffling’ required to accommodate an employee’s request. For example, in some manufacturing workplaces that operate on a 24 hour roster, accommodating particular working hours requested by an employee returning to work may be difficult because it would require a change to the entire roster and thereby affect the working hours of other employees. However, those employers that reported such difficulties indicated that they would use their best efforts to reach a ‘happy medium’ for the employee and the workplace.
- 2.5 Usually the members with whom we have provided assistance on such issues are acutely aware of their obligations arising under the *Sex Discrimination Act 1984* (Cth) (*‘Sex Discrimination Act’*) and State and Territory anti-discrimination laws. They are also typically aware of the key entitlements of employees under the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*) including parental leave, the right to request flexible work arrangements and the general

protections which prohibit an employer taking adverse action against an employee for a discriminatory reason. For those members unfamiliar with all of their obligations, usually smaller employers, we provide information and assistance to educate them on the law.

- 2.6 Ai Group also provides initial advice to members via its BizassistInfoline service. Since 1 July 2013, Ai Group's BizassistInfoline advisers have taken over 600 calls on the topic of pregnancy, parental leave and return to work. The bulk of these queries relate to parental leave entitlements under the Fair Work Act and the Government funded Paid Parental Leave scheme.

### **3. Challenges arising from pregnancy at work, parental leave and return to work**

- 3.1 Ai Group's membership is varied. We represent small, medium and large businesses from a variety of industries, both blue collar and white collar.
- 3.2 The challenges experienced by employers in respect of pregnancy, parental leave and return to work, are often influenced by the size of the employer, the type of industries the employer operates in and the work usually undertaken by the relevant employee. Furthermore, the level of knowledge and understanding of issues relating to pregnancy at work, parental leave and return to work, as well as the leadership style and personal experiences of the relevant manager, can heavily influence the employer's response to any challenges that may arise when dealing with a pregnant employee, parental leave or return to work.
- 3.3 The most common challenges experienced by our members are in respect of employees returning to work from a period of parental leave.
- 3.4 A common return-to-work challenge reported by employers that operate in blue collar industries with regular shift arrangements in place, is dealing with requests for flexible work from returning employees that conflict with existing rostering arrangements. These requests can be very difficult to accommodate

without impacting the entire roster and the arrangements of other employees that work within that roster. The difficulty of accommodating flexible working hours at a workplace that operates under regular shift arrangements is sometimes compounded by inflexibilities that appear in modern awards and enterprise agreements.

- 3.5 The challenge regarding rostering and the accommodation of flexible hours do not arise to the same extent for organisations which predominantly employ professional, white collar employees. The main reasons for this are that flexible working hours are more easily accommodated and options such a job-share or working from home are more accessible to both the employer and employee.
- 3.6 Nonetheless, some smaller employers, particularly those with 15 employees or less, find it challenging to accommodate requests for part-time work in circumstances where the employee, prior to parental leave, was employed on a full-time basis. Many of these employers report that, despite their best efforts, the requests could not be accommodated, or were very difficult to accommodate, because of the direct and indirect costs for the employer in recruiting a new employee to cover the days the returning employee would not be working or allocating some of the work to other employees. This challenge was overcome by one employer through enabling the returning employee to bring her baby into the office so that she could watch over the child while working. This however is not a practical solution for most workplaces because of work health and safety risks and insurance liability implications.
- 3.7 Other challenges experienced by employers include managing situations where the position of an employee on parental leave becomes genuinely redundant. In such circumstances the original position held by the employee no longer exists. This usually raises questions about how to best to manage the redundancy or, if possible, the redeployment of the employee to a similar role within the organisation. Employers sometimes raise practical concerns as to whether it would be best to manage the redeployment of an employee while

she or he is on parental leave or whether it would be best to await the employee's return to work.

#### **4. The inflexibilities in the *Fair Work Act***

- 4.1 There are aspects of the *Fair Work Act* which operate as barriers to providing employees with flexibility when returning to work from a period of parental leave. Employers are often constrained by inflexible provisions that exist within the Act and within modern awards.
- 4.2 The *Fair Work Act* enables employers and individual employees to enter into an individual flexibility arrangement ('IFA') to provide flexibility in respect of the workplace arrangements. If an enterprise agreement or modern award applies to the employment of the particular employee, then the type of IFA is affected by the terms and conditions of the flexibility term within the agreement or award.
- 4.3 Since the commencement of the *Fair Work Act*, employers have reported that many unions routinely refuse to agree to a flexibility term in an enterprise agreement which delivers any meaningful flexibility.
- 4.4 This is consistent with the findings reported by the Fair Work Act Review Panel in its report *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation*, released in 2012. The report cites a finding by the Department of Education, Employment and Workplace Relations (now the Department of Employment) that as of 30 September 2011, of the 14,282 enterprise agreements examined, 92 per cent contained a flexibility term covering four or fewer matters.<sup>1</sup> While, the Fair Work Act Review Panel acknowledged that the sample could not be assumed to represent the character of all specific flexibility terms in enterprise agreements, the 'figures are consistent with the submissions made by employers at the time that in many cases flexibility terms in enterprise agreements are restricting the

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<sup>1</sup> Fair Work Review Panel, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation*, June 2012, pages 105-110 and 163-164.

number of matters over which an IFA may be made'.<sup>2</sup> In response to this trend the Panel recommended that the *Fair Work Act* be amended to require that enterprise agreement flexibility terms permit IFAs to deal with all matters listed within the model flexibility term in the *Fair Work Regulations 2009*, along with any additional matters agreed to by the parties.<sup>3</sup> To date this recommendation has not been implemented.

4.5 Another limitation of IFAs made under the flexibility terms of enterprise agreements is that they may be terminated by either party with 28 days' notice. This short notice period provides little incentive for an individual employee or an employer to enter into an IFA because of the lack of certainty. The Fair Work Act Review Panel recommended that the notice period be extended to 90 days' and last year, as part of the *Modern Awards Review 2012*, the Fair Work Commission gave effect to this recommendation by varying the flexibility term in all modern awards.<sup>4</sup> However, the 28 day maximum notice period still applies to IFAs entered into under the flexibility term of an enterprise agreement.

4.6 We note that the abovementioned recommended changes to the *Fair Work Act* were identified by the new Coalition Government in its *Policy to improve the Fair Work Laws*.<sup>5</sup> The Government has committed to amending the *Fair Work Act* to give effect to the abovementioned recommendations.

4.7 Inflexible provisions in modern awards also create barriers to the accommodation of requests for flexible working arrangements made by employees returning to work from a period of parental leave.

4.8 Currently, six modern awards prevent employees to whom the award applies from working on a part-time basis. These awards are:

- the *Maritime Offshore Oil and Gas Award 2010*;

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> *Modern Awards Review 2012—Award Flexibility*, [2013] FWCFB 2170 and [2013] FWCFB 8859.

<sup>5</sup> The Coalition's Policy to Improve the Fair Work Laws, May 2013.

- the *Mobile Crane Hiring Award 2010*;
- the *Professional Diving Industry (Industrial) Award 2010*;
- the *Road Transport (Long Distance Operations) Award 2010*;
- the *Stevedoring Industry Award 2010*; and
- the *Hydrocarbons Field Geologists Award 2010*.

4.9 Ai Group, as part of the *Modern Awards Review 2012* made an application to the Fair Work Commission (FWC) to enable part-time work in the *Road Transport (Long Distance Operations) Award 2010*.<sup>6</sup> The matter has been heard by the FWC and Senior Deputy President Harrison has reserved her decision.

4.10 The absence of part-time provisions in the abovementioned awards highlight that archaic and inappropriate industrial arrangements still exist in some awards.

4.11 Other, more common, inflexibilities in awards are prescriptive provisions setting out traditional hours of work, for example 8am to 6pm, Monday to Friday, with all work outside of these traditional hours classified as overtime.<sup>7</sup>

4.12 Also, excessive penalty rates in some awards for work carried out on weekends makes it extremely costly for an employer to operate a business on Saturdays and/or Sundays.<sup>8</sup> Many employers decide to operate only from Monday to Friday given the cost of weekend penalties. An employee returning to work might prefer to work on weekends as opposed to weekdays because of shared care arrangements for the child.

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<sup>6</sup> See Fair Work Commission matter AM2012/223.

<sup>7</sup> For example see clause 19 of the Architects Award 2010.

<sup>8</sup> For example see clause 25 of the Fast Food Industry Award 2010.



## 5. Right to request provisions

- 5.1 The *Fair Work Act* includes provisions which give employees with 12 months or more of service the right to request flexible working arrangements if they have a child who is school age or younger.<sup>9</sup> The Act expressly states that a parent or other person who has responsibility for the care of a child and is returning to work after taking a period of parental leave, may request part-time work.<sup>10</sup> The right to request has recently been extended to other employees, including those who are carers as defined in the *Carer Recognition Act 2010*.<sup>11</sup>
- 5.2 Ai Group supports the educative and facilitative nature of the right to request provisions in the *Fair Work Act* as they encourage dialogue between employees and employers about achieving meaningful flexibility in the workplace that works on both a personal level for the employee and an operational level for the employer.
- 5.3 Since the inception of the right to request under the *Fair Work Act*, unions and some other parties have called for compulsory arbitration to be available when an employer has refused an employee's request for flexible work arrangements on reasonable business grounds.
- 5.4 Ai Group strongly opposes the introduction of compulsory arbitration to deal with 'right to request disputes'.
- 5.5 This issue was heavily contested between employer groups and unions during the development of the *Fair Work Act*. During the development of the National Employment Standards, the Government announced that Fair Work Australia (now the Fair Work Commission) would not be empowered to impose requested working arrangements on an employer and that the intention of the right to request provisions is to set out a process for encouraging discussion between employees and employers.<sup>12</sup>

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<sup>9</sup> *Fair Work Act*, section 65.

<sup>10</sup> *Fair Work Act*, subsection 65(1B).

<sup>11</sup> *Fair Work Amendment Act 2013* (Cth).

<sup>12</sup> Department of Education, Employment and Workplace Relations, 'Discussion Paper - National Employment

- 5.6 Ai Group strongly supports this intention. A significant proportion of employers already have in place internal policies and procedures for dealing with flexible work. Employers generally report that the best flexible working arrangements are those that are discussed and negotiated freely and openly with the employee. Difficulties arise when the employee, or the employer, does not enter the discussion about flexible working arrangements with an open mind and an understanding that any arrangements must be workable for both parties.
- 5.7 Cultural changes within workplaces in respect of pregnancy, parental leave and return to work are best achieved by educative and facilitative approaches to the making of flexible working arrangements. Prescriptive and ‘dispute-oriented’ approaches would most likely perpetuate an adversarial, negative response from employers when dealing with requests for flexible working arrangements from employees returning to work.

## 6. General protections

- 6.1 Part 3-1 of the *Fair Work Act* (the ‘General Protections’) prohibits a person, including an employer, from taking adverse action against another person, for example an employee, because that person has a workplace right. Specifically section 351 of the *Fair Work Act* prohibits any adverse action by an employer against an employee for a discriminatory reason, such as pregnancy or family or carer’s responsibilities.
- 6.2 This avenue for recourse against allegations of discrimination is in addition to the complaints procedure to the AHRC under the *Sex Discrimination Act*. That is, the General Protections duplicate the protections under the *Sex Discrimination Act*, but in doing so provides a different forum for a dispute to be dealt with.

- 6.3 The differences between the two forums are stark. For example, the General Protections do not place a cap of the compensation which may be awarded by the courts to an aggrieved party and it requires that the defendant (usually the employer) disprove the allegations made by the applicant (usually the employee). The dispute resolution mechanism under the *Sex Discrimination Act* is different. That jurisdiction does have a cap on compensation and the onus is on the applicant to make his/her case.
- 6.4 This opportunity to forum shop is unfair to employers, and we have on many occasions advocated that the anti-discrimination provisions, aside from those that have been in the Federal workplace relations legislation for many years, should be removed from the *Fair Work Act*.<sup>13</sup>

## **7. Child care as a return-to-work barrier**

- 7.1 Ai Group members have identified aspects of the child care system as a barrier to facilitating a flexible return to work for employees, and in some cases as the reason for some employees taking longer periods of parental leave than others.
- 7.2 Ai Group is providing a submission to the Productivity Commission's inquiry into Child Care and Early Childhood Learning, due on 3 February 2014. In that submission, we will set out employer concerns with the current system and make recommendations to increase the participation of parents, particularly women, in the workforce.
- 7.3 Ai Group is happy to provide a copy of this submission to the AHRC, once it is finalised.

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<sup>13</sup> The predecessor to the *Fair Work Act*, the *Workplace Relations Act 1996*, enabled employees to challenge a termination of employment on discriminatory grounds. The *Fair Work Act* expanded this protection to any 'adverse action' which may occur because of a discriminatory reason.

## **8. Leading practices and strategies**

8.1 A number of Ai Group members have implemented effective practices and strategies for managing pregnancy at work, parental leave and return to work.

8.2 A number of these practices and strategies were shared by employers during the face-to-face consultations jointly facilitated by the AHRC and Ai Group in October and November 2013.

8.3 Some of the leading practices shared by employers were:

- Allocating a manager or ‘buddy’ to an employee who is on parental leave to be responsible for providing the employee with workplace updates, and generally keeping in touch with the employee.
- Implementing a framework for keeping in touch days.
- Inviting employees who are on a period of parental leave back to the workplace to participate in annual performance and salary reviews.
- Implementing buddy or reconnect programs for employees returning to work from a period of parental leave.
- Providing training and educative material about returning to work from a period of parental leave.
- Making development and/or training programs available to employees on a period of parental leave and to those employees who have returned to work on a part-time basis.
- Implementing policies and procedures which enable particular jobs to be performed on a flexible basis. A ‘flexible basis’ includes all methods of working flexibly, such as working alternative or compressed hours, job-sharing and working remotely, not just working part-time.
- Enabling employees to work from home where appropriate.

8.4 Of course not all employers have the capacity to implement the above leading practices at their workplace, but this does not mean that these employers cannot be accommodating to employees in respect of pregnancy, parental leave and return to work, in other ways. For small employers, practices are often devised and implemented on a case by case basis.

## **9. Information and support**

9.1 Ai Group provides support to employers by providing advice and training on all matters regarding pregnancy at work, parental leave and return to work.

9.2 Advice is generally initially provided to employers over the phone via our BIZassistInfoline service and detailed written advice can be provided by experienced workplace relations advisers and lawyers on a fee for service basis.

9.3 Written compliance advice is also provided to all Ai Group members whenever there is a change in relevant laws or regulations.

9.4 Further, Ai Group provides publications and training programs for employers on matters relating to discrimination and equal employment opportunity, as well as leadership training programs that can assist managers to deal with workplace issues related to pregnancy, parental leave and return to work.

9.5 In our experience, most employers respond well to announcements of pregnancy by employees and are supportive throughout the pregnancy, parental leave and return to work, but we acknowledge that sometimes an employer may show mixed feelings of happiness for the employee and apprehension as they contemplate challenges which may arise, for example, considering how they will fill a temporary vacancy in the employee's job while she or he is on parental leave. Our specialised leadership training services can help organisations address these concerns. These range from the provision of one-on-one coaching aimed at helping individual managers develop a positive mindset and approach to supporting working parents, to the

structured facilitation of “working groups” to enable managers to collaborate around the development of proactive strategies.

- 9.6 Ai Group welcomes opportunities to work jointly with the AHRC to better educate employers on matters relating to pregnancy, parental leave and return to work. Such collaboration can be undertaken by the development of joint resources as well as jointly run training sessions and seminars. We look forward to working with the AHRC on such initiatives.

## **10. Recommendations for the National Review Report**

- 10.1 Our experiences in working with employers reveals time and time again that a legislative framework which promotes flexibility and facilitates dialogue and cooperation between employers and employees is very effective in dealing with matters relating to pregnancy, parental leave and return to work. These matters are not industrial in nature; nor should they be. They relate to the individual needs of employees and employers. The *Fair Work Act* should be amended so that employers and employees have more flexibility to enter into agreed arrangements to enable pregnancy, parental leave and return to work to be managed more effectively.
- 10.2 The provisions in the *Fair Work Act* and modern awards which allow IFAs to be made do not provide sufficient flexibility to individual employees or employers. For example, flexibility in relation to annual leave is not on the list of flexibilities available under the Fair Work Commission’s model flexibility clause or under the model flexibility term for enterprise agreements in the *Fair Work Regulations*. Annual leave flexibility is widely recognised as one of the most important types of flexibility valued by employees who are pregnant or returning to work.
- 10.3 The new Federal Government has announced some changes to the *Fair Work Act* to address some of these barriers and it is important that the changes are supported by the Parliament.

- 10.4 In respect of the inflexibilities in modern awards, the Fair Work Commission needs to be open during the current 4 Yearly Review to variations which would deliver more flexibility to employees and employers.
- 10.5 It is also important that employers, managers and employees are provided with ongoing education in respect of pregnancy, parental leave and return to work, to enable them to deal effectively with any challenges that might arise in respect of these matters.
- 10.6 We have set out above the services we provide to employers to educate them on their legal obligations, as well as, providing training and other assistance to help them deal with matters relating to pregnancy at work, parental leave and return to work. In this regard, we would welcome further opportunities to work with the AHRC to assist employers to better manage these issues.
- 10.7 Lastly, limitations in the affordability and availability of child care have been identified by employers and their employees as challenges in respect of pregnancy, parental leave and return to work. As mentioned above we will shortly be making a submission to the Productivity Commission's inquiry into Child Care and Early Childhood Learning and the recommendations in that submission will be relevant to the AHRC for the purposes of this Review.

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