

**AFEI Submission to the
Workplace Gender Equality Act 2012
Consultation on Reporting Matters**

January 2013

Australian Federation of Employers and Industries (AFEI)

The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.

With over 3,500 members and over 60 affiliated industry associations, our main role is to represent, advise, and assist employers in all areas of workplace and industrial relations and human resources. Our membership extends across employers of all sizes and a wide diversity of industries.

AFEI provides advice and information to employers on employment law and workplace regulation, human resources management, workplace health and safety and workers compensation.

AFEI is a key participant in representing employers and developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

AFEI Submission

FAHCSIA released an Issues Paper on 21 December 2012 and invites submissions on the development of “reporting matters”. These are the matters to be specified by the Minister by legislative instrument in relation to each gender equality indicator under Section 13(3) of the Workplace Gender Equality Act 2012 (the Act). There are to be minimum standards for the matters against which employers will be required to report:

Before 1 April 2014, the Minister will, by legislative instrument, set minimum standards in relation to specified gender equality indicators, specified relevant employers and specified reporting periods.¹

Before making legislative instruments the Minister has a legislative obligation to consult with the Workplace Gender Quality Agency (the Agency) and with such persons mentioned in subsection 31(3) of the Act as the Minister considers appropriate.

Further the Agency is to consult with relevant employers and employee organisations on the development of “benchmarks” in relation to gender equality indicators.²

The Issues Paper invites the involvement of those specified in the legislation in the consultation process and the “broader community”:

The Act provides an opportunity for all stakeholder groups to identify the issues affecting gender equality in the workplace. The views of the business and broader community are important, and your participation in the development of the reporting matters is welcomed and encouraged.³

¹ Workplace Gender Equality Act 2012 Section 19 (1).

² Section 10 (1) (aa).

³ <http://www.fahcsia.gov.au/our-responsibilities/women/publications-articles/consultation-process-to-develop-reporting-matters-under-the-workplace-gender-equality-act>.

It is a matter of considerable concern that new and additional minimum standards for employment entitlements are to be established by an indeterminate consultative process and Ministerial discretion and that these could change each year. The Act was deliberately drafted to be devoid of any specific detail on actual compliance requirements. The process of consultation provides no reassurance that the reporting matters and standards determined by the Minister and the Agency will be reasonable and appropriate, or even workable. There is no mechanism for oversight or review. We reiterate our earlier submission in which we expressed our concern about this legislative outcome:

.....legislation gives the Minister discretionary powers without legislative constraint on the exercise of these powers. There is no mechanism for appeals or review of the Minister's decisions and no legislated criteria the Minister has to consider before making a decision which affects industry. Without these checks the scope and reach of this legislation is indeterminate and gives unacceptable power to the Executive.⁴

The clear risks involved with generation of new minimum standards via a process of consultation and Ministerial discretion is compounded by the uncertainty already evident in the legislation. Matters which would appear to be crucial for compliance with reporting requirements and the yet to be established standards are not established by the Act. For example the Act:

- does not define remuneration
- does not define equal remuneration or how it will be determined
- does not define industry or occupation or how these will be determined
- is unclear as to who employers are to report on
- stipulates that a function of the Agency is to develop "benchmarks" (undefined)⁵ and does not establish what is their relationship to the standards published by the Minister

⁴ AFEI Submission to Senate Education, Employment and Workplace Relations Committee Inquiry Equal Opportunity for Women in the Workplace Amendment Bill 2012 March 2012.

⁵ Section 10(1)(aa).

- enables the Minister to expand the ambit of its regulation at any time.⁶

Additionally the legislation allows publication of material which, while identified as private by the employer, may be published with the permission of the employee or if the Agency deems it to be sufficiently aggregated so that specific employers would not be identified.⁷ Again, the Minister retains discretion as to what is, or is not, published information. No amount of consultation on the content of reportable matters will remove this legislated provision.

Finally, the worth of the consultative process in terms of achieving balanced and workable outcomes for employers is highly unlikely given the already stated objectives of the (then) Minister:

For the first time businesses will be required to report on the indicators that matter on the actual figures of gender composition of their organisations and their boards, on their employment conditions and whether they have flexible work practices for men and women.

Where previously businesses were required to establish and report their workplace equity plans, programs and processes - we are now asking them to tell us about tangible outcomes how women and men are actually faring in the workplace.

No more good intentions we want good outcomes.

Under these reforms, we are doing away with reporting on hollow plans and promises.

Businesses will no longer be able to pay mere lip service to gender equality, while women languish in the lower ranks.

⁶ Section 3 1A.

⁷ Section 13; section 14. We note the Frequently Asked Questions guidance material published by the Agency states:

" Are reports still public documents?

Yes, but certain information in the reports will not be published by the Agency. This includes any remuneration data, personal information or other information specified by the Minister."

The legislation explicitly allows publication of remuneration data if the Agency considers it to be sufficiently aggregated (s 14 (3) (a)) or if an individual gives permission to publish private information (s 13 (3) (c)).

For the very first time, pay equity will be enshrined in the objects of the Act and businesses will be required to report against it. This will allow us to see where gender pay gaps are emerging or growing.

We will put more checks in place and we will keep businesses honest in a few important ways.

There will be regular spot checks to ensure that the information that organisations are providing to the Government actually matches how they conduct their day to day business.

And annually both CEOs and employee representatives will be required to sign off on reports to verify their accuracy and whether they are a true illustration of what is happening in workplaces.

We will remove the power of the EOWA Director to waive the requirement that a business has to report.

We want to know what is happening in all businesses with more than 100 employees no exceptions.

We are also working across Government to develop options to improve the capacity of EOWA to access reliable information to identify the one third of Australian businesses who should be complying with the Act but are currently escaping their obligations.⁸

This statement indicates that any consultation about “priority indicators” “priority measurable outcomes”, “priority process indicators” and other matters raised in the Issues Paper is likely to be a matter of process and procedure, not substance, for employers.

The gender equality indicator standards will impose conformity with the Agency’s view as to the appropriate gender equality norms. These will necessarily exceed those legal minimums established under the Fair Work Act. This is an unacceptable regulatory outcome. Employers should not be compelled by legislation to pay wages and provide conditions above the legal minimum properly set by the statutory wage fixing authority, particularly by a body which has no such authority.

⁸ The Hon Kate Ellis MP Minister For The Status Of Women: *Celebrating 100 Years Of International Women’s Day - Where To From Here* - The National Press Club, Canberra 09 Mar 2011.

The Regulatory Impact Statement accompanying the Act provides the comforting assessment that **reporting costs** to business for compliant organisations will decrease to \$450 per annum (those requiring an audit increasing to \$1300).⁹ We note this estimate is confined to reporting costs alone. The actual costs of compliance, as opposed to reporting costs, cannot be known in advance of the gender equity indicators being specified and the minimum standards defined. The fact that reporting organisations already gather and report some data on the gender composition of their workforce, working arrangements and employment conditions will not ameliorate the cost impact of new requirements for specific indicators and meeting the yet to be determined standards.

An employer whose reported “measurable outcomes” do not meet the standards for equal remuneration, the promotion rate for part time workers, parental leave or flexible work/family caring arrangements for example will incur substantial increases in labour costs in order to do so.

Of particular concern are the resources which would be required to meet suggestions for the so called “process indicators”, including Key Performance Indicators for managers, pay equity review and analysis and training and development programs to alter the gender composition of a workforce. Such measures are resource intensive and the assumption that they are not currently implemented for reasons based on gender inequity is both unsound and unfair. Many organisations, notably those with smaller workforces, simply cannot afford to operate with these additional costs, particularly if the return to the business is likely to be marginal or non existent.

⁹ Regulatory Impact Statement contained in the Explanatory Memorandum, *Equal Opportunity for Women in the Workplace Amendment Bill 2012* page 26; page 28.