



**Motor Trade Association
of South Australia**

**Fair Work Amendment
(Gender Pay Gap) Bill
2015
Inquiry Submission**

15 January 2016

Table of Contents

Executive Summary.....	3
Summary of Recommendations:.....	5
Context.....	6
The MTA.....	6
The Fair Work Amendment (Gender Pay Gap) Amendment Bill 2015	6
Effects of the Bill.....	8
Commercial-In-Confidence.....	8
Discrimination	8
Unconscious Bias and Poor Decision Making.....	9
Workplace Harmony and Cost Structure Flexibility	9

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Executive Summary

The Senate Education and Employment Legislation Committee Standing Committee has asked the Motor Trade Association of South Australia for advice on the Fair Work Amendment (Gender Pay Gap) Amendment Bill 2015.

The Fair Work Amendment (Gender Pay Gap) Amendment Bill 2015 seeks to reduce the gender pay gap by removing legal prohibitions on workers discussing their own pay.

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 "confidentiality clause", which means that workers can be sanctioned for discussing their pay.

According to the legislation's Explanatory Memorandum, the Bill is predicated upon the view that when pay is set in 'secret' by individual negotiation, women are at a disadvantage. While there is no evidence to suggest that women's abilities to negotiate are any different from men's; there is research that shows women's negotiations are often less successful.

The MTA concurs that gender pay inequity exists in Australia and poses a serious ongoing encumbrance on Australia's economic growth and capacity for future job creation. The full time average wage difference between men and women is currently calculated at 17.9%.¹

However, the implicit suggestion made through the Explanatory Memorandum is that some form of collectivised bargaining should occur to address inequity. The MTA is doubtful that this would achieve greater pay equity and suggest it may have economically harmful unintended consequences.

This inequity should be addressed through meaningful and practical measures that resolve the underlying causes of gender pay inequity in the workplace.

Measures should address blatant discrimination; lack of women in senior positions; industrial and occupational segregation; educational differences; and family caring arrangements that place roadblocks in the way of returning women to work.

Women are heavily represented in part-time and casual employment, often because they have the flexibility to overcome some of the issues above, whereas as men are overwhelmingly found in full time employment. This situation exacerbates gender pay inequity.

Further, greater parity is achieved in the public sector than private sector because of the higher degree of political sensitivity in public sector and collective bargaining, compared to the private sector which relies more heavily on market forces to determine wage outcomes.²

¹ *Gender pay gap statistics*, Australian Government Workplace Gender Equality Agency, September 2015, https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

² *Gender pay gap statistics*, Australian Government Workplace Gender Equality Agency, September 2015, https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

MTA | Fair Work Amendment (Gender Pay Gap) Bill 2015 Inquiry Submission

However, the MTA does not believe the provisions in the Fair Work Amendment (Gender Pay Gap) Amendment Bill 2015 meet the test of addressing these underlying causes nor address the causes laid out in the Explanatory Memorandum.

We contend the Bill as currently drafted will likely lead to adverse unintended consequences for both employers and employees such as heightened workplace tensions whilst failing in its stated objective of reducing the gender wage gap. Additionally, the Bill adds to the compliance burden of small and medium sized businesses.

Summary of Recommendations:

The Motor Trade Association of South Australia (MTA) recommends that the Commonwealth Government:

1. Continue to investigate ways to increase female participation in the workforce by reducing the gender pay gap;
2. Work with the MTA to identify the optimum policy responses to gender pay inequality that address the underlying causes of inequity;
3. Not proceed with the Fair Work Amendment (Gender Pay Gap) Amendment Bill 2015 in its current form;
4. Clarify the rights of and obligations on employers and employees in cases of disclosure of incorrect information;
5. Provide protection from disclosure of commercially sensitive information to competitors;
6. Recognise the importance of wage flexibility in appropriately rewarding employees, irrespective of gender, with higher levels of skill, ability and requiring less supervision.

Context

The MTA

The following comments are provided on behalf of Motor Trade Association of South Australia (MTA). We are an employer organisation representing the interests of its 1,100 members. We also speak on behalf of the MTA-GTS, a registered training organisation and Group Training Scheme which delivers post trade and apprentice training as well as places some 500 apprentices in over 200 host businesses.

As a representative state body, the MTA has numerous Divisions representing the full range of businesses within the motor industry except for the vehicle manufacture group.

In particular, MTA membership comprises:

- Small component manufacture, assembly, and reconditioning;
- Commercial body building (heavy light and specialty commercial vehicles, assembly);
- New and used vehicles of all kinds (farm machinery, industrial , light passenger, caravans and trailer able boats, leisure craft and motor cycle);
- Automotive mechanical repair of all of the above sectors specialist repair and diagnosis, collision repair and towing, restoration of vehicles/coach work; and
- Dismantling of vehicles.

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

The Bill, according to the Explanatory Memorandum, is predicated upon the notion that when pay is set in 'secret' by individual negotiation, women are at a disadvantage. While there is no evidence to suggest that women's abilities to negotiate are any different from men's, research shows women's negotiations are often less successful.

This Bill creates a new section in the Fair Work Act – Section 333B. This new section, 333B, seeks to amend the Fair Work to reduce gender pay inequity by removing penalties negotiated into individual Awards and employment agreements that provide sanctions for disclosure by an individual of their pay and conditions to other persons.

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 changes introduced by the Bill would apply to all employees covered by the Fair Work Act 2009 and would apply to all modern awards, enterprise agreements or contracts of employment, including ones already in operation.

MTA | MTA | Fair Work Amendment (Gender Pay Gap) Bill 2015 Inquiry Submission

The Bill would not force anyone to discuss their pay, but it would remove existing sanctions they so choose.

The Commonwealth's own Workplace Gender Equality Agency³ (the Agency) cites the following as key contributors to gender pay inequality:

- Gender stereotyping of occupations;
- Women and men working in different industries (industrial segregation) and different jobs (occupational segregation);
- A lack of women in senior positions;
- A lack of part-time or flexible senior roles;
- Women are more likely than men to work part-time or flexibly because they still undertake most of society's unpaid caring work and may find it difficult to access senior roles;
- Women's more precarious attachment to the workforce (largely due to their unpaid caring responsibilities);
- Differences in education, work experience and seniority; and
- Discrimination, both direct and indirect.

The Agency demonstrates a gender pay gap of 17.9% or \$284.20 per week for full time average earnings.

Pleasingly, South Australia has the lowest gender pay gap of any Australian State or Territory, at 10.8%.⁴ However, the Agency's data reflects that jurisdictions with a higher proportion of private sector works have a greater pay gap than those higher public sector workforces.

The data also indicates that some of the current inequity reflects the historical discrimination and disadvantage women have faced in the workforce. The gender pay gap is highest amongst employees aged 45 and over (19%) whilst the gender pay gap for 18 to 20 year olds is 5.9%. This can be partly explained by students in part time work, however even at the gap between 18 to 34 years olds is significantly lower at 11%.

Despite a currently delicate employment environment, Australia faces a skilled workforce shortage over the longer term that if left unaddressed will put a handbrake on future growth.

The MTA commends the Commonwealth for its ongoing efforts to address this shortage by increasing female participation through greater pay equity.

³ *Gender pay gap statistics*, Australian Government Workplace Gender Equality Agency, September 2015, https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

⁴ *Gender pay gap statistics*, Australian Government Workplace Gender Equality Agency, September 2015, https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

Effects of the Bill

The MTA has a number of concerns regarding the efficacy of the Bill as they relate to its objective of reducing gender pay inequality.

The Bill's Explanatory Memorandum cites discrimination, unconscious bias and bad decision making as root causes of gender pay inequity.

An analysis of the Bill and its Explanatory Memorandum, detailing the MTA's concerns, is provided for the Committee's consideration as follows:

Commercial-In-Confidence

The amendment is designed to capture disclosures between colleagues within the same workplace. However, the legislation does not actually reflect that intention.

The provisions within the Bill are broadly applied and 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.

This is the most serious unintended consequence of this legislation as it fails to improve workplace conditions and creates additional risk for businesses wishing to employ or negotiate at a time when business confidence needs to be bolstered.

Discrimination

Discrimination based on gender in pay negotiations is already unlawful. Therefore additional legislation is superfluous and will add to the compliance burden.

While disclosure and knowledge of relative pay structures within a workplace will prove that one employee is paid more than another, it will not prove why.

It would be unlikely in the extreme that an employer would indicate, either explicitly or implicitly, any pay difference would be based purely on gender. Arguments would likely be made around suitability of an individual to perform certain tasks – and these arguments may well have merit in specific circumstances.

For the same reason, the legislation may in fact create perceived gender inequity in a workplace where there are legitimate reasons for pay differences, even where two employees may be performing nominally the same role.

MTA | MTA | Fair Work Amendment (Gender Pay Gap) Bill 2015 Inquiry Submission

These reasons may relate to experience; physical ability to perform required tasks; levels of required supervision; quality of finished product; stress levels; or compatibility in the workplace.

Unconscious Bias and Poor Decision Making

By definition, unconscious bias is not usually recognisable to the person with the bias.

Equally, poor decision makers often do not realise they are making poor decisions at the relevant point in time.

Mechanisms already exist within the Act for the Fair Work Commission to check employment agreements prior to conclusion and to respond to and provide advice on claims of unfairness.

Having this independent intervention may well be preferable in small to medium sized enterprises.

The Commission's oversight removes the risk of lingering workplace tensions or a breakdown in the working relationships between employee and employer by ensuring there is reasonable perspective being applied in individual cases.

Workplace Harmony and Cost Structure Flexibility

It is acknowledged that a better informed person is better able to negotiate price, including during wage negotiations. Equally, misinformed persons can create unproductive tensions.

The inherent competitive advantages each employee may have and the commensurate remuneration they are paid could easily lead to workplace jealousies between individual employees as well as creating tensions between employers and employees.

Additionally, employers must be able to reward skill differentiation and competency while retaining some control over costs without fear of employees either collectively or individually 'bidding up' wage negotiations.

There is additional risk to employers by the use of provocative suggestions in the legislation that differences between employees pay may be because of sexist or discriminatory behaviour.

The Bill also does not address what obligations are on employees who disclosure false or misleading information to another person, which may be done to help 'bid up' wages or to create a combative negotiating environment.

Would an employer have the right to disclose an individual's wages and conditions in order to correct misinformation?

If progressed, the Bill would require amendment to address these issues.

Enterprise Responses

Small and medium enterprises may undertake two major foreseeable actions to mitigate the risks associated with this amendment that undermine its key objectives:

1. Employers will remove the risk of perceived gender discrimination by tending towards single gender workplaces; and
2. Employers will equalise pay rates across the workplace by refusing to recognise productivity, skill or experience.

They may seek either action or both actions, and the net effect will be a loss in skilled workers, in mixed gender workplaces and lower participation by women in all workplaces, all of which run counter to government policy objectives over the last several decades.