

# Ai GROUP SUBMISSION

***Paid Parental Leave  
Amendment (Improvements  
for Families and Gender  
Equality) Bill 2022***

**The Senate Standing Committee on  
Community Affairs**

30 January 2023

**Ai**  
GROUP

## **About Australian Industry Group**

The Australian Industry Group (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, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

## Introduction

Ai Group welcomes the opportunity to lodge a submission regarding the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022 (the Bill)* currently before the Community Affairs Legislation Committee. If passed, the Bill would amend the *Paid Parental Leave Act 2010 (Cth) (PPL Act)*.

Specifically, the Bill:

- Extends Government-funded parental leave pay (**PLP**) from 18 weeks to 20 weeks by combining the current maximum of 18 weeks parental leave pay with the current 2 weeks of dad and partner pay. The 2 weeks' pay added to the 18 weeks is to be taken on a 'use it or lose it' basis by each claimant. The separate dad and partner pay will be abolished.
- Removes the requirement that only the birth mother can apply for PLP and permits a larger cohort of defined persons to apply for PLP and removes the categories of primary, secondary and tertiary carers.
- Replaces the current individual income threshold of \$156, 647 for an eligible primary claimant to PLP with a \$350,000 family income limit.
- Removes the current limitation of 6 weeks (30 days) on the portion of PLP that can be taken as flexible PPL days, allowing claimants to take the PLP in multiple blocks, including for ad hoc single days, within 2 years of the birth or adoption of the child. The current requirement on eligible claimants to not return to work is also removed.
- Alters the application of employer determinations to require employers to pay the claimant instalments of PLP if 40 flexible PLP days are taken consecutively as weekdays as a continuous flexible period before the child's first birthday or anniversary of care.

The Australian Government<sup>1</sup> has announced that it will vary its paid parental leave scheme by increasing the current maximum 18-week quantum to 26 weeks by 1 July 2026 via staged increments of 2 weeks each year over the next 4 years. The Bill forms the first step of that policy objective.

The Bill presents worthwhile and important changes to the Government's paid parental leave scheme under the PPL Act as it relates to Australian families and broader equality.

While Ai Group broadly supports key principles of the Bill, the Bill proposes some important inconsistencies with the *Fair Work Act's 2009 (Cth) (FW Act)* unpaid parental leave provisions, particularly as they relate to flexible parental leave pay. A range of the Bill's provisions as they relate to PLP eligibility and being absent from work, are unlikely to be effective until these matters in the FW Act have been addressed.

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<sup>1</sup> [Media Release, Prime Minister of Australia, 15 October 2022](https://www.pm.gov.au/media/boosting-parental-leave-enhance-economic-security-support-and-flexibility-australias-families), <https://www.pm.gov.au/media/boosting-parental-leave-enhance-economic-security-support-and-flexibility-australias-families>

On that basis, we anticipate that some level of amendment to the FW Act by the Australian Government would be contemplated. However, it appears that any intention to amend the FW Act to account for the Bill and the nature of any such amendments has not been publicly confirmed by the Australian Government at the time of preparing this submission.

As a general principle, employers need a stable framework where both the FW Act and PPL Act work cohesively together and consider the impact on employers, workplaces as well as employee parents. This is particularly important for employers who have implemented, or are considering the implementation of their own employer-funded parental leave schemes where both the FW Act and PPL Act form a baseline structure underpinning how these more beneficial schemes may operate.

In the absence of whether, or how the FW Act's unpaid parental leave provisions will change, Ai Group's support for the Bill should not be construed as support for any associated and unseen amendment to the FW Act's unpaid parental leave provisions. Any subsequent FW Act amendment should attract careful consideration as to the impact on employers, co-workers and replacement employees, in addition to the needs of individual families.

## **Ai Group's position on Paid Parental Leave Schemes**

Childbirth and raising a family are fundamental societal and community matters that should be afforded appropriate public policy attention. A Government-funded paid parental leave scheme is an important mechanism to financially support new parents care for infant or adopted children for periods they are not at work. Ai Group was involved in the development of the *Paid Parental Leave Act 2010 (Cth)* and supports the efforts of the previous and current Government to reform the Commonwealth paid parental leave scheme.

Specifically, Ai Group supports a Government-funded paid parental leave scheme that:

- provides equitable access to PLP for all parents and in turn supports infant development and bonding;
- considers a 'use it or lose it' portion of parental leave as a counter-balance to the well established trend of PLP generally being accessed by one parent – typically the mother;
- considers the adjustment of the income test to provide more equitable access to households on similar income levels regardless of whether the higher-income earner was the mother or father;
- is sensitive to the regulatory burden on business;
- works cohesively with the FW Act to ensure employers can easily administer obligations under both the PPL Act and the FW Act;
- enables employers to easily build their own employer-funded schemes with the PLP operating as a baseline safety net framework; and
- is workable for employers in managing associated parental leave absences.

## **The new quantum of PLP and abolishing the separate dad and partner pay**

The Government has announced that it will vary its paid parental leave scheme by increasing the current maximum 18-week quantum to 26 weeks by 1 July 2026 via staged increments of 2 weeks each year over the next 4 years.<sup>2</sup>

Provided that associated legislative provisions around the taking of the increased quantum of Government-funded PLP remains workable for employers and is sensitive to the regulatory burden on business, Ai Group is broadly supportive of this policy.

The Bill's abolition of the 2-week separate dad and partner pay entitlement and the addition of 2 weeks to the current quantum of 18 weeks of PLP signals that PLP is an entitlement for all parents, regardless of gender, in respect of the child born or adopted. This is an important equitable outcome that is discussed further below.

The Bill is also the initial step of legislating the first stage of an increased PLP quantum to a maximum of 20 weeks provided that each parent has used a minimum of 2-weeks on 'a lose it or use it' basis.

Considering the Government's announced further staged increases to the PLP quantum, it can reasonably be expected that further legislation will be required. Other than the Bill's provisions relating to the maximum quantum of PLP, we have assumed that the balance of the Bill's provisions, (if they are passed by Parliament), will largely remain in place as part of the paid parental leave scheme operating at 26 weeks of PLP.

However, if this is not the Government's intention then Ai Group requests that the Government clearly articulate how the scheme will change during the transitioning period and beyond. This information will also make it easier for employers to plan how they will modify or create their own supplementary employer-funded schemes to operate in parallel with the Government's paid parental leave scheme.

## **PLP calculation rate to support employer-funded leave**

The extended quantum of PLP will continue under the Bill to be calculated at the rate of the daily national minimum wage. This is consistent with the original purpose of the PPL Act being to provide a Government-funded entitlement calculated at the minimum wage, enabling employers who were able, to provide top-up payments or pay the employee's full rate of pay for a relevant period of parental leave taken in accordance with the employer's own parental leave scheme or other paid leave entitlements.

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<sup>2</sup> [Media Release, Prime Minister of Australia, 15 October 2022](https://www.pm.gov.au/media/boosting-parental-leave-enhance-economic-security-support-and-flexibility-australias-families), <https://www.pm.gov.au/media/boosting-parental-leave-enhance-economic-security-support-and-flexibility-australias-families>

In other words, the Government PLP Scheme and any applicable employer-funded schemes were intended to operate in conjunction for working parents of newborns or adopted children.

The supplementary nature of PLP with employer-funded leave is reflected in current section 3A(3)PPL Act which states that:

(3) The financial support provided by this Act is intended to complement and supplement existing entitlements to paid or unpaid leave in connection with the birth or adoption of a child.

The Bill preserves this subsection, allowing employees and employers a greater number of options in how parental leave and associated payments can be structured to best suit different circumstances for families.

Ai Group supports this approach to how PLP and any employer-funded parental leave interact. We note that data from the Workplace Gender Equality Agency (**WGEA**) have shown the consistent trend of an increasing number of employers creating their own paid parental leave schemes. Most recent reporting data shows this figure at 62% of reporting employers (those employers with 100 or more employees) offer paid parental leave, being an increase from 60% in the previous year.<sup>3</sup>

## **More equitable access to PLP to support infants and all parents**

The FW Act's unpaid parental leave provisions have been framed as gender-neutral for more than a decade, yet we only see a very small percentage of fathers and partners take extended parental leave. Accessing the leave is highly gendered in favour of birth mothers.

A key barrier to fathers and partners taking extended parental leave can be linked to the current requirement that PPL must attract a primary claimant who, subject to some exceptional circumstances, must either be the birth mother or an adoptive parent. Fathers and partners are excluded and may only be eligible for PLP as a secondary or tertiary claimant, or, if DAPP is applied for separately. The effect of the current threshold of primary claimant unfairly limits infant bonding to one parent and increases the likelihood that that same parent will disproportionately carry ongoing caring responsibilities and associated unpaid domestic work.

The Bill removes the current definitions and categories of primary, secondary, tertiary claimants or DAPP claimants such that now a claimant is any person covered by section 54 who has an effective PPL claim, or a person who meets the threshold of a special PPL claim in section 54(2).

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<sup>3</sup> [Australia's Gender Equality Scorecard, Key Results from the Workplace Gender Equality Agency's Employer Census, Workplace Gender Equality Agency, December 2022, p.39](#)

The Bill at sections 53 and 54 redefine the types of PPL claims that can be made and expands on the classes of people who can make them. Under section 54 of the Bill a PPL claim may be made by one of the following:

- (a) the child's birth mother;
- (b) the adoptive parent of the child;
- (c) a person who:
  - (i) is the parent of the child; and
  - (ii) is not the child's birth mother;
- (d) the partner of the child's birth mother;
- (e) the partner of an adoptive parent of the child;
- (f) the partner of a person covered by (c);
- (g) a person who satisfies the circumstances prescribed by the PPL rules as being exceptional circumstances in which a PPL claim can be made.

The ability for non-birth parents to access PPL is a significant step designed to address current inequalities to the limited access to parental leave by fathers and carers but also to enable infants to bond with more than one parent. In the long-term, the Bill also promotes greater equality between parents in terms of paid workforce participation and employment opportunities and the sharing of unpaid caring and domestic work commitments. From a broader industry perspective, this should encourage more even workforce participation across genders.

Ai Group strongly supports these objectives.

Despite this, Ai Group acknowledges that the Bill's removal of the requirement that PPL may only be claimed by an eligible birth mother may limit the scheme's more protective recognition of varied maternal health experiences that may relate to recovery from birth, the establishment of breastfeeding and other post-partum health issues that may be experienced. These experiences are generally unique to birth mothers and can impact infant health.

For instance, breastfeeding, has been identified as beneficial for infant and maternal health<sup>4</sup> with the World Health Organisation (WHO) recommending that babies be exclusively breastfed for the first six months of life.<sup>5</sup>

The Bill assumes that matters of maternal and infant health will be considered as part of a household's decision to determine who should be the initial claimant for PPL and the relevant duration. For the most part, we consider that families can best determine for themselves how PPL should be claimed to meet their needs and that of their infant or child.

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<sup>4</sup> *Pregnancy, Birth and Baby, Breastfeeding your baby*, Department of Health and Aged Care, Australian Government, <https://www.pregnancybirthbaby.org.au/breastfeeding-your-baby>

<sup>5</sup> *Breastfeeding, Recommendations*, World Health Organisation, [https://www.who.int/health-topics/breastfeeding#tab=tab\\_2](https://www.who.int/health-topics/breastfeeding#tab=tab_2)

It should also be noted that the Bill provides an added practical support for maternal and infant health at section 21 by enabling fathers and partners to take a greater period of concurrent flexible PPL of no more than 10 days particularly where the birth mother is unwell or requires support and care in addition to the newborn.

In addition, where a birth mother has claimed PLP, another eligible claimant (as set out in section 59A) of the Bill may only make a claim for flexible PLP if the birth mother has provided permission. These provisions alter the current permission granting provisions in the PPL Act.

### **Replacing the income test to cover the same households more equitably**

Claiming PLP under the current scheme requires the eligible claimant (the birth mother or adoptive parent) to receive an individual income of \$156,647 or less in the 2021-22 financial year.

The individual income threshold has not kept pace with the FW Act's high-income threshold currently indexed at \$162,000 for an individual.

The expansion of the income test to include family income, rather than individual income is an important change consistent with the Bill's recognition that certain persons other than the birth mother may also claim PLP and that parents may use take PLP at different times. The household income limit of \$350,000 is an appropriate cap that can ensure families with one income-earner above the current individual income test can still access the PLP, regardless of whether they are male or female.

Ai Group supports this provision in the Bill.

### **Strong concerns about all PLP as flexible PLP and future changes to the FW Act**

Ai Group is concerned that the Bill presents some significant inconsistencies with various provisions in the FW Act as they relate to the entitlement and the taking of unpaid flexible parental leave. On this basis, Ai Group anticipates that further legislative amendments to the FW Act would be contemplated to address such matters, but detail of any such change is not known.

The FW Act currently limits the taking of unpaid flexible parental leave to 30 days during a 24 - month period from the birth or placement of a child (section 72A). To access flexible unpaid parental leave under the FW Act, the employee must provide written notice to the employer of his/her intention to take the leave, as per section 74(3A) and then to provide further notice of the specific days to be taken 4 weeks in advance, unless it is 'not practicable' to do so, which may enable an employee to provide notice *after* the leave has been taken. The effect of the current FW Act notice provisions as they apply to unpaid flexible leave is that regardless employer operations, workloads of co-workers or the circumstances of replacement employees, an eligible employee need only provide notice, (including after the leave has been taken in some cases), to be absent from work on



specific days, including where those absences are within the employee's control and known to the employee well before that 4-week period.

The relevance of these FW Act provisions relates to the ability for an employee to be absent from work to receive Government-funded flexible PLP. The current notice threshold identified for flexible unpaid carer's leave is based on that flexible parental leave being capped at 30 days. It would be highly inappropriate and unfair to employers and other employees that this low notice threshold extend to all PLP days taken – including up to 26 weeks (or 130 separate days of PLP) to be taken within a 2-year period, including as single, ad-hoc days.

Specifically, the taking of an increased amount of flexible parental leave would be hugely disruptive for employers, co-workers and replacement employees to manage an extended period of ad hoc single day or multiple block absences, the duration and days of which the employee need not confirm with his/her employer until 4 weeks prior, or if not practicable, at a later stage, including after the leave has commenced.

Other forms of extended leave such as annual leave or long service leave, which may also be taken as single days, is generally accessible by agreement with the employer, provided that the employer does not unreasonably refuse the request for leave.<sup>6</sup>

The FW Act's recognition of flexible parental leave and the notice provisions at section 74 were introduced by the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020*. These provisions should be amended if the intent is to remove the current cap of 30 days on flexible parental leave in the FW Act to be in line with the Bill.

Specifically, any amendments should look at whether periods of unpaid parental leave to be taken in periods other than a single continuous block should be subject to agreement from the employer as to when that leave is to be taken or at the very least, a consideration of the employer's operations, impact on co-workers and replacement employees in nominating the days to be taken, including by identifying a *significantly* longer notice period to the employer and the removal of the exception to give notice on the basis that is not 'practicable.'

The Bill clearly identifies that the administering of PLP outside a continuous block of at least 40 workdays in a continuous flexible period (as defined) is unjustifiably onerous on employers. Similarly, Ai Group contends that equal consideration should be given to the onerous impact on employers, co-workers and replacement employees if a series of blocks, including single days can be unilaterally taken by employees to be absent from work outside a continuous flexible period.

Ai Group opposes any removal of the unpaid flexible parental leave cap in the FW Act with the retention of the existing low notification threshold of the specific days the employee must advise

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<sup>6</sup> See s.88 *Fair Work Act 2009 (Cth)* in respect of annual leave. Many state laws regulating long service leave allow for single day access by agreement between the employer and employee.

his/her employer under section 74(4B). Our opposition to this outcome would be further enhanced as the Government's staged increase of the PLP moves to 26 weeks (or 130 days of flexible PLP) likely resulting in more ad hoc requests by employees to access unpaid flexible leave under the FW Act for multiple blocks and single days absent any consideration for the employer's operations, other co-workers and replacement employees who may have been engaged.

The impact on employers, co-workers and replacement employees should be duly considered and not disregarded by the Australian Government.

## Employer Determinations

The effect of an Employer Determination under the PPL Act is a requirement that the employer pay the relevant employee claimant an instalment of PLP in certain circumstances. The payment is funded by the Government and provided to the employer before the employer makes the relevant payment to the relevant employee claimant.

Currently employers are not required to pay instalments of PLP for flexible PLP; however, on the basis that the Bill allows all PLP to be taken as flexible PLP, the Bill would limit the requirement of employer paid instalments to only those flexible PLP taken in a continuous flexible period as described below.

The Bill defines a continuous flexible period as when an eligible claimant has claimed a period of PLP that only consists of consecutive weekdays and the relevant period over which the consecutive weekdays are to be taken, is at least 40 consecutive flexible PPL days. This period amounts to a new concept of a *continuous flexible period* which cannot extend beyond the child's first birthday.

Ai Group is not opposed to the continuing of employer obligations to pay PLP instalments as set under section 71A of the Bill. However, we do not support expanding employer obligations to pay instalments to circumstances other than what is set out in the Bill due to increases in the administrative burden on employers, including small business. This includes in any subsequent legislative amendments to the PPL Act to give effect to further intended increases in the quantum of PLP.

## Conclusion

Ai Group is supportive of a more equitable paid parental leave scheme and many of the Bill's provisions support this objective. To this end, Ai Group supports the passage of the Bill.

However, the Bill's removal of the flexible PLP 30-day cap is inconsistent with the FW Act's flexible unpaid parental leave provisions. The FW Act and the PPL Act should work cohesively and in a manner that is workable and fair for employers and other employees. If related amendments to the FW Act are contemplated, then we request the Australian Government detail its intentions and the

nature of any FW Act amendment to account for the Bill's provisions. For reasons set out in out this submission, Ai Group would oppose the retention of the FW Act's current notice provision for unpaid flexible leave if the 30-day cap on flexible leave in the FW Act is removed.



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