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Inquiry into the Fair Work Amendment (Gender Pay Gap) Bill 2015 (Cth)

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Chamber of Commerce
and Industry



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1 Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) thanks the Senate Education and Employment Legislation Committee (Committee) for the opportunity to provide comments in relation to the *Fair Work Amendment (Gender Pay Gap) Bill 2015* (Cth) (Bill) as a part of this inquiry. The Bill aims to “reduce the gender pay gap by removing legal prohibitions on workers discussing their own pay”¹ and proposes to do this by amending the *Fair Work Act 2009* (Cth) (FW Act) 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.

It does this by inserting a new section 333B in the following form:

333B Terms prohibiting disclosure of pay have no effect

A term of a modern award, an enterprise agreement or a contract or employment has no effect to the extent that the term:

- (a) prohibits an employee from disclosing the amount of, or information about, the employee’s pay or earnings; or*
- (b) permits, or has the effect of permitting, an employer to take adverse action against an employee if the employee discloses the amount of, or information about, the employee’s pay or earnings.*

The Explanatory Memorandum states that 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 not discuss their pay”.² It also states that the new section 333B is intended to be read broadly and would remove restrictions on disclosure of information about whether and in what amounts employees receive entitlements such as bonuses, superannuation, share allocations, paid parental leave, allowances, professional memberships, paid overtime, company cars or parking spaces.³ The changes are proposed to apply to all modern awards, enterprise agreements or contracts of employment, including those already in operation.

It should be noted from the outset that where wages are paid in accordance with an industrial instrument such as modern awards or enterprise agreements the Bill would have no work to do as there is already transparency because the instruments are by their nature publicly available. Therefore the practical effect of this Bill is to promote the sharing of information about individual pay by people who are generally paid above statutory minima and have their pay determined through market mechanisms.

The Australian Chamber is committed to gender equality. We encourage businesses to ensure that gender equality is supported by their work systems and practices. However it is important that any regulatory requirement imposed by Government is clear in its objectives and that regulatory intervention of the nature imposed is the only viable means of achieving these objectives. While the

¹ Explanatory Memorandum, p. 1.

² Ibid.

³ Ibid., p. 2.

Australian Chamber does not oppose organisational strategies that promote pay transparency in the workplace, we have reservations about whether such strategies are appropriate to the circumstances of all organisations. The Australian Chamber is concerned that the Bill may not be the most effective means of achieving gender equity objectives and that it may instead give rise to conflict in the workplace, negatively impacting workplace culture.

The design and implementation of remuneration frameworks is a complex area of human resources management practice. Those frameworks will exhibit great variety between organisations. They are designed bearing in mind a range of factors including but not limited to the industry in which the organisation operates, the objects and strategy of the organisation, financial considerations and competition for skills.

Regardless as to the remuneration structure in place, there is strong motivation for organisations to implement effective performance and reward management systems that are perceived as fair to employees as this can play a powerful role in influencing work attitudes, trust⁴ and how employees relate to the organisation. However this can prove to be a delicate balancing act. As Shields notes:

Employee perceptions cannot simply be fashioned at will by management; the scope for shaping or reshaping employee attitudes will be limited (or perhaps even broadened) by the employee's prior experiences, socialisation, personality and expectations.⁵

The challenges associated with managing employee perception should not be understated, particularly where there are linkages between pay and performance. For example, Shields, calling on Ho's finding that social values and referents play a major role in shaping employee evaluations of outcomes, stated as follows:

For instance, because of their social values or their choice of social comparators, under-performers may still believe that a performance reward should have been forthcoming and that the organisation has breached its promise.⁶

The complex nature of organisational behaviour may result in employers adopting strategies to mitigate, in good faith, conflict arising from pay comparisons. The relevant strategy may result in enforceable provisions that prevent employees from disclosing pay outcomes to other people, not for sinister or discriminatory purposes, but to maintain workplace harmony.

2 Legitimate reasons exist for variations in pay

There are many reasons for variations in pay, even where people have the same job, role or occupation. In some sectors and occupations remuneration outcomes can vary significantly, even where people are employed to do the same work. For example, Shields has observed that commission based pay features in some workplaces where it is straightforward to measure results achieved by individuals such as real estate agencies, automotive retailer, courier firms and some manufacturing plants where piece rates are a feature.

⁴ Shields, J, *Managing Employee Performance and Reward: Concepts, Practices, Strategies*, Cambridge University Press, 2007, p. 6.

⁵ Ibid., p. 53.

⁶ Ibid.

Developing pay structures around the productive capacities of the person in the job rather than the job itself is also an established part of remuneration strategy and practice.⁷ Shields has described this approach as follows:

Personal 'capacity' can be defined in terms of traditional person-characteristics such as experience and seniority. Increasingly, however, it is being defined in terms of personal 'skills', 'knowledge' and 'abilities'. The premise here is that employees should be paid according to the work capacities that they possess, regardless of the particular job or role to which they happen to be assigned at any point in time. Some commentators (Klaas 2002, Risher 1997b, 2003) have gone so far as to suggest that traditional jobs are anachronistic; that effective human resource management now requires a focus on personal capacities and performance rather than on managing positions. The job, it is argued, is redundant; we live in the age of the 'job-less' or 'de-jobbed' organisation. Lawler (1991:148), an outspoken critic of job-based pay argues: 'It is people that have market value, not jobs. Jobs are simply a bureaucratic structure that can be used to estimate the market value of an individual. The key compensation issue from a human resource management perspective concerns what an individual is worth: not what a job is worth'.⁸

As social, economic and demographic shifts continue to impact our world of work, it is likely that person based pay will come into heightened focus. As organisations endeavour to address productivity challenges in a globally competitive environment, work will become increasingly focussed on outputs, as opposed to inputs. Greater importance will be placed on what value a person adds to the business as opposed to how much time they spend in a workplace or what their job description states. Traditional skills and knowledge banks are being challenged and 'adaptive learning' is coming into focus. Information is freely available anytime and anywhere and in dynamic, changing contexts, a person's ability to learn new things, to apply those learnings and stay adaptable is critical. This trend will give rise to mechanistic, hierarchical structures being replaced with flatter, more agile structures. Job based pay may seem a poor fit for many organisations, especially in knowledge based industries.

Shields notes the following shortcomings associated with job based pay:

Because pay is based on position rather than job holder-performance, there is little short-term incentive to improve performance. If you pay someone a fixed wage for each hour, day or week they perform a designated job ... they have no monetary incentive to perform beyond the customary effort level for the job. To be sure, promotion to a more important job will deliver a significant pay increase, but this stands to reinforce organisational hierarchy. Employees are encouraged to increase their pay by securing promotion up the job hierarchy, which stands to make the organisation 'top heavy' and to saddle it with a costly management structure. Paying the job rather than the person also provides employees themselves with little incentive to acquire skills and competencies that the organisation may need now or in the future. Pay for narrow job assignments is also incompatible with the multiskilling requirements of teamworking. Pay-for-the-job may also be too slow and inflexible to accommodate rapid

⁷ Shields, J, op. cit., p. 235.

⁸ Ibid., p. 236.

*changes in technology, work processes and product or service type requirements, such as those characteristic of prospector firms.*⁹

Indeed, many of the benefits Shields identifies as being associated with person based pay will be of increasing importance as our economy undergoes structural adjustment. In that scenario skills, education and training become areas of increasing policy focus. For example, Shields has identified the following benefits associated with person based pay:

- “skill-based pay encourages employees to develop personal skills in line with the organisation’s changing needs”;¹⁰
- “[p]ay-for-skill” facilitates functional flexibility through multiskilling and team working. Multiskilling allows employees to be redeployed quickly without retraining delays and minimises ‘downtime’ arising from the absence of required skills”;¹¹
- “[b]y encouraging the acquisition of new knowledge and skills, skills pay allows organisations to respond rapidly to new skill needs arising from technological and product market changes”;¹²
- “[s]kill pay also facilitates systematic organisational learning and continuous improvement by rewarding employees for developing their ‘human capital’”.¹³

The Australian Chamber has concerns that the Bill may have the effect of discouraging employers from implementing person based pay structures out of concern that discussion of pay outcomes may create workplace conflict, despite legitimate and non-discriminatory reasons for pay differentials, even in circumstances where people might carry the same job title but have different skill levels.

It should also be noted that ‘rewards’ received by employees may not always be financial or pay related. Shields notes that the following components form part of ‘total rewards’:

- Extrinsic rewards:
 - Financial rewards or remuneration:
 - Fixed or base pay;
 - Direct benefits;
 - Performance-related pay;
 - Developmental rewards:
 - Learning, training and development;
 - Succession planning;
 - Career progression;
 - Other indirect or non-cash benefits;
 - Social rewards:
 - Organisational climate or management culture;
 - Performance support;

⁹ Shields, J, op. cit., p. 239.

¹⁰ Ibid., p. 240.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid., p. 241.

- Work group affinity;
- Work-life balance;
- Other indirect or non-cash benefits.
- Intrinsic rewards:
 - Job challenge;
 - Responsibility;
 - Autonomy;
 - Task variety.¹⁴

Shields notes that in some situations non-financial rewards may be able to play a role equal to, if not greater than, that of monetary rewards, using the example of not-for-profit organisations where the intrinsic rewards flowing from the work itself may be of greater importance than monetary rewards.¹⁵

Tailoring remuneration to the organisation and people within it should be encouraged however this process is likely give rise to variations in ‘total reward’ structures because pay forms only one part of the organisation’s performance and reward framework. The Australian Chamber is concerned that the Bill may result in a heightened focus on the level of ‘pay’ at the expense of non-financial rewards which may be of greater value to both the organisation and the individual.

3 Existing protections and correcting differences

Currently there are a range of legal remedies available where a gender pay gap is a result of gender based discrimination. The Australian Chamber submits that the Bill is superfluous given the existence of these remedies. Sex-based discrimination is unlawful pursuant to Commonwealth, and State and Territory legislation. The *Sex Discrimination Act 1984* (Cth) provides that discrimination on the basis of sex, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, family responsibilities, sexual orientation, gender identity, and intersex status is unlawful. Discrimination in employment, including about remuneration, is covered by the statute.

Varying approaches may be taken to identifying ‘gender pay gaps’ and achieving ‘pay equity’ based on differing understandings of those terms. The Workplace Gender Equality Agency (WGEA) has suggested that “[p]ay equity is achieved when women and men performing the same roles or roles of comparable value receive the same remuneration”.¹⁶ The Australian Chamber supports the principle of equal pay for work of equal or comparable value.

Another legal remedy is contained within Part 2-7 of the FW Act which creates a statutory scheme to ameliorate differences in remuneration for work that is of equal or comparable value. The Explanatory Memorandum to the FW Act indicates that this “allows comparisons to be carried out between different but comparable work” and “relies on job and skill evaluation techniques”. This requires proper comparator group(s) to compare the value of work in question on the basis of

¹⁴ Shields, J, op. cit.7, p. 31.

¹⁵ Ibid., p. 32.

¹⁶ Louise McSorley, Workplace Gender Equality Agency, [Case study: Research showcasing leading practice at the Commonwealth Bank.](#)

gender and the identification of such groups as well as the practice of job and skill evaluation is a complex and contentious exercise. There are a range of considerations which may be relevant to the exercise of the discretion to make an equal remuneration order. As recently set out in a decision of the Full Bench of the Fair Work Commission (FWC), the exercise of that discretion the FWC must take into account include the matters identified in s.302(4), s.578 and the objects in s.3. The nature and assessment of such factors will depend on the circumstances of the case. The considerations which may be relevant to the exercise of the discretion include, without limitation:

- the circumstances of the employees to whom the order will apply;
- eliminating gender based discrimination;
- the capacity to pay of the employers to whom the order will apply;
- the effect of any order on the delivery of services to the community;
- the effect of any order on a range of economic considerations, including any impact on employment, productivity and growth;
- the effect of any order on the promotion of social inclusion by its impact on female participation in the workforce; and
- the effect of any order on enterprise bargaining.¹⁷

Understanding the reasons for pay differential requires a degree of rigour to carefully scrutinise and determine on an objective basis what employees are paid and why. While the Bill will enable people to establish that they are paid more or less than someone else, the relevant disclosure will not establish why that is the case. A finding that gender is the cause of any wage disparity is not one that should be made solely on the discovery of individual wage differentials.

There are a range of reasons employers may seek to prevent employees discussing their pay with others. The reasons for legitimate pay differentials may not always be understood and accepted by employees. This can have a negative impact on both morale and relationships in the workplace. While the literature in relation to pay transparency is not consistent, some studies have found that individuals care about their income relative to others and that employees may expend less productive effort upon discovering that their pay is low relative to peers, providing employers with an incentive not to disclose pay.¹⁸ Studies have also suggested that there is a strong incentive for employers to impose rules to prevent pay disclosure because of negative impacts upon job and pay satisfaction and ultimately turnover.¹⁹ Disclosure may be problematic for organisations with variable and/or person based pay structures.

Furthermore, employers may wish to secure competitive advantage in their remuneration and benefits structures and may not want pay information to be widely known. Competitors of an enterprise may find this information useful in the market penetration of their competitor. The Australian Chamber has concerns that the Bill's broad application may result in employees, disgruntled or otherwise, disclosing workplace wage structures to business competitors.

¹⁷ *Equal Remuneration Decision* [2015] FWCFB 8200.

¹⁸ See for example Gartenberg C and Wulf J, *Pay Harmony: Peer Comparison and Executive Compensation: Working Paper 13-041*, Harvard Business School, New York, 2014.

¹⁹ See for example Card D, Mas A, Moretti E and Saex E, *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction*, University of California, Berkley, 2011.

The Australian Chamber is concerned that the Bill may otherwise have unintended consequences. Gartenberg and Wulf queried “the equilibrium consequences of the changes in wage contracts resulting from increased access to pay information”. They suggested that:

From the firm’s perspective, these consequences may range from pay ratcheting to aggregate shifts in worker effort or firm-specific investments and turnover. Each of these changes, in turn, may have performance consequences for firms. From the employee’s perspective, increased pay information may influence decisions to join firms and shift the relative importance of internal and external benchmarks, thereby having larger labor-market consequences.²⁰

There is a risk that pay disclosure may result in increased costs for organisations as a result of ratcheting up of pay in the absence of corresponding productivity increases, negatively impacting employment, investment and overall firm performance.

Pay disclosure also has the capacity to negatively impact workplace culture where it drives competitiveness between teams and individuals at the expense of the organisation.

4 Another source of claims?

A clear effect of the Bill is that clauses prohibiting disclosure of pay information would be unenforceable. Beyond this, the use of the term ‘adverse action’ within proposed s. 333B(b) of the Bill may create confusion about the broader effects of the provision and exist as a source of disputation. In particular, it can be expected that the Bill might create a legal contest around whether the provision gives rise to a workplace right to discuss pay information which, if breached would constitute adverse action as defined in section 342 of the FW Act. Such an interpretation could substantially broaden the circumstances in which the general protections provisions apply.

The Australian Chamber’s concerns in relation to the operation of the general protections provisions of the FW Act have been documented in submissions made during the Productivity Commission’s recent inquiry into the workplace relations framework.

The Australian Chamber noted that prior to the FW Act, there was a comprehensive range of protections available covering unlawful termination, freedom of association and the taking of industrial action. However the introduction of the general protections regime has disturbed this balance and there has been strong growth in these types of claims which are too easily made without merit and costly to defend.

The Australian Chamber maintains that the strong growth rate in relation to general protections claims is likely attributable to the following characteristics of the general protections provisions:

- They cover a broader range of workplace rights than were available under either the 1993 system or the *Workplace Relations Act 1996* (Cth);
- They are available to a broader pool of people (employees, contractors and prospective employees);

²⁰ Gartenberg C and Wulf J, *Pay Harmony: Peer Comparison and Executive Compensation: Working Paper 13-041*, Harvard Business School, New York, 2014, p. 36.

- They are more attractive in terms of remedies (e.g: uncapped compensation); and
- They give claimants encouragement, due to the burden of proof imposed on employers/prospective employers (i.e. it is presumed that the employer/prospective employer/principal/prospective principal has taken the alleged action in breach, unless he or she proves otherwise).

The Australian Chamber maintains its concern that the reverse onus of proof has the effect of encouraging unmeritorious claims which require an employer to direct resources to the task of demonstrating this. The FW Act's Explanatory Memorandum gave no insight as to why it was considered necessary to change the longstanding burden of proof in relation to these existing protections against discriminatory conduct. While the general protections regime has introduced a new layer of anti-discrimination regulation, the reverse onus of proof in the FW Act's general protections regime is in contrast to Federal and State anti-discrimination laws that have required 'direct' or 'indirect' discrimination to be established. The Australian Chamber suggested to the Productivity Commission that scaling back the general protections regime and reverting to the previous suite of rights would be more effective in restoring balance and provide reasonable relief to employers while not depriving employees of fundamental protections.

In its report arising from its recent inquiry into the workplace relations framework the Productivity Commission has also stated:

The General Protections are broad and sometimes ambiguous. Unlike the specific unfair dismissal provisions, they provide uncapped compensation, which provides incentives to use them as a more lucrative avenue for compensation for dismissals. Moreover, an employee dismissed for underperformance or breaching workplace codes of conduct has strong incentives to claim that some other non-permitted reason was the true basis for the dismissal (for example, because they had complained about some aspect of management), even if this claim was confected. These factors may have been one of the accelerants for the very rapid growth of dismissal cases under the General Protections.²¹

The Productivity Commission also noted that non-dismissal disputes under the general protections provisions have also increased significantly in recent years²² and stated:

As it currently stands, both the definition of a workplace right, and aspects of the associated provisions, result in a very broad range of potential applications. Problems with the drafting and definitions in this section of the general protections have been apparent for some time.²³

The Productivity Commission acknowledged the Australian Chamber's concerns that the "broad provisions inevitably created difficulties for employers and afforded a wide range of grounds for dispute to employees".²⁴ The Bill subject of this inquiry impliedly risks broadening the grounds of dispute even further which is an undesirable outcome.

²¹ Productivity Commission, *Workplace Relations Framework, Final Report*, p. 32.

²² *Ibid.*, p. 610.

²³ *Ibid.*, p. 622.

²⁴ *Ibid.*

5 Advancing gender equity through other means

It is important to note that every organisation is different and supporting an inclusive culture that is free from discrimination, including in relation to pay determination, will require different strategies that are tailored to the needs of the particular organisation. The Australian Chamber maintains the view that voluntary, tailored organisational strategies that create a genuine organisational commitment to gender equality will be more effective than the blunt force of regulation.

The WGEA has published case studies highlighting varying organisational approaches to achieving pay equity within large organisations. In its published case study relating to the Commonwealth Bank the WGEA has suggested that in eliminating the “gender pay gap”:

*success is not reliant on any single initiative. Instead it requires multi-faceted, sustained effort and action from every level of the organisation, backed by data analysis across the employee lifecycle to highlight areas in which pay gaps can occur and ensure they are not continued. This is essential, as once difference in pay for like roles occur, they typically continue throughout an employee’s life into retirement.*²⁵

The desirability for efforts and actions to be tailored to the needs of the organisation is highlighted in the following statement:

*A good pay equity strategy starts with understanding the unique challenges an organisation faces, and creating solutions that are guided by a focused, measurable and realistic action plan...*²⁶

This sentiment is reiterated in the WGEA statement that:

*It is critical that in addressing gender pay equity organisations develop a pay equity approach and strategy that is tailored to the specific circumstances of their business.*²⁷

The case study acknowledges that gender pay equity is a “complex issue” and that:

*Success in achieving gender pay equity is not measured by the number of initiatives or by the noise generated; rather it is through careful and consistent evaluation of pay decision outcomes throughout the employee lifecycle.*²⁸

The Bill is a blunt instrument for purportedly achieving pay equity. Approaches that encourage people to discuss their pay may not be appropriate in all context and risk creating conflict without achieving the objective of narrowing the gender pay gap.

A study exploring gender differences in the relationship between job satisfaction and relative wages amongst co-workers at the establishment level using workplace data for Britain found that while relative earnings is an important determinant of job satisfaction for men (especially when comparing wages with other males):

²⁵ Workplace Gender Equality Agency, Case study: Research showcasing leading practice at the Commonwealth Bank, 2015.

²⁶ Ibid.

²⁷ Workplace Gender Equality Agency, Case study: Research showcasing leading practices in two organisations, 2014.

²⁸ Workplace Gender Equality Agency, Case study: Research showcasing leading practice at the Commonwealth Bank, 2015.

In contrast, women appear to be indifferent to the average wages of other men or women in their workplace. Their job satisfaction is sensitive only to their own wage level.²⁹

This brings into question whether pay transparency is effective in motivating people to address gender pay equity in their workplace. The Australian Chamber maintains the view that the pursuit of gender equity is best supported through cultural change. It would be counter-productive to implement policy solutions that drive conflict as this will only harden attitudes against action on the issue. Policy should encourage employers to develop tailored strategies that fit their resources and strategic objectives. It is important for businesses to take ownership of their efforts and secure buy in from workplace participants.

6 About the Australian Chamber

6.1 Who We are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

6.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

²⁹ Mumford K and Smith P, *Peer Salaries and Employee Satisfaction in the Workplace: Discussion Paper No. 6673*, Institute for the Study of Labour (IZA), Bonn, 2012.



We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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