

The Regulation of Paid Parental Leave in Australia: Delivering Gendered Patterns of Care

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Abstract

Key changes to the *Paid Parental Leave Act 2010* (Cth) (*'PPL Act'*), which offers minimum wage payments to parents on parental leave, took effect in July 2023. These changes sought to improve the gender equal utilisation of parental leave. This article assesses these changes to that end. The article also explores the regulation of employer-funded parental leave policies, which has been under-researched to date, drawing upon recent Workplace Gender Equality Agency data and interviews with human resource professionals. The data reveals that employer-funded parental leave policies often provide higher levels of income replacement than the *PPL Act* but mirror many of the *PPL Act's* features that discourage gender equal parenting. These findings highlight the need for further reform in the regulation of paid parental leave to increase take up amongst men. Such reform will require flexible parental leave policies with non-transferrable and generous entitlements for all parents with high levels of income replacement.

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I Introduction

When the *Paid Parental Leave Act 2010* (Cth) (*'PPL Act'*) was first introduced, it marked a long-awaited step forward in recognising the need for funded parental leave.¹ Over the years, reform proposals to the *PPL Act* have been put forward by Members of Parliament.² However, barring minor amendments,³ the *PPL Act* and its delineation between payments for 'primary' and 'secondary'

1. Shae McCrystal and Belinda Smith, 'Industrial Legislation in 2010' (2011) 53(3) *Journal of Industrial Relations* 288, 294.
2. See, eg, Wendy Tuohy, 'Paying Dads to Take Six Months' Leave "Could Help Close the Gender Pay Gap"', *The Sydney Morning Herald* (Web Page, 14 February 2021) <<https://www.smh.com.au/national/paying-dads-to-take-six-months-leave-could-help-close-the-gender-pay-gap-20210212-p5724g.html>>; Jane Norman, 'Tony Abbott Reframes Paid Parental Leave Scheme As "Holistic Families Package" Following "Community Concern"', *ABC News* (Web Page, 8 December 2014) <<https://www.abc.net.au/news/2014-12-08/paid-parental-leave-scheme-tony-abbott-acknowledges-concern/5950302?nw=0&r=HtmlFragment>>.
3. See, eg, *Paid Parental Leave Amendment (Flexibility Measures) Act 2020* (Cth); *Paid Parental Leave Amendment (Covid-19 Work Test) Act 2021* (Cth).

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carers remained substantively the same. Before July 2023, the *PPL Act* offered eligible ‘primary’ carers 18 weeks of payments at the national minimum wage while eligible ‘secondary’ carers were offered two.⁴ ‘Birth mothers’ were automatically assigned the role of primary carer unless exceptional circumstances applied,⁵ such as where they were deemed to be ‘incapable of caring for the child’ or it was considered unreasonable for the birth mother to care for the child.⁶ Secondary carer payments were referred to as ‘dad and partner pay’, a payment that ‘birth mothers’ were prohibited from accessing.⁷

However, in October 2022, the Labor government proposed amending the *PPL Act* to consolidate these ‘primary’ and ‘secondary’ carer payments into a single 20-week payment for each family.⁸ The *PPL Act* was eventually amended to enact this change and several others, taking effect for children arriving on or after 1 July 2023.⁹ Under the amendments, any parent, regardless of their role as birth parent, can claim the payments first.¹⁰ Several new objectives were also added into the *PPL Act* including increasing ‘the time that fathers and partners take off work around the time of birth or adoption’, creating ‘further opportunities for fathers and partners to bond with their child’ and allowing ‘fathers and partners to take a greater share of caring responsibilities and to support mothers and partners from the beginning’.¹¹ The amending act was even called the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* (Cth).

The *PPL Act*’s amendments were therefore focussed on improving the gender equal utilisation of parental leave by increasing take up amongst fathers. To quote the Labor Government’s Budget announcement:

[g]ender equality under the [*PPL Act*] will be improved by removing the current requirement that the primary claimants of parental leave must be the birth parent. Families will be able to decide who will claim PPL first. A move to gender neutrality in the scheme recognises the diversity of Australian families and removes assumptions about who provides care.¹²

Improving the gender equal utilisation of parental leave is a worthy endeavour. Since the *PPL Act* was introduced, research has highlighted the gender biases embedded in the *PPL Act*’s original definitions of ‘primary’ and ‘secondary’ carers and how this compromises gender equal parenting.¹³

4. *Paid Parental Leave Act 2010* (Cth) s 4, as at 25 March 2023 (*PPL Act*).

5. *Ibid* s 54, as at 25 March 2023 (emphasis added).

6. *Paid Parental Leave Rules 2021* (Cth) r 26, as at 26 October 2022.

7. *PPL Act* (n 4) s 115DD, as at 25 March 2023 (emphasis added).

8. Commonwealth of Australia, ‘Budget October 2022–23: Expanding Paid Parental Leave’, *Budget Australia* (Web Page) <https://archive.budget.gov.au/2022-23-october/factsheets/download/factsheet_parental_leave.pdf> (‘Budget October 2022–23’).

9. *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* sch 3.

10. *PPL Act* (n 4) s 54.

11. *Ibid* s 3(2)(c)(v)–(vii).

12. Budget October 2022–23 (n 8).

13. See, eg, Marian Baird, Myra Hamilton and Andreea Constantin, ‘Gender Equality and Paid Parental Leave in Australia: A Decade of Giant Leaps or Baby Steps’ (2021) 63(4) *Journal of Industrial Relations* 546; Deborah A Widiss, ‘The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently-Enacted Laws in the United States and Australia’ (2021) 41 *Comparative Labor Law and Policy Journal* 723; Gillian Whitehouse and Hideki Nakazato, ‘Dimensions of Social Equality in Paid Parental Leave Policy Design: Comparing Australia and Japan’ (2021) 9(2) *Social Inclusion* 288, 295; Gillian Whitehouse and Michelle Brady, ‘Parental Leave, Social Inequalities and the Future of Work: Possibilities and Constraints within the Australian Policy Framework’ (2019) 29(3) *Journal of Labour and Industry* 257.

Usage of the payments under the original scheme was gendered, with around 95% of primary carer payments taken by mothers and approximately 95% of secondary carer payments taken by fathers in 2017.¹⁴

However, gender-neutral rules do not necessarily achieve substantive equality when applied to a society marked by a gendered hierarchy.¹⁵ In fact, such rules can sometimes contribute to a continued denial and failure to address persisting inequalities.¹⁶ Feminist scholars have therefore had mixed views on the effectiveness of legislation in achieving gender equality, noting the inherent masculinity of the state, challenges in enforcement and enactment and entrenched social norms as barriers to achieving meaningful, practical change through legislative reform.¹⁷ However, ‘by bringing a gender perspective, law reform can and will do more than merely replicate and validate the original rules’,¹⁸ if these ‘original rules’ are recognised and addressed.

Australia’s employment framework was centred around the ‘ideal worker’ — ‘an unencumbered (male) citizen available for long hours, without home and care responsibilities’.¹⁹ Under this framework, caregiving was relegated to an undervalued, feminine endeavour that was therefore costly (both literally and socially) to perform.²⁰ To shift these norms, society’s institutional scaffolding must facilitate the equal distribution of paid and unpaid labour along gender lines, where the historically ‘feminine’ task of caregiving is respected ‘enough to ask men to do them too’.²¹ The aspiration must be to achieve a ‘universal caregiving society’ where the worker-carer, someone with both work and caregiving responsibilities, is instead positioned as the norm in Australia’s employment framework.²² In the context of regulating parental leave, a universal caregiving society would provide parental leave policies that support all parents in accessing parental leave regardless of their gender and explicitly address any potential barriers or incentives that may limit men’s equal participation in parental leave.²³

Part II of this article assesses the *PPL Act* against this theoretical benchmark, highlighting all features that would fall short of a policy that reflects a universal caregiving society. This analysis is supported by extant, international literature on the key features required to advance gender equality.

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14. Australian Bureau of Statistics, ‘One in 20 Dads Take Primary Parental Leave’ (Media Release, 4125.0, 19 September 2017).
 15. Kristie Dunn, ‘“Yakking Giants”: Equality Discourse in the High Court’ (2000) 24(2) *Melbourne University Law Review* 427, 440, citing Deborah Rhode, ‘The Politics of Paradigms: Gender Difference and Gender Disadvantage’ in Anne Phillips (ed), *Feminism and Politics* (1980) 344, 347.
 16. *Ibid.* See also Ruth Halperin-Kaddari and Marsha A Freeman, ‘Backlash Goes Global: Men’s Groups, Patriarchal Family Policy, and the False Promise of Gender-Neutral Laws’ (2016) 28(1) *Canadian Journal of Women and the Law* 182, 185.
 17. Ramona Vijeyarasa, ‘Does Law Matter? Defending the Value of Gender-Responsive Legislation to Advance Gender Equality’ (2022) 24(3) *New York University Journal of Legislation and Public Policy* 671, 692–6.
 18. *Ibid.* 691.
 19. Tom Dreyfus, ‘Paid Parental Leave and the “Ideal Worker”: A Step towards the “Worker-Carer” in Australian Labour Law’ (2013) 23(1) *Labour & Industry* 107, 107. See also Sara Charlesworth, ‘Managing Work And Family In The “Shadow” Of Anti-Discrimination Law’ (2005) 23(1) *Law in Context* 88, 94-5; Ashlee Borgkvist et al, ‘I Might Be a Bit of a Front Runner’ — An Analysis Of Men’s Uptake Of Flexible Work Arrangements And Masculine Identity’ (2018) 25(6) *Gender, Work and Organization* 703, 704-5, 706-7; Belinda Smith, ‘It’s About Time — For a New Regulatory Approach to Equality’ (2008) 36(2) *Federal Law Review* 117, 122; Jessica Crofts and Julia Coffey, ‘Young Women’s Negotiations of Gender, the Body and the Labour Market in a Post-Feminist Context’ (2017) 26(5) *Journal of Gender Studies* 502, 505.
 20. *Ibid.*
 21. Nancy Fraser, ‘After the Family Wage: Gender Equity and the Welfare State’ (1994) 22(4) *Political Theory* 591, 610.
 22. *Ibid.*
 23. Nancy Fraser, ‘Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice’ (2007) 1(1) *Studies in Social Justice* 23, 27.

However, the focus is to identify all *potential* challenges to gender equal take up, to explore the gender justice *potential* of the law in reflecting a universal caregiving society, which may then be used to identify practical opportunities for reform.²⁴

Australia's regulation of paid parental leave, however, is not limited to the *PPL Act*. The *PPL Act* states in its objectives that '[t]he financial support provided by this Act is intended to *complement* and *supplement* existing entitlements'.²⁵ Workplace parental leave policies are therefore an essential component to Australia's regulation of paid parental leave. This was confirmed by the explanatory memorandum of the *PPL Act's* amendments that highlighted how the changes may 'encourage employers to increase the generosity and flexibility of [employer-funded parental leave] schemes, complementing the Government scheme, further benefiting new parents'.²⁶

However, there has been little empirical, qualitative research, on employer-funded parental leave in Australia and how these policies 'complement and supplement' the *PPL Act*.²⁷ The Workplace Gender Equality Agency ('WGEA') offers some insights into Australia's workplace parental leave policies by publishing general statistics from reporting organisations. This article expands upon this WGEA data from the 2021-22 and 2022-23 datasets with findings from semi-structured interviews with 22 human resource professionals conducted from August to November 2021. The article's empirical methods and findings are discussed in Part III.

The findings provide a more nuanced understanding of workplace parental leave policies and the extent to which these policies reflect a universal caregiving society. The findings also offer insights into the influence of the *PPL Act* on these policies and the respective role of each in the regulation of paid parental leave in Australia. Although the empirical data in this study pre-dates the *PPL Act's* changes, the findings provide a recent evidence base to inform predictions as to how employers may respond to the recent changes under the *PPL Act* and the continued role of workplace policies in the regulation of paid parental leave in Australia. It is therefore hoped that the findings of this study will provide a foundation for further empirical research following the *PPL Act's* amendments. The broader implications of the article's findings for the regulation of paid parental leave in Australia and its influence on the gender equal utilisation of parental leave are discussed in the concluding Part IV.

II The Paid Parental Leave Act

As mentioned above, the original *PPL Act* offered eligible primary carers 18 weeks of payments at the national minimum wage.²⁸ From July 2020, six of those weeks could be used more flexibly at any time within two years of the child's arrival.²⁹ The original *PPL Act* assumed 'birth mothers' to be the primary carer. Although, any parent could be eligible for the primary carer payments if they met the prescribed definition of a primary carer, ie someone who 'meets the child's physical needs *more* than anyone else in that period'.³⁰ It was also specified that 'only one person can be a child's

24. Rossella Ciccio and Inge Bleijenbergh, 'After the Male Breadwinner Model? Childcare Services and the Division of Labor in European Countries' (2014) 21(1) *Social Politics* 50.

25. *PPL Act* (n 4) s 3A(3) (emphasis added).

26. Explanatory Memorandum, Paid Parental Leave Amendments (Improvements for Families and Gender Equality) Act 2023 (Cth) 21 (*'PPL Amendment Explanatory Memorandum'*).

27. But see Baird, Hamilton and Constantin (n 13).

28. *PPL Act* (n 4) s 4, as at 25 March 2023.

29. *Ibid* s 4, 11D, as at 25 March 2023, amended by the *Paid Parental Leave (Flexibility Measures Act) 2020* (Cth).

30. *Ibid* s 47 (emphasis added), as at 25 March 2023.

primary carer on a particular day'.³¹ Parents had to pass three eligibility tests to access the payments — an income,³² work³³ and residency test.³⁴

The current *PPL Act* features several key changes. First, the payments are now offered as a total of 20 weeks (or 100 days) of pay for each family with any parent being entitled to claim the payments first.³⁵ However, there is a 10-day 'use it or lose it period'.³⁶ Therefore, in two-parent households, a parent can only access a maximum of 90 out of the 100 days of payments. Also, it remains that only a maximum of 10 days of payments can be accessed concurrently by two parents.³⁷ The income test now includes a family income test of \$350,000 instead of a previously individual income test.³⁸ Further, parents can now use all their payments flexibly, accessing it in blocks as small as a day at a time with periods of work in between during the first two years of the child's arrival.³⁹ This is in contrast the previous six-week flexible period of payments. The government has also committed to increasing the scheme's duration to 26 weeks total by 2026.⁴⁰

Overall, the changes to the *PPL Act* have improved its accessibility, utility and flexibility. The expanded family income test increases the number of individuals that would be eligible for the payments. The improved flexibility of the payments grants parents more freedom to structure their leave in the manner that best suits their unique circumstances. Also, if the overall duration of the payments is increased, parents will be able to spend more time with their children while receiving income that they otherwise would not receive.

However, despite a professed intention to improve fathers' parental leave usage, the *PPL Act* maintains several barriers that may compromise its gender equal utilisation. This is largely because the *PPL Act* continues to require parents in coupled households to share their payments between them to have an equal entitlement. This was exemplified by a hypothetical scenario in the government's announcement of the proposed changes that involved a two-parent household with a birthing and non-birthing parent.

In this example, the birthing parent took leave first to 'recover from the birth and breastfeed' and then both parents shared their payments working part-time to take a total 11 weeks of leave each (the example assumes that at this time the scheme has been expanded to 22 weeks).⁴¹ The example, however, makes no genuine attempt to grapple with the longstanding social, cultural, biological and

31. Ibid s 47(3), as at 25 March 2023.

32. Ibid ss 37(1), 41, as at 25 March 2023; Services Australia, 'Meeting the Income Test', *Services Australia* (Web Page, 22 January 2024) <https://www.servicesaustralia.gov.au/meeting-income-test-for-parental-leave-pay-for-child-born-or-adopted-before-1-july-2023?context=64475#:~:text=To_get_Parental_Leave_Pay%2C_you_must_have_an_individual,the_2022%2D23_financial_year>: the income test excluded individuals with an adjusted taxable income of more than \$168, 865 in the 2022-23 financial year.

33. The work test requires that recipients work for at least 10 of the 13 months preceding the child's arrival for approximately a day a week without too many breaks, with exceptions for pregnancy-related issues. The work must be 'paid work': *PPL Act* (n 4) ss 33–5.

34. Recipients must be living in Australia under a legitimate visa. Newly arriving residents must wait two years before being eligible with some exceptions: ibid ss 45-6.

35. Ibid ss 4, 54.

36. Ibid s 31AB.

37. Ibid s 21.

38. Ibid s 41(2).

39. Ibid s 11D.

40. The Hon Amanda Rishworth MP, 'Parents to Benefit from Paid Parental Leave Changes to Support Gender Equality' (Media Release, 6 March 2023) <https://ministers.dss.gov.au/media-releases/10531#:~:text=The_Senate_today_passed_the,to_be_with_theirchildren>.

41. Budget October 2022-23(n 8).

financial barriers and incentives that have been known to influence the gender-equal utilisation of parental leave.

When the *PPL Act* was first introduced, the Productivity Commission report that was tasked with informing its introduction found that non-birth partners were less likely to access leave that was not specifically designated for themselves.⁴² This is why ‘dad and partner pay’ was established.⁴³ This finding is supported by international, contemporary research that has found that non-transferrable and distinct periods of leave for each parent is essential in facilitating more gender equal utilisation of parental leave.⁴⁴

The latest EU directive on work-life balance, for example, has mandated that EU countries should offer a minimum of 4 months of parental leave with at least 2 out of the 4 months being non-transferrable between parents.⁴⁵ Iceland has long been an international leader in distinct, non-transferrable parental leave entitlements for parents. In 2000, Iceland became one of the first countries to introduce nine months of parental leave with a non-transferrable leave period of three months between parents.⁴⁶ This led to an immediate increase in fathers’ use of parental leave and helped reframe fathers’ involvement with their children as a necessary and natural component of their role as caregivers.⁴⁷ In 2021, Iceland amended their parental leave policy further to offer each parent six months of leave with six weeks that can be transferred between parents,⁴⁸ providing public recognition of the value of extended parental leave for *both* parents in two-parent households.

Under the *PPL Act*’s changes, the non-transferrable period of payments is maintained at 10 days. The only designation of leave between parents is therefore capped at two weeks. The explicitly gendered language around who that parent should be is now removed. However, it is questionable whether the mere removal of the language of ‘dad and partner pay’ or ‘secondary carer pay’ will be enough to overturn the longstanding designation of non-birth parents as ‘secondary carers’, especially given the financial and biological considerations that have been shown to influence the sharing of parental leave within families.

42. Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children* (Inquiry Report No 47, 28 February 2009) xxiii <<https://www.pc.gov.au/inquiries/completed/parental-support/report/parental-support.pdf>>.

43. *Ibid* 2.34.

44. See, eg, Marc Grau Grau and Hannah Riley Bowles, ‘Launching a Cross- Disciplinary and Cross-National Conversation on Engaged Fatherhood’ in Marc Grau Grau, Mireia Ias Heras Maestro and Hannah Riley Bowled (eds), *Engaged Fatherhood for Men, Families and Gender Equality* (Springer, 2022) 1, 7; Molly Mayer and Céline Le Bourdais, ‘Sharing Parental Leave Among Dual-Earner Couples in Canada: Does Reserved Paternity Leave Make a Difference?’ (2019) 38 *Population Research and Policy Review* 215, 236; Ann-Zofie Duvander and Mats Johansson, ‘What Are The Effects of Reforms Promoting Fathers’ Parental Leave Use?’ (2012) 22(3) *Journal of European Social Policy* 310, 324-5; Linda Haas and Tine Rostgaard, ‘Fathers’ Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave’ (2011) 14(2) *Community, Work and Family* 177, 188; Ankita Patnaik, ‘Reserving Time for Daddy: The Consequences of Fathers’ Quotas’ (2019) 37(4) *Journal of Labour Economics* 1009, 1053; Rebecca Ray, Janet C Gornick and John Schmitt, ‘Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality’ (Research Report, Center for Economic and Policy Research, June 2009) 19-20.

45. *Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU* [2019] OJ L 188/79, art 31.

46. Ásdís Aðalbjörg Arnalds, Guðný Björk Eydal and Ingólfur V Gíslason, ‘Paid Parental Leave in Iceland: Increasing Gender Equality at Home and on the Labour Market’ in Caroline de la Porte et al (eds), *Successful Public Policy in the Nordic Countries: Cases, Lessons, Challenges* (Oxford, 2022) 370, 376; Ingólfur V Gíslason, ‘Fathers on Leave Alone in Iceland: Normal Paternal Behaviour’ in Margaret O’Brien and Karin Wall (eds), *Comparative Perspectives on Work-Life Balance and Gender Equality: Fathers on Leave Alone* (Springer, 2017) 147, 153.

47. Arnalds, Eydal and Gíslason (n 46) 376; Gíslason (n 46) 153.

48. Work in Iceland, ‘Maternity and Paternity Leave’, *Work in Iceland* (Web Page) <<https://work.iceland.is/living/maternity-and-paternity-leave/>>.

As the payments under the *PPL Act* will continue to be set at the minimum wage, the more a parent earns above the minimum wage, the more pay they must sacrifice to utilise the scheme. This would not necessarily be a gendered issue if Australia did not have a substantial gender wage gap.⁴⁹ Even the explanatory memorandum enacting the *PPL Act's* recent changes acknowledged that:

[w]hile the proposed changes intend to encourage more equal use of PPL by both parents, as PPL is paid at a rate based on the national minimum wage it is likely that the higher earner in a couple (often the father) will return to work earlier in order to maintain the family's financial stability.⁵⁰

This financial consideration may be further exacerbated by long-term considerations surrounding the potential loss of superannuation savings for the family. There is currently no requirement that employees to continue to receive superannuation payments while on parental leave.

Comparative and international research has found high levels of wage replacement to be crucial in encouraging greater male take up of parental leave.⁵¹ Research suggests that a wage replacement rate of at least 80% is necessary to promote gender equality in parental leave use, which reflects the approach to parental leave in at least 25 of the 34 countries in the OECD.⁵² However, the *PPL Act's* changes do nothing to address this reality.

Also, the 'gender neutrality' of the *PPL Act's* recent changes fails to appropriately consider the biological realities of childbirth and breastfeeding. The government's hypothetical example briefly alluded to the birth parent accessing the parental leave payments first to recover from childbirth and breastfeed. However, in the example, the birthing parent was portrayed as taking a total of only 11 weeks of leave interspersed with periods of work in between.

Under the original *PPL Act*, the differentiated treatment of birth parents as primary carers and their much greater allowance of payments was justified by the biological needs of breastfeeding and recovery from childbirth. The Productivity Commission concluded in its report that '[o]n health and wellbeing arguments alone' leave for birth parents should be for at least *12 weeks* and up to six months.⁵³ The government has ignored this finding in their example.

The scheme is expected to increase in duration to 26 weeks total, theoretically allowing parents to share their leave entitlement equally while allowing birth parents 13 weeks of payments. However, this still expects birth parents to have just above the minimum of 12 weeks to recover from the aftereffects of childbirth as per the Productivity Commission's findings. This does not consider longer potential recovery times for caesareans or complicated births. It also does not address potential breastfeeding needs and adjustments when the recommended period of exclusive

49. The WGEA found that the full-time gender pay gap was approximately 21.7%: Workplace Gender Equality Agency, 'Gender Pay Gap Falls 1.1 Percentage Points to New Low of 21.7%', *Workplace Gender Equality Agency* (Article, 28 November 2023) <https://www.wgea.gov.au/newsroom/gender-pay-gap-falls-to-new-low#:~:text=The_Workplace_Gender_Equality_Agency,dropped_to_21.7%25_in_2023>.

50. *PPL Amendment Explanatory Memorandum* (n 26) 14. See also Dreyfus (n 19) 116.

51. See, eg, Ariane Hegeswich and Janet C Gornick, 'The Impact of Work-Family Policies on Women's Employment a Review of Research from OECD Countries' (2011) 14(2) *Community, Work & Family* 119, 123; Workplace Gender Equality Agency, 'Towards Gender Balanced Parental Leave: Australian and International Trends' (Insight Paper) 3 <<https://www.wgea.gov.au/sites/default/files/documents/Parental-leave-and-gender-equality.pdf>>; Haas and Rostgaard (n 44) 182; Alison Koslowski and Margaret O'Brien, 'Fathers and Family Leave Policies: What Public Policy Can Do to Support Families' in Marc Grau Grau, Mireia Ias Heras Maestro and Hannah Riley Bowles (eds), *Engaged Fatherhood for Men, Families and Gender Equality* (Springer, 2022) 141, 143; Ray, Gornick and Schmitt (n 44) 19.

52. Amy Raub et al, 'Paid Parental Leave: A Detailed Look at Approaches across OECD Countries' (Research Report, World Policy Analysis Center, 2018) 7.

53. Productivity Commission (n 42) 4.15.

breastfeeding in Australia is six months.⁵⁴ The *PPL Act* and its continued reliance on sharing payments expect that non-birth parents will effectively deprive birthing partners of potentially much needed extra weeks of paid leave for both parents to have an equal entitlement to the payments.

Essentially, the original *PPL Act* reflected a maternalist policy that reinforced caregiving as solely and predominantly a woman's responsibility by entwining the biological needs of breastfeeding and childbirth with primary carer's leave.⁵⁵ However, the proposed changes seem to ignore the reality of the implications of childbirth and breastfeeding, while continuing to expect equal outcomes.

The *PPL Act's* amendments removed the explicitly gendered language of the original scheme but have retained a substantively similar policy. The *PPL Act* still contains only a 10-day non-transferrable period to be used to the exclusion of the other parent unless exceptional circumstances apply. This is despite longstanding established evidence around the importance of non-transferrable and generous leave entitlements for each parent to improve their utilisation.⁵⁶ The payments also continue to be set at the minimum wage despite the importance of high levels of wage-replacement for improved utilisation amongst men.⁵⁷ Also, birth parents' biological needs appear to have been ignored in the name of gender neutrality despite its undeniable role in how parental leave is utilised within a family unit.

In general, the amendments appeared to mistake gender blindness for gender neutrality. Gender blindness refers to an unawareness or failure to account for the significance of gender influences.⁵⁸ Gender blind policy assumes that men and women will react similarly or be similarly affected by phenomena.⁵⁹ This is reflected by the lack of key features in the *PPL Act's* amendments which have been shown to be necessary in promoting fathers' use of parental leave, despite this being the professed intention of the amendments. These features include having a flexible, generous, non-transferrable entitlement for each parent to care equally for their children with high levels of income replacement. Without these features it is likely that two-parent households will continue to share their payments with birth parents accessing most payments.

However, the regulation of paid parental leave in Australia is not confined to the *PPL Act*. The *PPL Act* only provides the right to receive payments while on parental leave, not the right to parental leave itself.⁶⁰ Twelve months of *unpaid* parental leave is offered to most employees under the National Employment Standards.⁶¹ This leave entitlement was also amended to mirror the changes

54. World Health Organisation, 'Infant and Young Child Feeding', *World Health Organisation* (Fact Sheet, 9 June 2021) <<https://www.who.int/en/news-room/fact-sheets/detail/infant-and-young-child-feeding>>; Amanda Lee, 'Supporting Women to Breastfeed', *NHMRC* (Article, 3 August 2018) <<https://www.nhmrc.gov.au/about-us/news-centre/supporting-women-breastfeed>>.

55. Merike Blofield and Juliana Martínez Franzoni, 'Maternalism, Co-Responsibility, and Social Equity: A Typology of Work-Family Policies' (2015) 22(1) *Social Politics* 38, 47.

56. See above n 44.

57. See above n 51.

58. Aliza Forman-Rabinovici and Hadas Mandel, 'The Prevalence and Implications of Gender Blindness in Quantitative Political Science Research' (2023) 19(2) *Politics & Gender* 482, 482.

59. *Ibid.*

60. Ray Broomhill and Rhonda Sharp, *Australia's Parental Leave Policy and Gender Equality: An International Comparison* (University of Adelaide, 2012) 6; Christina Malatzky, 'Don't Shut Up: Australia's First Paid Parental Leave Scheme and Beyond' (2013) 28(76) *Australian Feminist Studies* 195, 195.

61. *Fair Work Act 2009* (Cth) ss 13-4.

to the *PPL Act* such as the ability to use the leave flexibly and to remove explicitly gendered language.⁶² However, parents may choose to access the government's parental leave payments alongside their *employer's* parental leave entitlements instead, as was intended by the objectives of the *PPL Act*. In other words, parents have the option of accessing the *PPL Act's* payments while on unpaid parental leave under the National Employment Standards *or* while accessing parental leave as per their workplace policies.

Understanding these policies is therefore essential in determining the extent to which the regulation of paid parental leave in Australia reflects a universal caregiving society that supports gender equal patterns of care. After all, the criticisms outlined above may be rendered moot where workplace parental leave policies are widely offered and overcome these identified limitations.

For example, as discussed further below, employers' parental leave policies are often fully compensated at an employee's usual salary. Some employers also offer superannuation payments alongside their parental leave entitlements. Therefore, if an employee complies with the terms of their workplace's parental leave policies, they would be able to receive the government's payments while still receiving superannuation payments and their usual salary from their employer. This is much more financially attractive than utilising the unpaid parental leave entitlement under the National Employment Standards where parents would only receive the government's minimum wage payments for a maximum of 90 days. Men would presumably also be more likely to access employer-funded parental leave given its comparatively higher levels of wage replacement.

However, to date, there has been limited empirical research to support a detailed analysis of employer-funded parental leave policies, how these policies interact with the *PPL Act* and how these policies operate in practice. The remainder of this article utilises WGEA data and interview findings from 22 human resource professionals to assist in filling this gap in the literature.

III Paid Parental Leave in the Market

A Research Method

The WGEA provides useful statistics on the provision and nature of employer-funded parental leave policies. The WGEA dataset is mostly composed of private organisations and higher education institutions with over 100 employees who are legally required to report to the WGEA.⁶³ The 2021-22 and 2022-23 datasets (the two most recent datasets at the time of writing) include information from around 5000 employers, respectively, representing the workplace policies of approximately 40% of Australian workers.⁶⁴ The reporting period for each dataset is 1 April to 31 March of the following year.⁶⁵ The datasets necessarily exclude smaller and public organisations and pre-date the changes to the *PPL Act*. However, it is the most recent and comprehensive quantitative dataset of the provision of employer-funded parental leave in Australia.

62. Ibid pt 2-2, div 5, ss 71(3), 72A, amended by the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth).

63. *Workplace Gender Equality Act 2012* (Cth) ss 3, 13.

64. Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard 2021-22* (December 2022) 1 <<https://www.wgea.gov.au/sites/default/files/documents/WGEA-Gender-Equality-Scorecard-2022.pdf>> ('WGEA 2021-22 Scorecard'); Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard 2022-23* (November 2023) 66 <https://wgea.gov.au/sites/default/files/documents/WGEA_Gender_Equality_Scorecard_2022-23_0.pdf> ('WGEA 2022-23 Scorecard').

65. *WGEA 2021-22 Scorecard* (n 64) 3; *WGEA 2022-23 Scorecard* (n 64) 4.

This article's qualitative analysis complements this quantitative data by drawing on results from 22 semi-structured interviews with human resource professionals. Participants were sourced via purposive sampling. This mostly involved LinkedIn searches with search terms such as 'diversity and inclusion', 'people and culture' or 'human resources officer'. A small number of interviewees were recruited via snowball sampling. However, no interviewees were known to the researcher prior to the interview process.

All interviewees had drafted and/or implemented employer-funded parental leave policies. Interviewees came from organisations that ranged in size from fewer than 20 employees to over 5000 employees, from both the public and private sector and diverse industries. Care was taken to ensure a balance of participants from organisations of different sizes and industries. However, the final sample included interviewees from organisations with a more developed parental leave policy and/or of larger size. This may be a consequence of self-selection bias, and that inactive organisations are perhaps less likely to have designated 'people and culture', 'diversity and inclusion' staff or 'human resource officers'.

In practice, this imbalance was unproblematic. The interviews were meant to provide a more nuanced understanding of organisations' parental leave offerings beyond the *PPL Act*. As such, recruitment prioritised organisations more likely to be offering their own paid parental leave policies. Moreover, interviewees often drew upon their general knowledge of the landscape of parental leave in Australia, previous work experiences and personal experiences. The data was regularly reviewed and collection ceased when sufficient material of sufficient quality had been gathered to answer the study's research questions.⁶⁶

Prospective participants were invited via email (where publicly available) or LinkedIn message. From 205 invites, 22 participants were interviewed and included in the study. Interviews were all conducted by the researcher on an individual basis. These interviews were conducted as part of a broader research project examining supports for balancing work and caregiving in Australia, which commenced in February 2020. Ethical approval was granted by the researcher's university ethics committee in February 2021. Interviewees were provided with a detailed consent form and information sheet before the interviews commenced. These documents made clear how the data would be handled and stored and provided assurance regarding the anonymity of their responses and the research's questions and aims.

Video conferencing was used to accommodate COVID-19 lockdown restrictions that were in place at the time. Interviews were consensually recorded and transcribed through real-time transcription software, Live Transcribe, and analysed thematically using a reflexive thematic analysis approach with the assistance of the software NVivo as an organisational tool.⁶⁷ The coding process was predominantly data-driven, but reflexive thematic analysis acknowledges that the researcher's personal and academic interests and pre-existing theories and findings will influence the analytical process.⁶⁸ Interview recruitment and data collection took place from August to November 2021.

As mentioned above, the interview findings and quantitative data pre-date the government's recent changes to the *PPL Act*. The 2022-23 dataset includes information on workplace parental

66. Virginia Braun and Victoria Clarke, 'To Saturate or Not to Saturate? Questioning Data Saturation as a Useful Concept for Thematic Analysis and Sample-Size Rationale' (2021) 13(2) *Qualitative Research in Sport, Exercise and Health* 201, 211.

67. Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 95–97; Lorelli S Nowell, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16(1) *International Journal of Qualitative Methods* 1, 4; Victoria Clarke and Virginia Braun, 'Thematic Analysis' (2017) 12(3) *The Journal of Positive Psychology* 297; David Byrne, 'A Worked Example of Braun and Clarke's Approach to Reflexive Thematic Analysis' (2022) *Quality & Quantity* 1391, 1393.

68. Byrne (n 67) 1393.

leave policies up to 31 March 2023 and the interviews concluded in November 2021, while the changes to the *PPL Act* took effect in July 2023 (but were proposed in October 2022 and passed on 25 March 2023). However, the objective of the study was to gather empirical data about the nature of *employer-funded* parental leave, as a central component of the regulation of paid parental leave in Australia. The interviews sought to explore if these policies reflect a universal caregiving society and the influence of the *PPL Act* on its design to date. The timing of the empirical data collection precludes the ability to explore the actual impact of the *PPL Act's* recent amendments on workplace parental leave policies. However, it is hoped that the data provide an evidence base to make informed predictions on the continued role of employer-funded parental leave in the regulation of paid parental leave in Australia and the likely impact of the *PPL Act's* amendments to these policies to support and inspire further research. In the interests of brevity, references to parental leave in this part of the article refer to employer-funded parental leave.

B Findings

I Influence of the PPL Act on Parental Leave Provision. The 2021-22 WGEA dataset revealed that most organisations offered some form of employer-funded parental leave (62%) in addition to the government's payments under the *PPL Act*, increasing to 63% in the 2022-23 dataset.⁶⁹ Employees working in businesses with more than 250 employees were 1.5 times more likely to offer employer-funded parental leave than organisations with fewer than 250 employees.⁷⁰

In both the 2021-22 and 2022-23 WGEA dataset, the most common reported reason for organisations not offering employer-funded parental leave was that the government's scheme was sufficient (45%).⁷¹ This was explained by an interviewee from a large manufacturing organisation who said that the lack of a legislative mandate for employers to offer specific parental leave offerings often posed a barrier for them to encourage the organisations they worked for to offer their own parental leave entitlements.⁷² The findings suggest that contrary to the stated objectives of the *PPL Act*, there is a widespread perception in the market that the *PPL Act* sufficiently addresses employees' parental leave needs and organisations do not need to 'complement or supplement' the *PPL Act* with parental leave policies of their own.

Where employer-funded parental leave policies were offered, the interviews revealed that the *PPL Act* was very influential in how organisations structured their own offerings. An interviewee from a large manufacturing organisation explained how organisations set the duration of their parental leave offerings as follows:

since [secondary carer's leave] is two weeks [in the *PPL Act* at the time of the interviews] then typically people just default to two weeks rather than making it larger and I think that's just kind of a guidance post and that's probably the same thing with the 18 weeks ... [there's kind of an] unspoken rule that corporates are around 12 to 14 [weeks of primary carer's leave].⁷³

69. *WGEA 2021-22 Scorecard* (n 64) 39; *WGEA 2022-23 Scorecard* (n 64) 66.

70. *WGEA 2022-23 Scorecard* (n 64) 65.

71. *WGEA 2021-22 Scorecard* (n 64) 46; *WGEA 2022-23 Scorecard* (n 64) 68.

72. Interview with a culture and development specialist at a manufacturing organisation with 1000-4999 employees (Amanda Selvarajah, 18 August 2021) ('Interview 1').

73. Interview with an inclusion and diversity lead at a manufacturing organisation with 1000-4999 employees (Amanda Selvarajah, 6 September 2021) ('Interview 6').

Several interviewees across organisation sizes and types described the *PPL Act* as a guide against which organisations designed their own offerings. As a human resources consultant put it:

I think [the *PPL Act*] tends to be the starting point and then they look at well, how do we improve it? So, how can we, for example, improve the parental leave policy, but it's still primary/secondary and gendered in nature? We might have additional weeks, or we might offer [parental leave] at their full-time salary rather than the minimum wage rather than saying, well, is that really the problem that we are solving ... as an organization?⁷⁴

In this same vein, interviewees said that changes to the *PPL Act* would prompt revisions to their own offerings. An interviewee from a large professional services organisation stated that:

when the government ... quite relatively recently introduced the flexible component to the government paid parental leave scheme we did the same in our own policy. Also ... there's some discussion of parental leave going to 26 weeks. If the government were to do that, we would of course, immediately increase our paid parental leave policy to 26 weeks and similarly if the government ... started paying superannuation ... we would immediately look at that. So, it's ... very influential.⁷⁵

This deference to the *PPL Act* was reiterated by an interviewee from a large administrative services organisation who said that 'the removal of secondary/primary carer [categories]' in the *PPL Act* 'would force us to be quicker because we'd have to respond to that ... [and if] the government required organisations to pay superannuation on extended parental leave ... that would force us to do that'.⁷⁶ It was therefore clear that the *PPL Act* was influential both in terms of whether an organisation offered parental leave and how they chose to do so. These views were supported by the many identified similarities between the nature of employer-funded parental leave policies in the data and the former *PPL Act*, as outlined below.

2 Primary and Secondary Carer Leave. At least 76% of organisations utilised the primary/secondary carer labels in their parental leave offerings in the 2021-22 WGEA dataset, with this number decreasing to 67% in the 2022-23 dataset.⁷⁷ In keeping with the more common practice in the quantitative data of offering parental leave to primary and secondary carers, only one interviewee from a large professional services organisation offered a blanket parental leave offering to all employees.⁷⁸ This practice mirrors the *PPL Act* as it was at the time of the interviews, although the quantitative data suggest a trend towards removing the primary and secondary carer's leave labels in workplace policies. Given interviewees' self-professed deference to changes in the *PPL Act*, the removal of these labels by way of the recent amendments would presumably further accelerate the removal of these labels in workplace policies. This prediction is supported by interviewees' general disapproval of these labels.

74. Interview with a human resources consultant (Amanda Selvarajah, 10 November 2021) ('Interview 18').

75. Interview with a head of diversity and inclusion, professional, science and tech services organisation with 1000–4999 employees (Amanda Selvarajah, 13 September 2021) ('Interview 9').

76. Interview with a wellbeing, diversity and inclusion lead at an administrative and support services organisation with 500–999 employees (Amanda Selvarajah, 26 August 2021) ('Interview 4').

77. *WGEA 2021–22 Scorecard* (n 64) 41; *WGEA 2022–23 Scorecard* (n 64) 66.

78. Interview 9 (n 75).

Interviewees across a range of industry types and sizes described the labels of primary and secondary carers as outdated or illogical. The majority view from the interviews was that the terminology of primary and secondary carers may provide (as a gender equality adviser for a public sector organisation put it) the ‘*impression of equality*’ but without meaningfully changing the reality of gendered take-up of leave within organisations.⁷⁹ As described by an interviewee from a small utilities organisation, ‘they kind of swapped out maternity for primary, paternity for secondary ... under the guise of keeping it all gender neutral, but it’s pretty much the same’.⁸⁰

As such, a few interviewees reported that they were considering moving towards a blanket parental leave provision. However, as mentioned above, only one interviewee from a large professional services organisation had done so.⁸¹ This lack of action was explained by an interviewee from a large administrative services organisation who noted that policy changes require ‘time and capacity of HR teams’ saying, ‘there just hasn’t been the capacity for the conversations with the decision-makers’ to remove the primary and secondary carer designation in their parental leave policy.⁸² Progress towards removing these labels in workplace policies may therefore be slow, as evidenced by the lack of universal parental leave policies even amongst interviewees that were generally in favour of such an approach.

There were also some interviewees that expressed concerns around the removal of these labels. A manager from a large professional services organisation expressed their concerns as follows:

my fear if you were to remove the primary and secondary labels and not have a requirement of the person taking leave to have a primary carer role, which we currently have — you have to be the person in charge for at least half a day or so to take the leave — then the strength of these gendered roles will mean that the, and I’ll just use the heterosexual binary normative here, the dad will do the shopping or mow the lawn ... but it’s not the caring of the child and that is the critical element for gender equal parenting.⁸³

Another concern with removing the designation of primary and secondary leave appeared to be accommodating the biological effects of childbirth. An interviewee from a large manufacturing organisation highlighted ‘that women typically started their parental leave four to six weeks before they had their child. So really women are getting less time to be with their child *after* birth if they are the birth parent’ and therefore deserve the longer designation of leave that comes with being the primary carer.⁸⁴ The same interviewee acknowledged that ‘some organisations have found ways to address that now with ... maternity leave before you go and then parental leave once your child is born’.⁸⁵ However, she also highlighted that this was also more expensive for an organisation and as such ‘moving to a space of gender-neutral[ity] could be at the cost of extensively available primary carer’s leave’.⁸⁶ Therefore, in organisations that are in favour of retaining primary and secondary

79. Interview with a gender equality adviser at a public administration and safety organisation with 5000+ employees (Amanda Selvarajah, 26 October 2021) (emphasis added) (‘Interview 14’).

80. Interview with a people and culture executive at an electricity, gas, water and waste services organisation with <100 employees (Amanda Selvarajah, 17 November 2021) (‘Interview 22’).

81. Interview 9 (n 75).

82. Interview 4 (n 76).

83. Interview with a diversity and inclusion manager at a professional, science and tech services organisation with 1000–4999 employees (Amanda Selvarajah, 12 October 2021) (‘Interview 13’).

84. Interview 6 (n 73).

85. *Ibid.*

86. *Ibid.*

carer's leave, the *PPL Act's* amendments to remove these labels may not necessarily prompt corresponding shifts in these organisation's workplace policies.

Moreover, the interview data revealed broader challenges to gender equal take up than could be attributed to the labels of primary and secondary carers.

(a) *Cultural Resistance to Fathers as Primary Carers.* While most interviewees' organisations offered primary and secondary carers' leave to all employees, interviewees reported how fathers would often face pushback when attempting to access primary carer leave. An interviewee from a large manufacturing organisation shared a story involving two employees who belonged to the same family unit. Both employees wanted to take primary carer's leave at separate times and as this interviewee explained:

there was no reason why they couldn't access both but there were some really heated discussions to say, 'no, he's now secondary'. And I [said], 'no she's coming back, she's more senior than him, ... we do want her back after four months' ... A lot of execs can't get their head around it..., [they think] 'he's always the secondary'. And I [say], 'he's now at home with the four-month-old baby, that's pretty primary'.⁸⁷

The same interviewee also recounted how three fathers who took four months of primary carer's leave during her tenure had managers who 'were not happy about it'.⁸⁸ A human resource consultant described how a father who was intending to take the five months of parental leave he was entitled to had to 'pitch it to some of the older partners' as 'long service leave' as opposed to parental leave.⁸⁹

These findings suggest entrenched biases around fathers acting as primary carers and taking longer periods of parental leave. While interviewees rightly pointed out that the 'primary carer' label problematically reinforced expectations of unequal caregiving within family units, it is difficult to imagine that the longstanding cultural biases against fathers engaging in longer periods of parental leave will be overturned by simply referring to this leave by a different name. This would explain the experience of the interviewee from the one organisation that offered a blanket parental leave provision of 18 weeks (without a primary or secondary carer delineation) who found that only one male partner, in a same-sex relationship, had accessed the leave since the change.⁹⁰

The interviewee suspected that this was because men 'feel the double bind [because] they not only see the impact on women's careers but secondly ... culturally there's still a[n] expectation that men don't take a long period of parental leave ... at the societal level'.⁹¹ This would be in keeping with an interviewee from a male-dominated, public sector organisation who said they had seen men who take on the role of primary carer 'relegated to the side' and 'pigeon holed as a particular ilk'.⁹²

Other interviewees highlighted cultural barriers that may not emanate from their employers but from peers and the general community. An interviewee from a large manufacturing organisation stated that fathers who are primary carers often face 'derogatory gender comments around the role reversal'.⁹³ Another interviewee said her brother 'got a lot of pushback and also even ... side jokes

87. Interview 1 (n 72).

88. Ibid.

89. Interview with a human resources consultant (Amanda Selvarajah, 20 September 2021) ('Interview 8').

90. Interview 9 (n 75).

91. Ibid.

92. Interview 14 (n 79).

93. Interview 1 (n 72).

from the other guys at work' when taking on the primary carer role.⁹⁴ Whilst another interviewee from a large manufacturing organisation talked about how in a dads' program she had started, she found that 'a lot of [fathers] felt ... apologetic for taking up space that they thought should be assigned to women' and that when she first started talking about gender-neutral parental leave in her organisation she was met with 'some not diversity and inclusion friendly things like ... "I wouldn't want to be home with my kids in the first three months anyway"'.⁹⁵

The fact that these gender assumptions persist may explain the 5% of organisations in the WGEA dataset that offered primary carer's leave only to women in 2021-22, promisingly decreasing to 4% in the 2022-23 dataset.⁹⁶ Within these organisations, it may be simply assumed that women will take on the primary carer role, and men will take on the secondary role. As a diversity and inclusion consultant pointed out, while a pregnant or female employee would often immediately be assumed to take the full primary carer entitlement, 'I don't know that the assumption is there for men'.⁹⁷ That being said, this relatively rare practice of limiting the availability of parental leave by gender in the dataset was mirrored in the interview sample where no interviewees reported limiting their primary or secondary carer offerings by gender.

(b) Use Restrictions and the Implications for Fathers. The interviews also revealed other use restrictions that may compromise fathers' ability to access equal entitlements to parental leave. Interviewees from organisations of varying sizes and industry types reported the ability for an employee to take on a primary carer role after having taken secondary carer's leave. However, these managers positioned this offering as a distinguishing feature of their workplace's practice. There were also instances where such flexibility was not permitted, with one manager in a small professional services organisation indicating that their employees had to choose to be either the primary or secondary carer under their organisation's leave entitlement.⁹⁸

This may suggest that some organisations force parents to assume a permanent primary or secondary carer role at the outset. Such an approach precludes a 'secondary carer' from having the flexibility to take on an equal or primary carer role later. Given that the birth parent typically requires leave at the start of parenthood to recover from the effects of childbirth, this would permanently place them in the position of primary carer by default.

Where organisations allowed parents to swap between the roles of primary and secondary caregiver, parents often had to prove that their partner had since returned to work. For example, an interviewee from a large transportation organisation stated that they asked for evidence of the original primary carer's return to work before allowing the other parent to take on the role of primary carer.⁹⁹ This was echoed by an interviewee from a different transportation organisation who described the practice as a norm, saying, 'a lot of organisations require the employee to put forward a stat dec to say, "Yes, my partner will be going back to work on this day and that's when I'll take over as the primary carer"'.¹⁰⁰ The interviewee explained that this policy was to 'promote the sharing of

94. Interview with a diversity, inclusion and development lead of a public electricity, gas, water and waste services organisation with 1000–4999 employees (Amanda Selvarajah, 27 September 2021) ('Interview 12').

95. Interview 6 (n 73).

96. *WGEA 2021-22 Scorecard* (n 64) 40; *WGEA 2022-23 Scorecard* (n 64) 68.

97. Interview with a diversity and inclusion consultant (Amanda Selvarajah, 28 October 2021) ('Interview 16').

98. Interview with a people and culture manager at a professional, science and tech services organisation with <100 employees (Amanda Selvarajah, 16 September 2021) ('Interview 10').

99. Interview with a diversity and inclusion manager at a transport, postal and warehousing organisation with 5000+ employees (Amanda Selvarajah, 27 October 2021) ('Interview 15').

100. Interview with a head of diversity, inclusion and talent at a transport, postal and warehousing organisation with 1000–4999 employees (Amanda Selvarajah, 11 November 2021) ('Interview 19').

primary caring' because they 'didn't want to end up in a situation where what we were incentivising was both parents getting six weeks or seven weeks off together because the benefits of that to our employees is limited'.¹⁰¹

In one small utilities organisation, the policy allowed for an employee's parental leave to be taken on a part-time basis, where their partner had returned to work part-time but this also required a statutory declaration that detailed the days that the partner returned to work so the employee could access their leave on only those same days.¹⁰² Only one interviewee from a large professional services organisation stated that they did not require a statutory declaration for their employees to later take on a primary carer role, although they still had a 'requirement that the partner is working while the male takes the primary carers' leave portion of their parental leave'.¹⁰³

This feature of parents having to access their leave to the exclusion of their partners is another example of employer-funded parental leave policies mirroring the *PPL Act*. As mentioned above, while the labels of primary and secondary carers are removed, the amended *PPL Act* still allows only 10 days of payments to be accessed concurrently in two-parent households. In practice, birth parents will often access parental leave first to accommodate the aftereffects of childbirth, meaning non-birth parents will have to wait for their partners to return to work before they can access parental leave themselves and 'prove' their primary carer status. This situation is further complicated by the prevalence of time limits on when employer-funded parental leave may be accessed.

At least 84% of organisations in the 2022-23 dataset offering employer-funded parental leave required employees to access the leave entitlement within a certain period after the arrival of the child.¹⁰⁴ Under the *PPL Act* parents must access payments within two years from the arrival of the child. However, most employer-funded parental leave policies in the 2022-23 dataset required that leave be taken within 12 months or less from the child's arrival.¹⁰⁵ This was reflected in the interview sample. Interviewees from a range of organisations reported restricting the use of parental leave to the months following the child's arrival, typically within the first year.¹⁰⁶ A manager in a large public sector utilities organisation found that 'organisations tend to be very focussed on the first 12 months or 2 years of life' for parents to access parental leave. However, the interviewee noted that this 'one size fits all' approach did not serve the full spectrum of parental needs and that 'a broader range of options' for when parents could 'push pause' on their careers would be 'fabulous'.¹⁰⁷ Despite this, no interviewees reported having no restrictions on when parents could access their leave.

In fact, allowances to access parental leave within more than a year from the child's arrival were positioned as exceptional. An interviewee from a large professional services organisation that allowed parents to access their parental leave up until the child's eighteenth month described this as 'flexible' and remarked that this allowance was the result of a recent extension.¹⁰⁸ One interviewee from a large professional services organisation described allowing

101. Interview 15 (n 99).

102. Interview 22 (n 80).

103. Interview with a human resources manager at a professional, science and tech services organisation with 5000+ employees (Amanda Selvarajah, 12 November 2021) ('Interview 20').

104. *WGEA 2022-23 Scorecard* (n 64) 71.

105. *Ibid.*

106. Interview 4 (n 76); interview with an inclusion and diversity manager at a public electricity, gas, water and waste services organisation with 1000-4999 employees (Amanda Selvarajah, 7 September 2021) ('Interview 7'); Interview 10 (n 98); interview with a diversity and inclusion manager at an education and training organisation with 5000+ employees (Amanda Selvarajah, 20 September 2021) ('Interview 11'); Interview 19 (n 100); Interview 20 (n 103).

107. Interview 7 (n 106).

108. Interview 4 (n 76).

employees to negotiate taking their leave outside the other 12-month limitation but only where there was a ‘strong commercial reason’ to do so.¹⁰⁹ An interviewee from a large education organisation reported the shortest period for access at 6 months.¹¹⁰ The interviewee expressed dissatisfaction with the policy saying that it would ideally be a 12 month access period to be ‘a bit more flexible’ but said that their policy was driven by a ‘traditional view of parental leave entitlements’, suggesting that this access period was perhaps the norm in smaller organisations.¹¹¹

Where such time limits are in place alongside limits on concurrent use, an interviewee from a large professional services organisation highlighted how this limited fathers’ access to parental leave under their policy.¹¹² For fathers to access the 14 weeks of primary carer’s leave that their workplace provided, their partners had to ‘go back to work at about 10 months’ because of their policy’s prohibition against concurrent parental leave between parents and the requirement that leave be accessed within the first year of the child’s arrival.¹¹³ This is despite the fact that parents are entitled to 12 months of unpaid parental leave under the National Employment Standards. In this way, one parent’s time on parental leave can directly cut into the other parent’s time to care for their child. Given the biological incentives for a birth parent to take that leave first, it is often the non-birth parent who will be left with less time to access their leave.

3 Other Restrictions on the Availability of Parental Leave. The interviews and WGEA data also revealed other restrictions on the availability of parental leave that were similar but more stringent than the *PPL Act*. At least 86% of organisations offering parental leave in the WGEA dataset required that employees work for the organisation for a specific period before being able to access their parental leave entitlement.¹¹⁴ The *PPL Act* requires employees to have worked for 10 out of the 12 months preceding their accessing of payments, while the average eligibility period for parental leave payments in the 2021–22 WGEA dataset was 12.1 months (and unreported for the 2022–23 dataset).¹¹⁵

Similarly, interviewees from a range of organisation sizes and industry types reported requiring employees to have worked for the organisation for a certain period before being eligible for the organisation’s parental leave entitlement. An interviewee in a large public sector utilities organisation said that in ‘every organisation that [they’d] worked for’ there had been timeframes before a person could access parental leave.¹¹⁶ A human resources consultant felt that a 12-month service requirement before employees could access parental leave was ‘pretty standard across the board’ with the option to sometimes negotiate around this requirement.¹¹⁷ Although, the interviewee felt that employees who successfully negotiated an exception, ‘always [had] pressure on them to return quicker’.¹¹⁸ A similar arrangement was described by an interviewee from a large professional

109. Interview 13 (n 83).

110. Interview 11 (n 106).

111. *Ibid.*

112. Interview with human resources manager, professional, science and tech services organisation with 500–999 employees (Amanda Selvarajah, 12 November 2021) (‘Interview 21’).

113. *Ibid.*

114. *WGEA 2021–22 Scorecard* (n 64) 42.

115. *Ibid.*

116. Interview 7 (n 106).

117. Interview 8 (n 89).

118. *Ibid.*

services organisation who reported ‘a hurdle barrier that you have to be with the company for 12 months before you can access paid parental leave’ with allowances for employees to negotiate around this requirement in their organisation.¹¹⁹ Although, the interviewee described the policy as ‘an issue’ and said they would be raising it for revision at the next review of the policy.¹²⁰

The requirement was explained by an interviewee from a large manufacturing organisation who said that length of service requirements were ‘pretty common’ in ‘a lot of places’ because of concerns ‘that someone will join in then announce they’re pregnant the next day, go on leave, and ... leave two weeks after’.¹²¹ Although the interviewee noted that there was an active effort to discourage this mindset and to instead encourage decision-makers to be grateful that generous parental leave policies were attracting good talent that could hopefully be encouraged to stay with ‘flexibility and the other great employee benefits’.¹²²

Interviewees also generally referred to their organisation’s leave as a continuous block of time. As mentioned above, one interviewee’s organisation allowed a pro-rata arrangement where leave could be taken on the days that their partner returned to work.¹²³ However, this was described as flexibility that the organisation was willing to negotiate on a case-by-case basis. The extent of this practice was not reported in the WGEA data and not necessarily explained by the interviewees. The *PPL Act* at the time the interviews were conducted did require most of the payments to be accessed concurrently but offered six weeks of flexible payments. However, even this relatively shorter allowance of flexible parental leave had not been adopted by any of the interviewees, suggesting that the further flexibility provided by the amendments to the *PPL Act* may not necessarily prompt any further flexibility in organisations’ parental leave policies.

4 Duration of Parental Leave. The 2022–23 WGEA dataset revealed that the average length of both universally available and primary carer’s leave was 12 weeks, and the average length of secondary carer’s leave was 3 weeks.¹²⁴ This was reflected in interviewees’ experiences, where reported lengths of primary and secondary carer’s leave generally ranged from 12 to 18 weeks for primary carer’s leave and 10 days for secondary carer’s leave. These durations were very similar to the respective length of primary and secondary carer’s leave under the *PPL Act* at the time the interviews were conducted.

A human resources consultant was of the view that ‘a lot of organisations offer as a minimum now 16 weeks’ primary carer’s leave.¹²⁵ Another consultant, however, reported that the best policies they saw offered 12 weeks of primary carer’s leave, one organisation offered two months while another offered four weeks but described this as being ‘on the lower end’.¹²⁶ This was explained by the interviewee as being because the companies they worked with were ‘quite small’ and in a ‘growth phase’.¹²⁷

Interviewees also appeared to be revisiting the length of parental leave they offered and described parental leave durations as being likely to increase or having increased in recent years. A consultant

119. Ibid.

120. Ibid.

121. Interview 6 (n 73).

122. Ibid.

123. Interview 4 (n 76).

124. *WGEA 2022–23 Scorecard* (n 64) 70.

125. Interview 8 (n 89).

126. Interview with a human resources consultant (Amanda Selvarajah, 5 November 2021) (‘Interview 17’).

127. Ibid.

found that the length of employer-funded parental leave had increased ‘significantly’ over the last 15 years that he had been working.¹²⁸ An interviewee from a large professional services organisation reported increasing their secondary carer’s leave entitlement from two to three weeks because it was a requirement of the WGEA’s Employer of Choice citation.¹²⁹ An interviewee from a large administrative services organisation said they offered 14 weeks of primary carer’s leave but noted that ‘the dial keeps shifting’.¹³⁰

Interviewees revealed that some organisations had different durations of leave depending on an employee’s length of service. An interviewee at a small professional services organisation described their primary carer leave entitlement as beginning at 12 weeks but increasing to a maximum of 18 weeks after 5 years of service.¹³¹ Similarly, an interviewee from a large education organisation reported 18 weeks of primary carer’s leave at the point of hire but increasing up to 24 weeks.¹³² The extent of this practice was not captured by the WGEA data and is not a feature of the *PPL Act*.

Even these more generous periods of parental leave, however, do not come close to the 12 months of unpaid parental leave guaranteed under the National Employment Standards. An interviewee from a large professional services organisation described how this often meant that fathers, who would usually only access their employer’s paid parental leave period of approximately 14 weeks, would often be conscious of quickly returning to work as their employers would rarely backfill the role while they were away.¹³³

5 Payment of Parental Leave. The one feature of workplace parental leave policies that generally improved upon the *PPL Act* was the level of wage replacement. All interviewees reported paying their employees their usual salary under their policies. This practice was not explained by the interviewees but mirrors the over 80% of organisations that offered employer-funded parental leave at an employee’s full salary in the 2022-23 dataset.¹³⁴ At least 83% of organisations in the 2021-22 WGEA dataset that provided employer-funded parental leave also paid superannuation, increasing to 86% in the 2022-23 dataset.¹³⁵

The interviewees, however, positioned the payment of superannuation during employer-funded parental leave as relatively rare or exceptional. A wellbeing, diversity and inclusion lead described superannuation payments by an organisation on paid and unpaid parental leave as ‘really proactive’.¹³⁶ Another interviewee from a large professional services organisation described their superannuation payments for both paid and unpaid leave up to 28 weeks as ‘above requirement payments’.¹³⁷ A human resources consultant similarly described superannuation payments while on parental leave as ‘a new thing’.¹³⁸

128. Interview with inclusion and diversity manager and consultant, government departments and education and training organisations ranging in size from 250–499 to over 5000 employees (Amanda Selvarajah, 1 September 2021) (‘Interview 5’).

129. Interview 13 (n 83).

130. Interview 4 (n 76).

131. Interview 10 (n 98).

132. Interview 11 (n 106).

133. Interview 13 (n 83).

134. *WGEA 2022-23 Scorecard* (n 64) 72.

135. *Ibid* 71.

136. Interview 4 (n 76).

137. Interview 13 (n 83).

138. Interview 8 (n 89).

Two interviewees were conscious of the need to start paying superannuation while employees were on parental leave but highlighted cost as a barrier. An interviewee from a large professional services organisation reported being in the process of making a proposal on paying superannuation on the unpaid portions of parental leave but noted that ‘preliminary modelling is [showing] that’s quite an expensive thing for us to do’.¹³⁹ An interviewee from a small utilities organisation reported offering superannuation contributions on the paid portion of leave and knew that ‘other organisations do it on the unpaid portion’ but said that they were ‘not there yet’.¹⁴⁰ It therefore appeared that offering superannuation payments on parental leave was challenging to implement where resourcing was a barrier and may perhaps be far less common in organisations smaller than those in the WGEA dataset. Where superannuation was paid, it was also generally only provided for the period of employer-funded parental leave. Only 14% of employers in the 2022–23 dataset also paid superannuation on government-funded payments under the *PPL Act* and only 13% paid superannuation on unpaid leave under the National Employment Standards.¹⁴¹

Interviewees noted how these financial implications of accessing leave within the family unit also influence decisions about which parent accessed longer periods of parental leave. As one human resources consultant set out:

the average age of a first-time mother is 30. The average age of a first-time father is sort of three years older than that, around 33, that age gap translates to a pay gap, a gender pay gap in the home, and that influences the decisions that many couples make at that particular time. They hinge ... their mortgage to the salary of the higher-income earner and make rather short-term decisions about career and care based on those financial circumstances.¹⁴²

IV Discussion and Conclusion

Ensuring that the regulation of paid parental leave facilitates gender equal utilisation is essential to advancing gender equality more broadly in Australia. Fathers who take parental leave have been found to be more likely to stay involved in caretaking responsibilities beyond the leave period.¹⁴³ The historically gendered patterns surrounding the utilisation of parental leave in Australia must therefore be rectified.

Recent amendments, including new objectives, in the *PPL Act* reveal an intention to regulate paid parental leave in Australia to promote fathers’ increased use of parental leave. However, this article reveals how ‘gender neutral’ policies may provide the appearance of progress without the necessary substantive measures to achieve gender equality. The amendments to the *PPL Act* have removed explicitly gendered language and improved certain aspects of the scheme but left a substantively similar policy in place with low levels of wage replacement and minimal, non-transferrable leave entitlements for each parent in coupled households.

That being said, the *PPL Act* was not intended to be the only provider of paid parental leave in Australia. The *PPL Act* was designed to be a complement or supplement to workplace parental leave

139. Interview 9 (n 75).

140. Interview 22 (n 80).

141. *WGEA 2022-23 Scorecard* (n 64) 71–2.

142. Interview 18 (n 74).

143. See, eg, Richard J Petts and Chris Knoester, ‘Paternity Leave-Taking and Father Engagement’ (2018) 80(5) *Journal of Marriage and Family* 1144; Dana Wray, ‘Paternity Leave and Fathers’ Responsibility: Evidence from a Natural Experiment in Canada’ (2020) 82(2) *Journal of Marriage and Family* 534.

policies. This article sought to fill the gap in the literature as to the role that employer parental leave policies play in the regulation of paid parental leave by drawing upon WGEA and interview data.

The data found that where employer-funded parental leave was offered, this leave was usually paid at an employee's full salary and some policies include superannuation payments. This makes employer-funded parental leave policies well-placed to improve the gender equal utilisation of parental leave given the feature of high wage replacement that is essential in improving men's use of parental leave. However, despite organisations' theoretical freedom to design policies more progressive than the *PPL Act*, the data reveals how employers' parental leave policies have instead mirrored many features of the *PPL Act* that compromise gender equal take up, often with further limitations.

For example, the quantitative data revealed that it was most common for organisations that offered employer-funded parental leave to offer this leave as primary and secondary carer's leave regardless of gender, as was the case under the *PPL Act* when the interviews were conducted. The qualitative data revealed dissatisfaction among interviewees with the labels of primary and secondary carers and a desire to move away from this distinction in their own policies. This may explain the quantitative data that found the number of universal parental leave policies to be increasing, even before the primary and secondary carer labels were removed under the *PPL Act*.

However, there were also interviewees who valued the primary and secondary carer labels. One interviewee believed that fathers would not care for their children if the mother was also present. Another interviewee felt that birth parents, who were often defined to be primary carers in the first instance, deserved a longer period of leave because of the biological effects and needs of childbirth. It was also noted that reforming and revising parental leave policies requires time and resources that some organisations may not be interested in expending. This may explain the relative rarity of universal parental leave policies in the interview data despite the interviewees' professed support for such policies. Therefore, while some organisations may change their policies to remove the distinction between primary and secondary carers to mirror the current *PPL Act* in the future, the data suggest that there may not be a universal or immediate shift across the market.

The data also illustrated how the mere removal of the labels of primary and secondary carers may not be enough to increase the take up of employer-funded parental leave amongst men. Interviewees' experiences of fathers rarely being supported in a primary carer role seemed rooted in a lack of acceptance and support of fathers accessing long periods of parental leave. This was a strong theme in the interview data, suggesting that these views are prevalent in Australian society both inside and outside the workplace. It is unlikely that these attitudes will be reversed by no longer referring to this longer period of parental leave as 'primary carer's leave'. Identified barriers to fathers' equal utilisation of parental leave in the data included entrenched gendered attitudes about fathers' roles; negative financial and career consequences for fathers who access extended parental leave; and requiring partners of parents to have returned to work before leave can be accessed.

Limits on concurrent use of parental leave are retained under the amended *PPL Act*. Therefore, organisations will likely continue to require parents to sign statutory declarations that their partners have returned to work. However, this would maintain the 'primary carer' requirement in practice and perpetuate the assumption that parents, and in particular non-birth parents, cannot care for their children equally and contemporaneously.

As for the length of parental leave in Australian workplaces, the WGEA data found average primary carer's leave offerings to be 12 weeks, and average secondary carer's leave offerings to be three weeks. At the time this data was collected, the non-flexible period of primary carer's leave under the *PPL Act* was 12 weeks and the duration of secondary carer's leave was 10 days. Therefore,

most organisations appeared to be mirroring the original *PPL Act* in constructing the duration of their leave. This was reflected in the interview data too that found most organisations offering between 12 to 18 weeks of primary carer's leave and 10 days of secondary carer's leave.

Other similarities between the *PPL Act* and workplace policies included length of service requirements, the requirement that leave be accessed within a certain period from the arrival of the child, and that leave be accessed concurrently. However, in each instance, workplace policies tended to be more stringent than the *PPL Act*. Under the *PPL Act*, parents must work for 10 of the preceding 13 months to be eligible for the payments. However, the data showed that 12-month length of service requirements were typically required in workplace policies. The *PPL Act* requires that payments be accessed within two years from the arrival of the child. In contrast, most employer-funded parental leave policies had a 12-month time limit. When taken together with limits on concurrent use, parents in two-parent households would need their partners return to work before 12 months for them to enjoy any of their employers' parental leave entitlements. This circumstance disproportionately affects non-birth parents given that birth parents would likely be accessing parental leave first.

Finally, while the *PPL Act*, at the time the interviews were conducted, allowed a six-week flexible period of payments, most interviewees required all their employer-funded parental leave to be taken consecutively with only two exceptions. One interviewee's organisation mirrored the *PPL Act's* former flexible six-week portion of leave and 12 weeks of consecutive leave. Another organisation allowed a pro-rata arrangement where if a partner of an employee had returned to work part-time, the employee could access their parental leave on those days and work on the others. However, these practices were positioned as novel. Therefore, it is questionable whether the *PPL Act's* amendments improving flexibility will necessarily prompt organisations to do the same, given the lack of flexibility in workplace policies to date.

The interview findings did suggest that organisations are influenced by the *PPL Act* and would respond to changes. This is supported by the identified similarities between the original *PPL Act* and workplace policies. Therefore, in time, workplace policies mirror the *PPL Act's* amendments improve their flexibility, remove their primary and secondary carer labels and increase the overall duration of parental leave.

However, the article's findings must be contextualised. The interviewees represented employers already offering employer-funded parental leave with policies that are considered relatively progressive. The WGEA data represents only 40% of Australia's workforce overall and even amongst these larger organisations, almost 40% of organisations offered no employer-funded parental leave. This responsiveness to legislative changes may therefore be rare in smaller organisations or those that were not already offering employer-funded parental leave. After all, the most common reason that employers reported for not offering employer-funded parental leave in the WGEA data was a belief that the *PPL Act* was sufficient. Therefore, the *PPL Act's* improvements may further discourage such organisations from introducing their own parental leave policies. Moreover, as evidenced above, when organisations do mirror core features of the *PPL Act* many have chosen to do so in ways that are more restrictive than the *PPL Act*.

Taken in its totality, the findings illustrate how the regulation of paid parental leave both by way of the *PPL Act* and workplace policies has failed to address potential barriers that may compromise the gender equal utilisation of parental leave. Despite recent changes to the *PPL Act*, the scheme is substantively the same in expecting parents to share their leave entitlements in a gender equal fashion but with few features to facilitate this beyond the removal of explicitly gendered language. This is despite established research that shows that birth parents are more likely to access parental leave first and for longer periods of time and non-birth parents are unlikely to access parental leave that has not been specifically designated for them with low levels of wage replacement.

While the *PPL Act* was intended to merely complement and supplement employer-funded parental leave policies, employer-funded parental leave is only available in some workplaces with many policies mirroring key features of the *PPL Act* but often more restrictively. Employers appeared to have limited imagination and generosity in constructing their own parental leave policies (except for their policies' rates of pay). Instead, employers' deference to the *PPL Act* in constructing their own policies suggests that improvements to workplace policies in the future will most likely be limited to mirroring legislative changes but probably to a lesser extent, as has been the case thus far. Improvements are also likely to be confined to organisations with the financial means and desire to enact such changes.

In conclusion, the article proves that large segments of the market do not consider the provision of parental leave to be their responsibility and where they do, the design of these policies is often based in key features of the *PPL Act*. Of course, individuals may utilise parental leave in a gender equal manner despite the problematic features of parental leave policies highlighted in this article. On the other hand, individuals may continue to utilise parental leave in a gendered manner even if these problematic features are addressed. However, the article contends that to achieve gender equal utilisation of parental leave, Australia's relevant regulatory framework should eliminate so far as possible any features that may compromise gender equality. The article underscores the need for further amendments to the *PPL Act*, using an explicit gender lens to ensure all Australians have access to parental leave policies that support the gender equal utilisation of parental leave. This will require drawing upon existing evidence to include key features that have been shown to improve take up amongst fathers, including high levels of income replacement; non-transferrable, generous and equal quotas of leave for each parent; universal coverage with few eligibility restrictions; and flexible use conditions.¹⁴⁴ In the meantime, it is hoped that the article inspires organisations to live up to their assumed role as a 'complement and supplement' to the *PPL Act* so that workplace parental leave policies better reflect a universal caregiving society too.

V Postscript

Shortly after the completion of this study, the government committed to paying super guarantee equivalent payments on the government-funded parental leave payments (ie 12% of the government's minimum wage parental leave payments) to the nominated super fund of eligible parents and carers. This will commence from 1 July 2025, and the ATO will make the first payments from July 2026. However, this still does not ensure superannuation payments equivalent to parents' usual rates of pay where parents earn more than the minimum wage. The article's comments on the importance of superannuation contributions at parents' usual rates of pay while on parental leave therefore remain relevant.¹⁴⁵

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144. Ray, Gornick and Schmitt (n 44) 2.

145. Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Act 2024. See also, Australian Taxation Office, 'Superannuation on Parental Leave', Australian Taxation Office (Web Page, 15 October 2024) < <https://www.ato.gov.au/about-ato/new-legislation/in-detail/superannuation/superannuation-on-parental-leave-pay>>.