

Australian Federation of Employers and Industries (AFEI)

Submission to the Senate Education and Employment Committee (The Committee)

Fair Work Amendment (Gender Pay Gap) Bill 2015 (The Bill)

17 February 2016

AFEI thanks The Committee for the opportunity to make this submission to The Committee's inquiry into The Bill.

The Explanatory Memorandum to the proposed Bill advises that it *"seeks to reduce the gender pay gap by removing legal prohibitions on workers discussing their own pay"*. The proffered rationale for this removal of legal prohibitions is research claimed to show that the negotiation of remuneration by women is "often less successful" than for men.

Many workers, especially those who receive a salary and those in the private sector, are not allowed to talk about their pay with colleagues. Many employment contracts include a "gag clause", which means that workers can be disciplined or even sacked for discussing their pay.

When pay is set in secret by individual negotiation, women are at a disadvantage.

The Bill would make sure that workers are allowed to tell their colleagues what they are paid if they wish to, without fear of retaliation from their boss. It does so by amending the Fair Work Act 2009 to provide that any term of a modern award, enterprise agreement or contract of employment has no effect to the extent that it prohibits an employee from disclosing the amount of, or information about, the employee's pay or earnings, or to the extent that it permits an employer to take adverse action against their workers for discussing their own pay.

The Bill would not force anyone to discuss their pay, but it would make sure that bosses could not pressure their employees to stay quiet, or take any action against them if they do discuss their pay.

The proposed amendments to the Fair Work Act ("**FW Act**") sought by the Bill are, in our respectful opinion, unnecessary, inappropriate and are likely to have significant unintended, or otherwise, negative consequences.

There are many things that differentiate employees working in apparently similar positions. Two such employees may have similar training and experience, but one of them may have other abilities that give that person significant advantages in employment: if the employment involves a sales function, that person might have significantly better interpersonal skills, the capacity to comprehend much better the needs and desires of the customer/client; a more empathetic demeanour; a relevantly happier personality, etc. At the end of the month, the effects of these skills are most likely to show up in superior sale figures and that "out-performance" is the kind of thing most likely to result in different remuneration settings. However, if these two employees were working in debt recovery, the more outgoing, empathetic, warm, understanding, perhaps accommodating persona of the sales environment may be less useful and successful in a tough debt recovery department.

We could provide many other examples where apparently equal training and experience do not make for equal work capacities.

It wouldn't matter whether the two employees above were both male or both female or any combination, these kinds of differences could be under consideration in relation to remuneration and promotion and yet there would be no sex-bias in the treatment that might be decided upon.

Based on decades of experience in advising and dealing with workplace issues confronting employers, we can say with full confidence that prohibitions on disclosure of remuneration by employees are not about discrimination, but about trying to manage the significant differences in actual skills and actual performance of employees working side by side. Sometimes, better performance on one scale will be cancelled out by less brilliant performance on another scale. However, it is often the case that employers will try a variety of extra measures to retain stand-out employees, but necessarily without public disclosure of the details, which carries the inevitable risk of losing others who are good employees, but "less sparkling" performers.

There are also bonus and incentive schemes in the pay structures of individual businesses which have close links to sensitive corporate financial performance and competitive positions in the market - where public disclosure may cause damage. This is another reason for confidentiality to be protected.

The measures proposed in The Bill will inevitably destabilise employment in many, many businesses – potentially hundreds of thousands of them – and competitive positions. The linkage of the Bill's measures to the gender pay gap debate is not appropriate – we reject it - and the consequential damage would be a high price to pay for a misunderstood element of employment law and commercial practice.
