

**ACTU Submission to the Education and
Employment Legislation Committee
regarding the *Fair Work Amendment
(Gender Pay Gap) Bill 2015***

17 February 2016

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INTRODUCTION

The Australian Council of Trade Unions (ACTU) is the peak union body representing Australian workers and their families. We welcome the opportunity to make this brief submission in support of the *Fair Work Amendment (Gender Pay Gap) Bill 2015*.

The proposed changes to the *Fair Work Act 2009* are clearly warranted given the impact of pay gag clauses on the capacity of employees, particularly women, to achieve fair wage outcomes.

Workers have a legitimate right to voluntarily discuss their terms and conditions of employment with their colleagues. Compelling employees to remain silent with respect to pay disempowers women, enables businesses to conceal discriminatory wage setting practices and outcomes, contributes to the gender pay gap and infringes on the fundamental right of workers to engage in collective bargaining.

Pay secrecy is also associated with higher levels of employee dissatisfaction leading to reduced productivity and absenteeism.

CONTEXT

There is compelling evidence that our current approach to addressing wage inequality is not working. In May 2015 the wages gap was 17.9%, meaning women earn on average 82.1% of male earnings or \$284.20 less per week than men.¹ When bonuses, overtime and part-time earnings are included, the difference in take home pay is in excess of 30%.²

While differences in education, work experience and seniority contribute to the gender wage gap, it is estimated that 60% of the difference between male and female wages is simply due to being a woman.³ Worse still, the gender pay gap has grown steadily over the last decade. Australian women are now earning less on average relative to men than they were 20 years ago, resulting in increased rates of poverty and insufficient retirement incomes for women.⁴

An array of studies and statistics have been generated and published by lead organisations that prove there is a compelling business case for pursuing gender equality in the workplace. Companies with more women on boards, in senior management positions and across the organisation have a competitive edge and consistently outperform those with fewer women.⁵

¹ ABS (2015), Average Weekly Earnings, Australia, May 2015, cat. No 6302.

² ABS (2014), Employee Earnings and Hours, Australia, May 2014, cat. No 6306.

³ ABS data shows that in 1994 the gender pay gap in average weekly ordinary time earnings was 15.9%.

⁴ Cassells, R, Vidyattama, Y, Miranti R. and McNamara, J.(2009) The impact of a sustained gender wage gap on the Australian economy, Report to the Office for Women, FAHCSIA, Canberra, Commonwealth of Australia

⁵ A useful summary of recent reports is available at http://genderequity.ahri.com.au/docs/GEP-Building_a_Business_case_for_Diversity.pdf

Closing the gender pay gap is also critical for Australia's growth, prosperity and international competitiveness. It is estimated that gender inequality in workforce participation, industry participation and progression into leadership roles results in the forfeiture of a 20% increase in GDP for every year that the problem goes unresolved.⁶ This figure represents an annual loss of around 300 billion to the Australian economy.

Despite this, the vast majority of organisations have not yet adopted a gender equality strategy or sought to address pay equity issues at the workplace. The most recent data published by the Workplace Gender Equality Agency shows that only 26.3% of reporting organisations conducted a gender pay gap analysis with respect to their employees and only 9.7% reported to the board on pay equity issues.⁷

The reality is that gender pay gaps exist in most organisations. While overt sex based discrimination remains a major problem, women also face more subtle, indirect and ambiguous forms of discrimination, making it harder to recognise and address.⁸ Women are reluctant to raise questions or concerns about organisational gender pay gaps or discriminatory wage practices even where there is compelling evidence that they are being discriminated against. Women that voice their concerns are more likely to experience greater levels of harassment and negative outcomes, often leading women in such organisations to engage in self-silencing or ultimately opting out of the workforce altogether.

Unintended biases in hiring, commencement salaries, promotion, performance and pay decisions lead to pay gaps between women and men performing identical jobs or roles within an organisation (known as 'like for like' gaps) and pay gaps between women and men doing work of equal or comparable value in terms of responsibility or skill level (known as 'by level gaps').

Employers and employees commonly rely on market rates in negotiating wage outcomes. This perpetuates the gender pay gap that already exists due to occupational and industry segregation and undervaluation of work that has historically been regarded as 'feminine'.

Employers who analyse performance ratings across their workforce by gender usually find that men receive disproportionately higher performance ratings than women resulting in higher total remuneration being

⁶ Goldman and Sachs. 2009. Economics – Australia's hidden resource: The economic case for increasing female participation.
http://www.asx.com.au/documents/about/gsjbw_economic_case_for_increasing_female_participation.pdf

⁷ Workplace Gender Equality Agency, Australia's Gender Equality Scorecard, November 2015,
https://www.wgea.gov.au/sites/default/files/2014-15-WGEA_SCORECARD.pdf

⁸ A useful summary of existing literatures regarding factors behind gender inequality is contained in the following report: The Committee for Perth, June 2015, Filling the Pool: A landmark report to achieve gender equality in Western Australia.

awarded to men. Research shows that men are often reward based on future potential while women are rewarded based on past performance.

Stereotypes and personal biases in decision making mean that women have to wait longer for promotions at all stages of their careers and are often forced to provide greater evidence of competency relative to equivalent males before being considered for the same promotion, job opportunity or project. In particular this occurs when assessment is not strictly based upon objective criteria, the role being assessed is in a gender stereotypical male industry or position and when the decision makers are male.

Preventing biases creeping into remuneration and promotion decisions requires a systematic, transparent and objective approach. Transparency regarding the salary range that attaches to a particular job and criteria and process for determining wage increases or bonuses helps ensure that employees are fairly compensated and reduce the differential between male and female earnings.

PAY SECRECY CONTRIBUTES TO WAGE INEQUALITY

Against this background, it is easy to see why the practice of preventing employees from discussing their pay with other employees contributes to wage inequality, both at the organisational level and across the workforce.

Pay secrecy ensures that the effect of conscious discrimination, gender bias or stereotyping and poor decision making on wage outcomes within an organisation remains largely undetected. Disguising the differential between salaries or bonuses paid to men and women ensures that employees do not have sufficient information to challenge illegal practices, minimizes the need for businesses to justify discretionary pay decisions and enables employers to take advantage of inequitable wage setting practices to reduce overall labour costs.

Another consequence of permitting businesses to restrict the right to disclose information about pay is that employees who uncover discrepancies are unable to raise legitimate concerns with their employer without revealing that they have discussed their pay with a colleague. The prospect of being disciplined for misconduct or being forced to reveal the name of the person that has disclosed useful information makes it very difficult for employees to challenge discriminatory practices or pay decisions.

Pay secrecy also makes it more difficult for women to successfully negotiate equitable or beneficial wage outcomes either individually or collectively through workplace bargaining. Research shows that individual women who negotiate assertively for pay are more likely to be viewed as aggressive or unlikable and therefore less likely to be successful in negotiating a higher salary as men who use the same tactics. As a consequence, women tend to ask for less and are more likely to accept an initial offer. Prohibiting employees from discussing pay with their male colleagues makes it impossible for women to use evidence about organisational wage outcomes to challenge the underlying stereotypes that produce this effect and

increases the likelihood that women who assert themselves in wage negotiations will be penalised for doing so.

Data collected by the Workplace Gender Equality Agency confirms that methods of setting pay that are less transparent correspond to a larger gender pay gap. For instance, the gender pay gap is considerably larger in the private sector (21.3%) where discussion is often prohibited than in the public sector (12.2%) where workers are allowed to talk about their pay. The gender pay gap is also larger for employees whose pay is set by an individual arrangement (21.7%) rather than a collective agreement (16.5%) or award (9.2%).⁹

Ultimately, restricting employees' rights to disclose information about their pay means that women are less likely to be able to secure fair wage outcomes or identify and address discrimination. While it is difficult to quantify the overall impact of this practice on the gender pay gap, the prevalence of pay gag clauses in contracts of employment, collective agreements and workplace policies indicates that prohibiting employees from discussing their pay is an effective strategy for maintaining employer control and minimizing the capacity of employees to challenge inequitable wage outcomes.

PAY SECRECY GENERATES EMPLOYEE DISSATISFACTION, POOR PERFORMANCE AND RETENTION ISSUES

Pay secrecy also has a number of negative implications for businesses.

First, employees that are prohibited from discussing their pay may infer that pay outcomes and procedures for distribution are unfair, even when the organisation is making a good faith effort to provide equivalent compensation based on individual contributions.

Second, the impression of inequality that arises particularly where employees are subject to disciplinary action for discussing their pay, contributes to a culture of distrust that reduces employee engagement. Workers that suspect they are being underpaid relative to their colleagues or resent the restriction on their right to discuss matters that have a direct impact on their personal wellbeing are much more likely to look for another job.

Pay secrecy has sometimes been justified on the basis that employees will become dissatisfied if they know what others are being paid. This may be true if the basis for determining pay is not transparent and/or wage outcomes are inequitable. However, in our experience prohibiting employees from discussing their pay is much more likely to generate high levels of employee dissatisfaction, both with respect to individual wage outcomes and in relation to the workplace more generally.

⁹ WGEA, Gender Pay Gap Statistics September 2015, available at https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

Third, without the link between performance and pay employees lack an essential driver of motivation and effort. As there is no guarantee that an employee will be fairly compensated for their contribution, there is little incentive for employees to maximise their productivity.

PAY SECRECY INFRINGES ON THE FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Workers have a legitimate right to be compensated fairly and to voluntarily disclose information about their terms and conditions of employment to other workers.

Information about wage setting practices and outcomes is clearly relevant to the formulation of employee claims in collective bargaining and critically important as it enables workers and their unions to make use of existing mechanisms within the *Fair Work Act* to combat discriminatory practices.

Prohibiting employees from discussing their pay and allowing businesses to discipline workers that do so is an unwarranted restriction on the fundamental right to freedom of association and collectively bargain provided by ILO conventions 87 and 98.

The proposed amendment to remove restrictions on employees' rights to disclose information about their pay and prohibit employers from taking adverse action against employees for disclosing such information are consistent with the objects of the *Fair Work Act* which include:

- providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.¹⁰

¹⁰ S. 3, FW Act

CONCLUSION

The ACTU strongly supports the amendments contained in the *Fair Work Amendment (Gender Pay Gap) Bill 2015*.

Removing restrictions on employees' rights to disclose information about their pay and prohibiting employers from taking adverse action against employees that do so is a small, but significant, legislative change that would help ensure women are paid more equitably and contribute to closing the gender pay gap.

Workers should be able to voluntarily disclose information about their pay in order to ascertain whether they are being discriminated against and challenge illegal or unfair wage setting practices. It is also entirely legitimate for workers to share information about their pay with other workers engaged in collective bargaining.

Pay secrecy may be seen as beneficial by employers because it can avoid perceptions of unfairness when pay inequities do exist and minimise claims of discrimination and organisational wrong doing. However there is no valid reason why employees should be compelled to keep information about their own pay a secret or be punished for disclosing that information to others.

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