



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

Prepared by:

The JobWatch Legal Practice with the assistance of JobWatch Volunteers
as supervised by Ian Scott, Principal Lawyer.

Job Watch Inc
Level 10. 21 Victoria Street. Melbourne 3000

CONTENTS

INTRODUCTION	3
ABOUT JOBWATCH	3
THE GENDER PAY GAP	4
REMOVING THE PROHIBITION ON PAY SECRECY	4
CASE STUDIES	5
AMENDMENTS TO THE FAIR WORK ACT 2009 (CTH) AND THE FAIR WORK REGULATIONS 2009	6
EMPLOYER'S OBLIGATIONS	7
CONCLUSION	7

1. Introduction

Job Watch Inc. (JobWatch) is pleased to contribute to the Senate Inquiry into the Fair Work Amendment (Gender Pay Gap) Bill 2015 (the Bill). In this submission, JobWatch submits that the Bill would assist in closing the gender pay gap and go some way to achieving gender equality. However JobWatch believes that further amendments to the Fair Work Act 2009 (Cth) (Fair Work Act) and the Fair Work Regulations 2009 (Fair Work Regulations) are necessary to assist in achieving gender parity.

2. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

- a) provide information and referrals to Victorian workers via a free and confidential telephone information service (TIS);
- b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c) represent and advise vulnerable and disadvantaged workers; and
- d) conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected approximately 170,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 8000 calls per year.

The contents of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients.

3. The Gender Pay Gap

The gender pay gap is the difference between men's and women's average weekly full-time equivalent earnings, expressed as a percentage of men's earnings. The Commonwealth Government's Workplace Gender Equality Agency (WGEA) reports that the national gender pay gap is currently 17.9 per cent and has hovered between 15 per cent and 19 per cent for the past two decades¹.

¹ Australian Government, Workplace Gender Equality Agency, 'What is the gender pay gap', <https://www.wgea.gov.au/addressing-pay-equity/what-gender-pay-gap>

The WGEA indicates in recent data (2013-2014) that the disparity between men and women's pay is widening in some industries and occupations. For example, financial and insurance services, construction, transport and real estate services.

There are numerous factors that have a bearing on the gender pay gap, including family, work and societal factors, stereotypes about the work that men and women should be doing and the way in which men and women should engage in the workforce.² Other influences include differences in education, work experience and seniority, discrimination, a lack of women in senior positions, a lack of flexible senior roles and men and women working in different industries and different jobs.³

It has been argued that women have a less aggressive or confident negotiating style compared to men and, as a result, accept the first offer made to them.⁴ It has also been contended that regardless of negotiating style, women are automatically seen as 'too demanding and unpleasant to work with' by engaging in negotiations.⁵

JobWatch is extremely concerned about the gender pay gap and supports any measures that can assist to reduce it.

4. Removing the prohibition on pay secrecy

4.1 Fair Work Amendment (Gender Pay Gap) Bill 2015

JobWatch supports the proposed recommendations in the *Fair Work Amendment (Gender Pay Gap) Bill 2015* (the Bill). JobWatch believes that by removing the legal prohibitions on workers talking about their own pay, it is likely to promote pay equity, particularly in relation to men and women.

Currently, if a worker's employment contract, modern award or enterprise agreement contains a clause requiring pay secrecy or if an employer directs a worker to keep their pay secret, then any worker who discloses their pay and is consequently dismissed may not be protected by legal causes of action such as unfair dismissal, general protections or discrimination as the employer could argue in its defence that there was a valid, lawful reason for dismissal. That is, that the employer may have an argument that the worker has breached his/her employment contract, award or enterprise agreement or has failed to follow a reasonable and lawful direction.

The proposed amendments would therefore provide greater legal protection for such individuals. JobWatch notes that we are not aware of an award or enterprise agreement that requires pay secrecy. However, the proposed amendments need to be expanded to also include "directions" of employers (see below).

In JobWatch's experience, workers are often afraid to discuss their pay for fear of being disciplined or dismissed. This is often the case where there is no such

² Australian Government, Workplace Gender Equality Agency, 'What is the gender pay gap', <https://www.wgea.gov.au/addressing-pay-equity/what-gender-pay-gap>

³ Australian Government, Workplace Gender Equality Agency, 'What is the gender pay gap', <https://www.wgea.gov.au/addressing-pay-equity/what-gender-pay-gap>

⁴ Professor Mara Olekalns, 'Negotiating to Bridge the Gender Wage Gap' 32(3) *Government News* 2012, 56; Marlene Kim, 'Pay Secrecy and the Gender Wage Gap in the United States' 54(4) *Industrial Relations: A Journal of Economy and Society* 2015, 648, 651.

⁵ Kim, Pay Secrecy.

prohibition in the worker's employment contract, modern award or enterprise agreement. Their employer may simply give the worker a direction not to discuss their pay, such as when they commence their employment or when they have re-negotiated the terms and conditions of their employment contract.

Employers may justify pay secrecy as part of their business strategy however JobWatch believes that an employee's freedom of speech is paramount and needs to be protected.

JobWatch submits that lifting the prohibition on discussion of pay will therefore increase the transparency of pay levels and thereby provide women with a stronger footing in negotiations. It would allow women to talk freely to other staff about pay and ascertain whether they are being paid equitably. Knowledge of their male counterpart's earnings may deter them from accepting any first offers which fall short of parity. It will also make it more difficult for employers to conceal discrimination and unconscious bias and ensure that employers have to justify their decisions regarding their workers' pay.

JobWatch therefore believes that the proposed amendment is a constructive policy initiative which will help to achieve parity of pay between men and women.

Aside from helping to narrow the gender gap, JobWatch believes that these amendments would be beneficial to workers as a whole. Allowing workers to share information would encourage transparency and motivate employers to 'establish fair pay systems so that workers can monitor, complain about, and remedy any unfair pay.'⁶

Additionally, the amendments are not retrospective as they only apply to conduct going forward. Therefore they do not seem to present any constitutional challenges. Such changes can be likened to the Fair Work Commission's (FWC) stop-bullying orders which came into effect on January 1, 2014. In *Ms Kathleen McInnes* [2014] FWCFB 1440, the Commissioner had to consider bullying which had occurred prior to the introduction of the bullying orders. However, this past conduct was only relevant insofar as it informed their assessment of likelihood of future bullying. Hence no adverse consequences would attach to past conduct.

In a similar vein, these amendments could be used to simply invalidate existing clauses in employment contracts, modern awards and enterprise agreements so that secrecy clauses no longer have any effect. The new provisions do not therefore "punish" employers in any way. They are not inappropriate, offensive or burdensome.

4.2 Case studies

Case study: Susan – hospitality

Susan confronted her employer after she realised she was being underpaid. Although her employer agreed to start paying her correctly, he directed Susan not to discuss her pay with other employees. Since this discussion, Susan has been bullied by her employer and threatened with dismissal.

⁶ Kim, 'Pay Secrecy' at 651.

Case study: Richard – construction worker

When Richard was hired as a construction labourer, he was required to sign a written employment contract which stipulated a three month probationary period. He was also told that he was not allowed to discuss his pay with other workers. His pay rate was set at \$16.50 per hour. After several weeks into the job, he found out that his co-workers were receiving substantially more than he was being paid. When considering his options, Richard had to keep in mind that his employer had directed him not to discuss his pay and that he was in a vulnerable position because he was on probation. This made it difficult for Richard to complain or negotiate for higher pay

Case study: Alexander – team leader

Alexander was working as a team leader for seven months. He found out that he was being paid \$200 per month less than other team leaders within the company. He raised this issue with several managers at a meeting but was ultimately told that i) he was not entitled to more than was stipulated in his contract and ii) it was a potential breach of his contract to discuss pay with other workers. Alexander felt humiliated and intimidated for having attempted to renegotiate his contract

5. Amendments to the Fair Work Act 2009 (Cth) and the Fair Work Regulations 2009

JobWatch strongly supports the proposed section and notes that the Explanatory Memorandum states that it should be read broadly. That is, removing restrictions on workers' rights to disclose a broad range of information about their pay, which includes information about whether and in what amounts they receive entitlements such as bonuses, superannuation, share allocations, paid parental leave, allowances, professional memberships, paid overtime, company cars or parking spaces⁷.

However JobWatch believes that section 333B of the Bill, in its current form, has some limitations and therefore may not fully achieve its intended objectives.

The amendment only covers situations where a modern award, enterprise agreement or employment contract specifically prohibits workers talking about their pay. It does not cover situations where there is no such prohibition, but where the employer simply gives a worker a direction not to talk about their pay, which may be justified as a 'lawful and reasonable direction' (as noted above) or, even if not lawful and reasonable, it would nevertheless be a direction a worker would be inclined to follow.

This situation will therefore not fall within the purview of section 333B. Whether a direction is 'lawful and reasonable' is something that can ultimately be tested in court, but if the Parliament seeks to stamp out any potential loopholes, then it should consider amending the Fair Work Act as far as the law allows by inserting a clause in the dictionary of the Act stating that 'a lawful and reasonable direction has its ordinary meaning at common law or as defined in the Fair Work Regulations. The Fair Work Regulations could define what is *not* considered to be a reasonable and lawful direction, being a direction by an employer to an employee not to talk about their pay and other entitlements. The Regulations already state that failure to obey a

⁷ Explanatory Memorandum, Fair Work Amendment (Gender Pay Gap Bill) 2015, item 9

lawful and reasonable direction is misconduct and sets out the meaning of misconduct⁸. Whilst the relevant minister would need to amend the Regulations, we believe that this is an appropriate course of action.

6. Employer's obligations

Employers currently have various legal obligations in respect to gender pay equity.

These include the following:

- compliance with equal remuneration orders (an order requiring certain employees to be provided equal remuneration for work of equal or comparable value);
- obligations under the *Workplace Gender Equality Act 2012* (Cth) (requiring large non-public sector employees with 100 or more employees to report to the WGEA annually against six gender equality indicators, such as equal remuneration between men and women); and
- obligations under State and Federal anti discrimination legislation (prohibiting discrimination on the basis of sex in relation a worker's terms and conditions of employment, including pay).

JobWatch believes that whilst labour regulation plays an important part in addressing pay inequity, in addition to employers complying with their legal obligations, it is important that employers develop best practice initiatives, such as those recommended by the Fair Work Ombudsman. For example, ensuring that the employer's business implements transparent remuneration practices and policies and comparing pay for men and women on a regular basis (such as upon commencement of employment and on promotion) to ascertain where gaps exist and either seek justification for any imbalances or work to eliminate them altogether⁹.

7. Conclusion

JobWatch believes that the Bill will assist to close the gender pay gap and achieve gender parity in the Australian workforce. However JobWatch recommends further changes to the Fair Work Act in order to fully achieve its intended consequence.

Thank you for considering our submission. We would welcome the opportunity to discuss any aspect of this submission further and to contact our case studies to see if they are willing to share their experiences directly with the Inquiry.

Yours sincerely,

The JobWatch Legal Practice

⁸ Fair Work Regulations 2009 – Reg 1.07

⁹ Fair Work Ombudsman, Best Practice Guide – Gender Pay equity, p 5

Per:

Job Watch Inc