

Chapter 2

Introduction

2.1 The key purpose of the bill is to promote the disclosure of remuneration by prohibiting arrangements that provide for confidentiality.

2.2 While there was widespread recognition that Australia's gender pay gap is inequitable, submitters to the inquiry disagreed about the best way to address it.

2.3 Supporters of the bill premised their position on the argument that pay secrecy contributes to the gender pay gap. These submitters argued that the bill would foster merit-based pay decisions, increase the accountability of managers and organisations for their pay decisions, and would empower women in pay negotiations, thereby reducing pay discrimination and the gender pay gap. In summary, these submitters argued that there was no valid reason for compelling employees to abide by pay secrecy provisions or directions, or for punishing employees for disclosing pay information.¹

2.4 Supporters of the bill considered that the bill effectively balances the needs of both employers and employees in that it continues to protect employee confidentiality because it does not require employees to disclose their pay information to other employees, nor does it require employers to disclose the pay information of employees to other employees.²

2.5 Some supporters of the bill also made the argument that pay secrecy decreases productivity and is an inefficient way to run an organisation, while pay transparency increases levels of organisational trust, motivation, performance, and efficiency.³

2.6 However, some submitters, while supporting the bill, argued that the bill could be improved by adding a provision that explicitly protected a worker who

1 See Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*; Good Shepherd Australia New Zealand, *Submission 4*; Professor Marian Baird and Ms Alexandra Heron, *Submission 18*; Finance Sector Union of Australia, *Submission 12*; Professor Beth Gaze, *Submission 17*; Victorian Women Lawyers, *Submission 11*; Law Council of Australia, *Submission 13*; Professionals Australia, *Submission 3*; JobWatch, *Submission 4*; Queensland Nurses' Union, *Submission 6*; Shop, Distributive and Allied Employees' Association, *Submission 7*; Australian Council of Trade Unions, *Submission 10*.

2 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 2.

3 Victorian Women Lawyers, *Submission 11*; Australian Council of Trade Unions, *Submission 10*.

requested pay information from a co-worker,⁴ and by expressly banning pay secrecy provisions.⁵

2.7 The Law Council of Australia, JobWatch, and the Queensland Nurses' Union also made several recommendations to improve the clarity of the bill so as to ensure that it was capable of achieving its stated purpose.⁶

2.8 Opponents of the bill argued that the bill should be rejected because it was based on the flawed premise that the non-disclosure of remuneration was a direct cause of the gender pay gap. These submitters argued that the bill was superfluous and would not achieve its stated aims.⁷

2.9 Furthermore, opponents argued that the bill would undermine the ability of organisations to manage workplace performance and maintain workplace harmony. These submitters asserted that the bill would harm business competitiveness, and further add to the regulatory burden imposed by the *Fair Work Act 2009*.⁸

2.10 This chapter will first present evidence put forward by supporters of the bill, before examining the issues raised by opponents of the bill. Chapter 3 will then turn to the problematic aspects of the bill, and go on to explore methods to reduce the gender pay gap that are not reliant on legislated pay transparency.

Key issues

Scope of the national gender pay gap

2.11 The Workplace Gender Equality Agency (WGEA) is an Australian Government statutory agency charged with promoting and improving gender equality in Australian workplaces. Based on data that it collects⁹, the WGEA found a full-time base salary gender pay gap of 19.1 per cent and a total remuneration gender pay gap

4 Professor Beth Gaze, *Submission 17*.

5 Professor Marian Baird and Ms Alexandra Heron, *Submission 18*; see also Victorian Women Lawyers, *Submission 11*.

6 Law Council of Australia, *Submission 13*, pp. 5–6; JobWatch, *Submission 4*, p. 6; Queensland Nurses' Union, *Submission 6*, p. 3.

7 Australian Federation of Employers and Industries, *Submission 16*, p. 1; Motor Trade Association of South Australia, *Submission 1*, p. 4; Ai Group, *Submission 14*, p. 2; Australian Chamber of Commerce and Industry, *Submission 9*, p. 8.

8 Australian Federation of Employers and Industries, *Submission 16*, p. 1; Motor Trade Association of South Australia, *Submission 1*, p. 4; Ai Group, *Submission 14*, p. 2; Australian Chamber of Commerce and Industry, *Submission 9*, p. 5.

9 The WGEA collects data on the gender composition and remuneration of the workforce from non-public sector employers with 100 or more employees.

of 24.0 per cent across all industries and occupations.¹⁰ Furthermore, the gender pay gap in Australia has increased since 2004.¹¹

2.12 The Shop, Distributive and Allied Employees' Association (SDA) argued that the gender pay gap widens throughout a woman's working life. The SDA presented data that showed that for 15–19 year olds the pay gap is 0.3 per cent; for graduate starting salaries the gap is 4.4 per cent, it rises to 21.8 per cent for 35–44 year olds and 24 per cent for 45–54 year olds.¹²

2.13 The gender pay gap in professional occupations in Australia is particularly large. The differential is 24.4 per cent in the Professional, Scientific and Technical Services industry,¹³ and up to 34 per cent in the legal services sector.¹⁴ In the financial and insurance services industry, the base salary gender pay gap is 27.3 per cent and the total remuneration gender pay gap is 35 per cent.¹⁵

2.14 The Australian Council of Trade Unions (ACTU) asserted that the gender pay gap imposed a substantial cost on the Australian economy and argued that closing the gap would boost 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 per cent increase in GDP for every year that the problem goes unresolved. This figure represents an annual loss of around \$300 billion to the Australian economy.¹⁶

Causes of the gender pay gap

2.15 As noted in the previous chapter, the gender pay gap reflects the overall position of women in the economy (including the concentration of women in lower-paying roles and industries), rather than just a gender pay comparison of equivalent roles. For example, the WGEA cited salary analysis from global talent consulting firm Mercer that identified a 4.4 per cent gender pay gap for equivalent roles.¹⁷

10 Workplace Gender Equality Agency, *Submission 15*, p. 4.

11 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 3; Professor Marian Baird and Ms Alexandra Heron, *Submission 18*, p. 2.

12 Shop, Distributive and Allied Employees' Association, *Submission 7*, p. 3; see also Ms Amy Johnstone, Chair of Law Reform Committee, Victorian Women Lawyers, *Proof Committee Hansard*, 27 October 2016, p. 35.

13 Professionals Australia, *Submission 3*, p. 1.

14 Victorian Women Lawyers, *Submission 11*, p. 1.

15 Finance Sector Union of Australia, *Submission 12*, p. 1.

16 Australian Council of Trade Unions, *Submission 10*, p. 3.

17 Workplace Gender Equality Agency, *Submission 15*, pp. 4–5.

2.16 The gender pay gap is lower in the public sector than in the private sector (12.0 per cent compared to 19.6 per cent) and lower under awards (9.2 per cent) and collective agreements (16.5 per cent) than under individual arrangements (21.7 per cent). The main method of setting pay in the private sector is by individual arrangement (44.4 per cent), compared to the public sector where 87.2 per cent of pay is set by collective agreement.¹⁸

2.17 The WGEA noted that:

The public sector predominantly uses collective agreements and has transparent pay levels and scales, therefore standardising pay between women and men and resulting in a smaller gender pay gap than the private sector, where individual agreements are common.¹⁹

2.18 However, the WGEA also observed that the various factors listed below may contribute to the difference in the gender pay gap between the public and private sectors:

- the public sector operates in a politically-driven environment, while the private sector is market-driven;
- differences in the levels of occupational integration (balanced proportion of women and men in an occupation);
- differences in the implementation of anti-discrimination legislation;
- differences in the size of establishments; and
- differences in the education and qualifications of workers.²⁰

2.19 In addition, the WGEA pointed out that gender stereotypes may also influence the gender pay gap:

Women and men often work in different industries (industrial segregation) and different jobs (occupational segregation). Historically, female-dominated industries and jobs have attracted lower wages than male-dominated industries and jobs.²¹

2.20 Furthermore, women undertake most of the unpaid caring work in society, often for long periods, and are therefore more likely to work in a part-time or flexible

18 Workplace Gender Equality Agency, *Gender pay gap statistics*, August 2016, pp. 6–8, www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet_final.pdf (accessed 31 October 2016).

19 Workplace Gender Equality Agency, *Submission 15*, pp. 5–6; see also Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 4; Law Council of Australia, *Submission 13*, p. 5.

20 Workplace Gender Equality Agency, *Submission 15*, p. 6; see also Motor Trade Association of South Australia, *Submission 1*, p. 7.

21 Workplace Gender Equality Agency, *Submission 15*, p. 6; see also Professor Marian Baird and Ms Alexandra Heron, *Submission 18*, p. 2; JobWatch, *Submission 4*, p. 4.

capacity.²² Given women's contribution to the unpaid caring workforce combined with the lack of part-time management roles, it is more difficult for women to move into higher paid, more senior roles. For example, the WGEA data showed that just 15.4 per cent of women were chief executive officers and only 27.5 per cent of women were employed in the top three levels of management, compared to 40 per cent of women employed in the lowest level of management categories.²³

2.21 The WGEA also noted that gender discrimination not only impacts women's ability to negotiate pay, but can also lead to male-dominated networks 'hiring and rewarding in their own image'.²⁴

Non-disclosure of remuneration in Australian workplaces

2.22 Non-disclosure of remuneration means that employees do not have full information about their colleagues' pay. This can include formal base salary levels, salary structures, informal remuneration salary components, and discretionary performance pay such as bonuses.²⁵

2.23 Non-disclosure of remuneration in Australian workplaces is not uncommon, with some data suggesting that 50 per cent of organisations discourage employees from sharing remuneration information.²⁶

2.24 Professor Michelle Brown and Ms Leanne Griffin, University of Melbourne academics researching pay secrecy and performance management systems, and JobWatch, reported that in Australia, many employers actively pressure employees not to disclose their pay, even in the absence of a formal pay secrecy clause in the employment contract. The employer may simply give a direction to an employee not to disclose their pay and many employees are fearful of being sanctioned or dismissed on the grounds that they have breached the confidentiality clause in their employment contract. Based on their research, Professor Brown and Ms Griffin noted that penalties appeared to be imposed when an employee used information about a co-workers' pay to make a pay claim or complaint.²⁷

2.25 Professor Beth Gaze, co-director of studies in employment and labour relations law at the University of Melbourne (who appeared in a private capacity) also informed the committee that in recent years a practice of explicit prohibitions on pay

22 Workplace Gender Equality Agency, *Submission 15*, p. 6; Queensland Nurses' Union, *Submission 6*, p. 4; Shop, Distributive and Allied Employees' Association, *Submission 7*, pp. 1–2.

23 Workplace Gender Equality Agency, *Submission 15*, p. 6.

24 Workplace Gender Equality Agency, *Submission 15*, p. 6.

25 Workplace Gender Equality Agency, *Submission 15*, p. 7.

26 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 3.

27 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 4; JobWatch, *Submission 4*, pp. 4–5; see also Shop, Distributive and Allied Employees' Association, *Submission 7*, p. 5.

discussion in employment contracts had developed in Australia, owing to increasing American influences in labour law.²⁸

2.26 Evidence received from the Finance Sector Union (FSU) indicated that pay confidentiality was widespread in the finance and banking industry. Although the enterprise agreements of the 'Big Four' banks²⁹ do not contain pay confidentiality clauses, employment contracts issued by the Commonwealth Bank, ANZ Bank and Westpac contain confidentiality clauses related to pay and remuneration. The FSU also stated that out of 100 general and insurance employment contracts provided to the union, 20 per cent of these contained pay confidentiality clauses.³⁰

2.27 For example, an excerpt from a CBA contract provided by the FSU contained the following clause:

In particular, the terms and conditions of your employment (including remuneration arrangements) are strictly confidential. It is a condition of your employment that you do not discuss these matters with any other person other than your legal or financial advisers or immediate family members.³¹

2.28 The FSU also provided an excerpt from an American Express contract which stated:

You will appreciate that salary and other employment conditions are confidential and must not be discussed with other employees of American Express.³²

2.29 Similarly, an excerpt from a BayCorp Australia contract stated:

Details of your remuneration package and future changes to your remuneration are confidential between you and BayCorp. You must not discuss these details with other Baycorp employees.³³

28 Professor Beth Gaze, private capacity, *Proof Committee Hansard*, 27 October 2016, p. 2; see also Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 3.

29 The 'Big Four' banks in Australia are the Commonwealth Bank, the National Australia Bank, the ANZ Bank, and Westpac.

30 Finance Sector Union, answers to questions on notice, 27 October 2016 (received 4 November 2016), p. 1.

31 Finance Sector Union, answers to questions on notice, 27 October 2016 (received 4 November 2016), p.1.

32 Finance Sector Union, answers to questions on notice, 27 October 2016 (received 4 November 2016), p.2.

33 Finance Sector Union, answers to questions on notice, 27 October 2016 (received 4 November 2016), p. 2.

2.30 In addition to the evidence the committee received on the finance industry, representatives from Victorian Women Lawyers (VWL) indicated that pay secrecy clauses were also extremely widespread in the legal industry.³⁴

2.31 By contrast, the Australian Industry Group (Ai Group) stated that terms prohibiting remuneration disclosure were rare and not necessarily problematic.³⁵ Noting that confidentiality clauses in employment contracts 'sometimes may capture terms prohibiting the disclosure of pay', this may not always be legally enforceable if 'there is an insufficient connection between an employer's legitimate business interests and the information sought to be protected'.³⁶

2.32 The Ai Group also pointed out that private sector remuneration is not completely opaque because the market rates that private enterprise uses to recruit employees is generally freely available or available for a small fee from 'salary surveys conducted by private consulting or recruitment firms'.³⁷ In addition, the Ai Group itself publishes a salary and benefits survey of its members.

Pay confidentiality and the gender pay gap

2.33 Submitters in support of the bill argued that pay confidentiality contributes to the gender pay gap in the following ways:

- conscious or unconscious bias and gender stereotyping can persist because organisations are able to make pay and promotion decisions that are not strictly based on objective criteria and employees do not necessarily have the requisite knowledge to challenge the basis of those decisions, and those decisions are not exposed to external scrutiny;
- women are less likely to get high performance ratings compared to men and therefore the gender pay gap is further perpetuated by performance pay remunerations;
- women are reluctant to negotiate over pay and tend to ask for, and accept, lower pay than their male counterparts. As a result, managers often make lower opening pay offers to women during pay negotiations; and
- employees who uncover discriminatory practices or pay decisions are unable to challenge their employer without exposing themselves to the charge that

34 Ms Stephanie Milione, Convenor, Victorian Women Lawyers, *Proof Committee Hansard*, 27 October 2016, p. 33.

35 Ai Group, *Submission 14*, p. 2.

36 Ai Group, *Submission 14*, p. 3.

37 Ai Group, *Submission 14*, p. 3.

they have discussed their remuneration with a colleague, and thereby risk being sanctioned.³⁸

2.34 However, the committee received no evidence that was able to conclusively determine the extent to which pay confidentiality arrangements contributed to the gender pay gap in Australia.

2.35 Professor Brown and Ms Griffin argued that pay confidentiality not only has a negative impact on female employees, but also impedes organisational productivity by:

- limiting the effectiveness of performance pay systems that rely on pay performance messages to be broadly communicated to drive higher levels of organisational performance; and
- reducing employee satisfaction with pay, creating an environment that reduces trust and can promote conflict between employees.³⁹

2.36 Professor Brown and Ms Griffin acknowledged that many employers viewed confidentiality arrangements as a way to minimise perceptions of inequity and limit negative employee attitudes. However, they argued that the belief that pay secrecy minimised conflict over pay was misplaced and based on a false assumption that employees are unable to handle the facts about differences in pay rates. Furthermore, they argued that non-disclosure has been shown to increase employee anxiety, encourage rumours, and reduce levels of employee trust and team motivation. By contrast, employees associated pay transparency with integrity.⁴⁰

2.37 Professor Brown elaborated on this point during the public hearing:

There is a body of research that shows that openness is signalling integrity. Employees take the view that if there is a lack of information it means they [employers] have something to hide, whether that is true or not. The natural perception is, 'If you're not telling me something you must be really potentially unfair.' Not only do people begin to doubt the fairness of the pay system but there is also research that shows employees begin to doubt the quality of any other kinds of decisions or activities the organisation is engaging in. So it has a kind of domino impact on other organisational activities.⁴¹

38 Workplace Gender Equality Agency, *Submission 15*, pp. 7 and 11; Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, pp.5–7; Good Shepherd Australia New Zealand, *Submission 4*, p. 1; Finance Sector Union of Australia, *Submission 12*, pp. 1–2; JobWatch, *Submission 4*, pp. 4 and 5; Queensland Nurses' Union, *Submission 6*; p. 5; Shop, Distributive and Allied Employees' Association, *Submission 7*, pp. 5–6; Australian Council of Trade Unions, *Submission 10*, pp. 2–4.

39 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, pp. 2 and 8–9; Australian Council of Trade Unions, *Submission 10*, pp. 2 and 5.

40 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, pp. 9–11.

41 Professor Michelle Brown, private capacity, *Proof Committee Hansard*, 27 October 2016, p. 9.

2.38 The ACTU concurred with the above points and noted that pay secrecy may lead employees to infer that pay procedures and outcomes are unfair even if their employer is acting in good faith. The ACTU was also of the view that pay secrecy infringed on the fundamental right to freedom of association and collective bargaining, enshrined in International Labour Organisation conventions 87 and 98.⁴²

2.39 During the public hearing, the committee heard from Ms Erin McCoy, Industrial Officer for the ACTU, who stated that:

...our view is that prohibiting employees discussing their pay tends to have a negative impact on workplace culture, which in turn reduces employee engagement. In our experience, workers are much less likely to be dissatisfied if organisations are transparent about the criteria used to set pay, take steps to ensure that wages are fair and do not prohibit employees discussing their pay with colleagues.⁴³

2.40 The committee also received evidence arguing that non-disclosure in organisations had the potential to disproportionately impact women. Professor Brown asserted:

But what we know from research is that organisations are really using pay secrecy as a cost reduction method. By keeping pay secret, they can actually keep their labour costs down, which in and of itself is not a problem, but what you see is that organisations are actually keeping the wages of women lower, rather than the wages of men and women lower.⁴⁴

2.41 Finally, representatives from VWL informed the committee that they considered non-disclosure a contributing factor to the large gender pay gap in the legal industry. Ms Amy Johnstone, chair of the VWL Law Reform Committee observed:

The legal sector provides a fairly unique kind of case study in relation to the pay gap and the role of pay secrecy. This is a sector where women are particularly highly educated and often engage in complex negotiations as part of their job. So it would be hard to imagine that the pay gap exists because they are not negotiating and not asking. The full-time base salary pay gap is about 19 per cent for women in law. We consider that pay secrecy is one factor in that, and it suggests that we obviously need more than a lean-in approach to addressing the pay gap in our sector.⁴⁵

2.42 The WGEA submitted that in contrast to pay secrecy, pay transparency refers to institutional arrangements where salary determination and salary increases are accessible and comprehensible to employees such that employees have information

⁴² Australian Council of Trade Unions, *Submission 10*, pp. 5–6.

⁴³ Ms Erin McCoy, Industrial Officer, Australian Council of Trade Unions, *Proof Committee Hansard*, 27 October 2016, p. 38.

⁴⁴ Professor Michelle Brown, private capacity, *Proof Committee Hansard*, 27 October 2016, p. 3.

⁴⁵ Ms Amy Johnstone, Chair of Law Reform Committee, Victorian Women Lawyers, *Proof Committee Hansard*, 27 October 2016, p. 32.

and clarity about their co-workers' salary.⁴⁶ Pay transparency can also mean that employees can discuss their pay without the fear of being sanctioned by their employer.⁴⁷

2.43 Professor Brown and Ms Griffin were of the view that in terms of providing greater transparency, the bill struck an effective balance between the needs of employers and employees:

Employees who prefer to keep their pay confidential do not have to reveal their pay and employers are not required to make pay information publicly available. Employers merely need to be able to provide responses to employees who ask for additional information about their pay.⁴⁸

2.44 Supporters of the bill argued that tackling discrimination and unconscious bias when it is hidden by non-disclosure clauses posed a particular challenge. Mr Jonathan Kirkwood, a member of the Industrial Law Committee in the Federal Litigation and Dispute Resolution Section of the Law Council of Australia (Law Council) stated:

In the Law Council's view, removing legal prohibitions on workers discussing their pay will assist in removing pay secrecy, which can hide discrimination and unconscious bias. Discrimination is particularly difficult to remove where it is hidden from view. Accordingly, the Law Council supports the passage of the bill as a necessary and proportionate measure to reduce the gender pay gap, as well as recognising its consistency with Australia's international human rights legal obligations.⁴⁹

2.45 The WGEA, and Professor Brown and Ms Griffin noted that research indicates that pay transparency may improve motivation and trust, minimise unconscious bias and lead to the retention of talented workers. Pay transparency may also empower women in pay negotiations and reduce gender bias by fostering greater employer accountability over pay decisions.⁵⁰

2.46 However, the WGEA stated that there was currently no definitive evidence to link the removal of legal prohibitions on employees discussing their pay and the reduction of gender pay gaps.⁵¹

46 Workplace Gender Equality Agency, *Submission 15*, p. 7.

47 Professor Marian Baird and Ms Alexandra Heron, *Submission 18*, p. 3.

48 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 2.

49 Mr Jonathan Kirkwood, Member of the Industrial Law Committee, Federal Litigation and Dispute Resolution Section, Law Council of Australia, *Proof Committee Hansard*, 27 October 2016, p. 30.

50 Workplace Gender Equality Agency, *Submission 15*, pp. 7 and 11; Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, pp. 5–6; see also Australian Council of Trade Unions, *Submission 10*, pp. 3–4.

51 Workplace Gender Equality Agency, *Submission 15*, p. 3.

2.47 Ms Jackie Woods, Acting Director of the WGEA emphasised this position at the public hearing:

...We do not see, or have hard evidence to hand, that removing the secrecy clauses would directly reduce gender pay gaps.

Nevertheless, we do see that transparency in a broad sense can really support pay equity in workplaces. That can be thinking about transparency of remuneration policies and strategies and making sure that people understand what they are, which is a bit of a different issue to individuals knowing each other's pay information.⁵²

International approaches to pay transparency

2.48 The WGEA noted that the role of pay transparency in supporting gender pay equity has been the subject of both international debate and legislative action in countries such as the United Kingdom (UK) and the United States (US).⁵³

2.49 In 2010 the UK enacted changes to the *Equality Act 2010* (UK), implementing a limited protection for employees wishing to discuss their pay. The provision prevents an employer from enforcing a term in an employee's contract prohibiting the employee from discussing their pay or asking a colleague (or ex-colleague) about pay matters. However, the protection only applies where the disclosure or request is specifically to discover whether there is discrimination (on sex or other grounds).⁵⁴

2.50 This particular approach does not invalidate pay secrecy clauses, and as Professor Gaze noted:

Unless employees are very well educated on their rights, they may not be aware that they have the right to discuss pay in the face of an apparently valid secrecy clause in their employment document.⁵⁵

2.51 Professor Marian Baird and Ms Alexandra Heron, academics from the University of Sydney Women and Work Research Group, provided comments from a British barrister noting that the changes to the UK law still permit contractual prohibitions on discussing pay to remain in employment contracts and only guards against their enforcement. The comments explained that the provision means the employer may leave a total ban in place (potentially misleading employees as to the state of the law), and observed that it could prove difficult to assess or prove whether an employee intended to make inquiries or a disclosure for the purposes for checking discrimination. As such, Professor Baird and Ms Heron suggested that should the UK

52 Ms Jackie Woods, Acting Director, Workplace Gender Equality Agency, *Proof Committee Hansard*, 27 October 2016, p. 45.

53 Workplace Gender Equality Agency, *Submission 15*, pp. 8–9.

54 Professor Marian Baird and Ms Alexandra Heron, *Submission 18*, p. 6.

55 Professor Beth Gaze, answers to questions on notice, 27 October 2016 (received 3 November 2016), p. 5.

legislation be used as a model, these problematic aspects should be taken into consideration and remedied.⁵⁶

2.52 In the US context, 11 states have passed laws banning pay secrecy: Michigan (1982); California (1984); Colorado (2008); Illinois (2004); Maine (2009); Vermont (2005); New Jersey (2013); Minnesota (2014); New Hampshire (2014); New York (2015); and Connecticut (2015).⁵⁷

2.53 Professor Brown and Ms Griffin presented evidence of research from the US that found that women's wages were 4 to 12 per cent higher in states that prohibited pay secrecy compared to states that did not prohibit pay secrecy.⁵⁸ Furthermore, the committee was informed that enforcement of pay secrecy by companies in the US had decreased from 75 percent in 1985, to 36 percent in 2001, to 23 percent in 2010.⁵⁹

2.54 Additionally, in 2014 US President Barack Obama issued executive orders designed to decrease the gender pay gap through the introduction of provisions to reduce pay secrecy among federal contractors. As Professor Gaze outlined:

The Order amended Executive Order 11246, a longstanding executive policy that deals with positive action requirements in federal government contracting, to add a further area of protection whereby the contractor may not 'discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant'.⁶⁰

2.55 However, Professor Gaze also noted that this transparency approach has been criticised as too weak, as rather than requiring employers to take responsibility for reviewing and remedying pay inequalities, it places responsibility for checking pay equity solely on employees.⁶¹

2.56 During the hearing Ms Amanda McIntyre, First Assistant Secretary for the Office for Women, part of the Department of the Prime Minister and Cabinet, commented on the international context:

Senators would be aware that the transparency provisions in both the UK and the US have not solved the gender pay gap, which remains high, and there is no substantial evidence that the removing of pay gagging clauses,

56 Professor Marian Baird and Ms Alexandra Heron, *Submission 18*, p. 6.

57 Professor Marian Baird and Ms Alexandra Heron, *Submission 18*, p. 4.

58 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p. 8.

59 Professor Michelle Brown and Ms Leanne Griffin, *Submission 8*, p.3.

60 Professor Beth Gaze, answers to questions on notice, 27 October 2016 (received 3 November 2016), p. 3; see also Workplace Gender Equality Agency, *Submission 15*, p. 8.

61 Professor Beth Gaze, answers to questions on notice, 27 October 2016 (received 3 November 2016), p. 3.

such as the amendment proposed, have actually contributed to the reduction of the gender pay gap in these countries.⁶²

2.57 When subsequently queried on whether the Office for Women was aware of a US study⁶³ provided by Professor Brown indicating that the gender pay gap had decreased in the states which had outlawed pay secrecy, Ms McIntyre undertook to review the evidence in question.⁶⁴

2.58 In answering the question on notice, the Office for Women concluded:

While the study uses a large sample size and accounts for a number of other factors that could contribute to wage discrepancies, such as education level and sector, it also suggests that 'banning pay secrecy may not be what increases pay for women, but rather a larger culture that supports women' (p. 658) in the states that have introduced these laws. The Office for Women maintains that cultural change is an important driver in improving gender equality, including addressing the gender pay gap in Australia.

The introduction of minimum wage provisions in these states also had an impact, and men's and women's wages were both positively affected. This indicates that there has been broader legislative and cultural change that cannot be discounted as contributors to the reduction in the gender pay gap in those states. While the outlawing of pay secrecy clauses appears to have a positive effect in the evidence presented, it is not the only factor contributing to this positive change.⁶⁵

Employer views on pay transparency

2.59 In discussions with employers, the WGEA observed a divergence of views regarding this legislation to remove the restrictions on employees discussing their pay. Overall, a majority of employers which responded to the WGEA about the bill, opposed it.⁶⁶ Some employers saw pay transparency as a way to progress gender pay equity. For example, the WGEA cited an employer that argued the bill was 'reasonable' because it did not require anyone to discuss their pay.⁶⁷

62 Ms Amanda McIntyre, First Assistant Secretary, Office for Women, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 27 October 2016, p. 46.

63 The study referred to is: Marlene Kim, 'Pay Secrecy and the Gender Wage Gap in the United States', *Industrial Relations*, vol. 54, no. 4, 2015, pp. 648–677.

64 Ms Amanda McIntyre, First Assistant Secretary, Office for Women, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 27 October 2016, p. 48.

65 Office for Women, Department of the Prime Minister and Cabinet, answers to questions on notice, 27 October 2016 (received 11 November 2016), pp 2–3.

66 Workplace Gender Equality Agency, *Submission 15*, p. 9.

67 Workplace Gender Equality Agency, *Submission 15*, p. 9.

2.60 Another employer noted:

All employees should have access to de-identified wage and salary data that shows wages for women and men across all roles within an organisation, so that all employees, especially women, have the opportunity to negotiate fair and equitable wage outcomes.⁶⁸

2.61 By contrast, other employers were of the view that the legislation would lead to workplace conflict and reduce staff morale because employees may not fully understand all aspects of pay decisions. For example, the WGEA noted that one employer expressed concern that the 'fallout' from the bill would outweigh the good intentions of the bill by undermining organisational culture.⁶⁹ Another employer stated:

We believe that equal pay is addressed through better communication with managers, better education of decision makers around unconscious bias as well as providing decision-makers with support and guidance by those who help set and regulate pay... Discussion between employees does not address the issue as, in most situations, they do not have all the facts to understand how pay was determined for each individual.⁷⁰

2.62 The Australian Chamber of Commerce and Industry (ACCI) noted that 'the design and implementation of remuneration frameworks is a complex area of human resources management practice' and that the management of employee perceptions around performance and remuneration was particularly challenging. Consequently, employers adopted strategies to minimise potential conflict arising from pay comparisons including preventing employees from disclosing their pay. The ACCI argued that this was done in the interests of maintaining workplace harmony and not because of discrimination.⁷¹

2.63 Likewise, the Australian Federation of Employers and Industries (AFEI) argued that prohibitions on the disclosure of remuneration by employees are 'not about discrimination' and instead are a necessary part of managing workplace performance.⁷²

2.64 On this point, Mr Gary Brack, Chief Executive Officer of the AFEI argued it was difficult for managers to provide objective justifications for pay differences and remuneration strategies that employees would accept:

Once you get involved in the debate about 'because'...then you get involved with people's perceptions and their views about whether or not they should or they should not be up there, and a lot of people think they should be up

68 Workplace Gender Equality Agency, *Submission 15*, p. 9.

69 Workplace Gender Equality Agency, *Submission 15*, p. 9.

70 Workplace Gender Equality Agency, *Submission 15*, pp. 8–9.

71 Australian Chamber of Commerce and Industry, *Submission 9*, p. 5.

72 Australian Federation of Employers and Industries, *Submission 16*, p. 2.

there even though their position and their contribution do not necessarily warrant it. You argue that this is an equitable proposition, surely they should have the information and you should be able to justify objectively. I am saying that in practice, in the workplace, objective proof is much more difficult to provide to the point where it convinces someone who will then be destabilised. That is the problem.⁷³

2.65 Evidence from supporters of the bill countered this view saying that employees are accepting of performance pay as long as the frameworks used to determine it are fair and transparent. Professor Brown stated:

One of the other points that organisations often argue...is that employees cannot cope with pay differences. That argument was probably valid back in the 1990s, but it is now pretty clear that employees accept differences in pay so long as they are based on valid performance management systems. Employers argued through the 1990s that they wanted to move away from the award system; they wanted to have performance-related pay and they wanted to pay people differently. Employees have gone with them and there is an understanding that people get paid differently on the basis of their performance. All pay transparency requires is that organisations articulate those differences.⁷⁴

2.66 Ms McCoy from the ACTU further elaborated on this point during the public hearing:

I think fairness is the key here. Workers accept that different jobs get paid at different rates, and, when they understand why it is that certain work is rewarded or bonuses are given for certain performance outcomes, they are very accepting of that. But the question may be 'why am I being paid less than someone who is doing exactly the same work as me' or 'why does my employer want to hide from me how much my colleagues are getting paid'. The idea that, all of a sudden, if it is known to an employee how much others are getting paid at a general level or even at individual pay rates, that is going to create disharmony in the workplace, I think, is somewhat disingenuous. As you pointed out, the public sector have had that for many years, and it is not a major issue.⁷⁵

2.67 The ACCI pointed out that enabling an employee to ascertain their comparative remuneration would do nothing to foster an objective understanding amongst employees of the underlying reasons for any pay differential. This could lead to an employee making an automatic assumption that gender was the basis for a disparity in remuneration.⁷⁶

73 Mr Gary Brack, Chief Executive Officer, Australian Federation of Employers and Industries, *Proof Committee Hansard*, 27 October 2016, p. 20.

74 Professor Michelle Brown, private capacity, *Proof Committee Hansard*, 27 October 2016, p. 9.

75 Ms Erin McCoy, Industrial Officer, Australian Council of Trade Unions, *Proof Committee Hansard*, 27 October 2016, p. 41.

76 Australian Chamber of Commerce and Industry, *Submission 9*, p. 9.

2.68 Ms Alana Matheson, Deputy Director of Workplace Relations for the ACCI also voiced concerns that pay transparency would not necessarily encourage a disgruntled employee to speak to their managers, but rather would merely foster workplace resentment:

What we do question is whether or not this bill will approach that [conversations between employees and managers on pay differences] or facilitate that in a constructive way. What it might result in is resentment between colleagues, as an example, who perhaps consider that they have worked harder or contributed more than the other person, and vice versa. We would like people who feel that their pay may be set on inappropriate grounds, or may be set unfairly, to be able to discuss these issues openly with the person responsible for pay decisions, and the way to achieve that is to facilitate workplace cultures where the relationship is strong enough to be able to have those conversations.⁷⁷

2.69 The Motor Trade Association of South Australia (MTA) acknowledged that the gender pay gap in the private sector is greater than in the public sector because of collective bargaining and greater political sensitivity in the public sector, whereas market forces typically determine wage outcomes in the private sector.⁷⁸

2.70 However, the MTA argued that greater collectivised bargaining in the private sector would not address the gender pay gap and may cause economic damage. While it acknowledged that better information would improve an employee's ability to negotiate wages, the MTA argued that it was vital that employers kept the ability 'to reward skill differentiation and competency while retaining some control over costs without fear of employees either collectively or individually 'bidding up' wage negotiations'. The MTA also raised the possibility that employers would be left defenceless to deal with an employee who, with the intention of bidding up wages, made a false or misleading disclosure about their pay.⁷⁹

2.71 The ACCI also pointed out that there are a host of legitimate reasons why pay might vary among people performing the same job, role, or occupation. In particular, a focus on personal capacities such as skills, knowledge and abilities meant that people are remunerated according to their performance or worth rather than the job they are doing.⁸⁰

2.72 Mr Brack from the AFEI reinforced this argument when he stated:

It is not that there is a precise science in pay setting, but it is clear that they have to operate within a market, they have to take into account people's

77 Ms Alana Matheson, Deputy Director of Workplace Relations, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 27 October 2016, p. 26.

78 Motor Trade Association of South Australia, *Submission 1*, p. 3.

79 Motor Trade Association of South Australia, *Submission 1*, p. 9.

80 Australian Chamber of Commerce and Industry, *Submission 9*, pp. 5–6.

differential contributions and capacities, they have to look at their education levels and a variety of other things.⁸¹

2.73 Supporters of the bill acknowledged that there may be legitimate differences between employees, but asserted that pay transparency led to more conscious decisions around pay. Professor Brown observed:

It may well be that there are differences between people, and they are completely legitimate, and all pay transparency does is make sure organisations make very conscious and rational decisions, whereas when it is secret they do tend to be ad hoc – there is no pressure to really think about what you are doing, so that is why you get these kinds of adverse outcomes with one group of people getting paid less than another. I think the key argument for pay transparency is around more rational and conscious decision making around pay.⁸²

2.74 Professor Brown also asserted that pay transparency worked to increase the efficacy of performance management systems:

If you do not know you are being paid less, you may not actually change your performance, so you are not getting the kinds of signals that the performance management system is supposed to be sending. We also know that the people who are performing better want to know that they are getting paid more than other people.⁸³

2.75 On a similar point, when asked for an opinion on whether pay transparency would be a barrier to implementing performance based pay structure in the finance sector, Ms Wendy Streets, the Local Executive Secretary for the Queensland branch of the FSU responded:

I do not believe for a minute it would be a barrier. I think what they are probably fearful of is what gets exposed in the performance pay information once it is free to be discussed and be out there. It will out an awful lot of discrimination. There is probably at least 75 per cent of people who work in the finance industry on one type or another of performance based systems. We have difficulty – we have tried to enter into pay equity audits with some of our major employers. For all their billions of dollars, sometimes they are quite unable – and, more often than not, most of them are unwilling, but we have had a few who have worked with us – to produce the data.⁸⁴

81 Mr Gary Brack, Chief Executive Officer, Australian Federation of Employers and Industries, *Proof Committee Hansard*, 27 October 2016, p. 19.

82 Professor Michelle Brown, private capacity, *Proof Committee Hansard*, 27 October 2016, p. 4.

83 Professor Michelle Brown, private capacity, *Proof Committee Hansard*, 27 October 2016, p. 3.

84 Ms Wendy Streets, Local Executive Secretary of the Queensland Branch, Finance Sector Union, *Proof Committee Hansard*, 27 October 2016, p. 42.

2.76 Performance criteria and outputs are likely to become increasingly important in a globally competitive business environment. However, the ACCI was concerned that the bill would discourage employers from implementing legitimate remuneration structures based on personal capacities because of a concern that employee discussion of pay outcomes could lead to workplace conflict.⁸⁵

2.77 Professor Brown responded to these concerns by emphasising the potential for reduced productivity under pay secrecy arrangements:

We have a number of studies which show that pay secrecy reduces the effectiveness of pay systems to motivate employee performance and that employee performance is lower under a pay secrecy policy because people cannot see the connection between pay and performance. The lower-performing employees do not know that they are performing poorly and getting less pay, and the high performers have no relative information that says they are working hard and being remunerated for that. The overwhelming body of research shows that pay secrecy is bad for employee performance rather than better for it.⁸⁶

2.78 The ACCI was also concerned that an increased focus on pay risked undervaluing valuable non-monetary or intrinsic rewards such as job challenge, responsibility, autonomy, and task variety.⁸⁷

2.79 Both the AFEI and the ACCI argued that performance pay schemes are closely linked to corporate financial performance, and that the public disclosure of pay structures could inflict damage on market performance.⁸⁸

2.80 Ms Matheson from the ACCI emphasised the commercial and competitive risks of releasing pay-related information when she stated:

The Australian Chamber supports the principle that workplaces should be free of sex-based discrimination, but there are ways to achieve this other than through pay transparency. The bill also raises concerns that its blanket approach of rendering unenforceable clauses preventing employee pay disclosure will see pay-based information land in the hands of competitors.⁸⁹

2.81 Similarly, the MTA argued that the amendment as currently drafted does not reflect the intention of the bill which is designed to capture the disclosure of pay information between colleagues within the same workplace. However, the MTA

85 Australian Chamber of Commerce and Industry, *Submission 9*, p. 7.

86 Professor Michelle Brown, private capacity, *Proof Committee Hansard*, 27 October 2016, p. 9.

87 Australian Chamber of Commerce and Industry, *Submission 9*, p. 8.

88 Australian Federation of Employers and Industries, *Submission 16*, p. 2; Australian Chamber of Commerce and Industry, *Submission 9*, p. 9.

89 Ms Alana Matheson, Deputy Director of Workplace Relations, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 27 October 2016, p. 18.

argued that because the provisions of the bill could be applied broadly, 'a literal interpretation of the legislation could lead to penalty free disclosure of a workplaces wage structures to business competitors, either inadvertently or by disgruntled employees'. The MTA was of the view that the potential for general disclosure of business wage structures created serious commercial risks.⁹⁰

2.82 Finally, both the ACCI and the MTA pointed out that there were various legislative and regulatory mechanisms already in place to address factors such as discrimination and bias. For example, it is already unlawful to discriminate in pay negotiations on the basis of gender. Furthermore, the Fair Work Commission is already empowered to review employment agreements and respond to allegations of bias and poor decision-making.⁹¹

2.83 The Office for Women concurred with this point and noted:

The Fair Work Act already contains a number of provisions which support gender equality, including gender pay equity. Employers must also have regard to obligations under state, territory and federal anti-discrimination laws.⁹²

90 Motor Trade Association of South Australia, *Submission 1*, p. 8; see also Australian Chamber of Commerce and Industry, *Submission 9*, p. 9.

91 Australian Chamber of Commerce and Industry, *Submission 9*, p. 8; Motor Trade Association of South Australia, *Submission 1*, p. 9.

92 Ms Amanda McIntyre, First Assistant Secretary, Office for Women, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 27 October 2016, p. 46.

