EQUAL OPPORTUNITY FOR WOMEN IN THE WORKPLACE AMENDMENT BILL 2012

Submission to the Senate Education, Employment and Workplace Relations Legislation Committee

23 March 2012

Introduction

Ai Group supports workplace gender equality and we support appropriate amendments being made to the *Equal Opportunity for Women in the Workplace Act 1999* to support gender equality.

Ai Group has been heavily involved in the development of the *Equal Opportunity for Women in the Workplace Amendment Bill 2012.* We have been an active Member of the Government's Implementation Advisory Group (IAG) for the legislation and we have made direct representations to the Government on several occasions about this Bill. During the development of the Bill, we had major concerns about proposals being pressed by the unions, various special interest groups and others, and we acknowledge the extensive efforts made by the Government since May 2011 when the IAG first met to address the concerns of Ai Group and other industry representatives.

Following such extensive consultation, the Government is no doubt of the view that the version of the Bill introduced into Parliament achieves the right balance between the competing views and interests. Despite the efforts of the Government, we remain concerned about some aspects of the Bill and we urge the Committee to recommend the amendments proposed in this submission. Such amendments would ensure that the legislation has positive rather than negative effects in the workplace.

It is employers who will need to implement and comply with this legislation, not unions and special interest groups, and therefore the views of employer representatives on the workability of the Bill need to be given substantial weight.

Provisions of the Bill

Ai Group's position on the provisions of the Bill is set out in the following table. It is not our intention to comment on all aspects of the Bill but rather to outline Ai Group position on the most significant legislative amendments proposed.

Provisions of Schedule 1 of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Items 1 and 2 – Section 1	**Supported**	The proposed titles for the Act and the Agency are appropriate.
Item 3 – Section 2A – Objects of the Act	**Amendment proposed**	While Ai Group is supportive of the Act's new focus to promote and improve gender equality in the workplace, we are concerned that the proposed objects of the Act fail to focus upon the need to reduce the regulatory burden on industry. The Explanatory Memorandum (EM) states that the legislation is intended to simplify and streamline the reporting framework. Consistent with this intention the following object needs to be added to Section 2A: *(f) to reduce the regulatory burden on industry".*

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Item 14 – Subsection 3(1) – Definition of *gender equality indicators* **Item 24 – Minister may by legislative instrument specify matters for the purposes of paragraph (f)**	**Amendment proposed**	Ai Group proposes the following amendments: "***Gender equality indicators*** *means ~~the following:~~* ~~*(a) gender composition of the workforce;*~~ ~~*(b) gender composition of governing bodies of relevant employers;*~~ ~~*(c) equal remuneration between women and men;*~~ ~~*(d) availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities;*~~ ~~*(e) consultation with employees on issues concerning gender equality in the workplace*~~ ~~*(f) any other matters*~~ *indicators of progress towards gender equality specified in an instrument under subsection (1A).* The gender equality indicators need to be developed in consultation with industry. It is not appropriate to lock them into legislation before such consultation occurs. With the amendment proposed above, Ai Group supports the concept in Clause 24 of the Bill whereby the Minister may by legislative instrument set gender equality indicators. The formality associated with legislative instruments will give employers more protection against unfair consequences of the legislation.

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Item 17 – Subsection 3(1) – Definition of "*minimum standard*"	**Opposed**	Ai Group is opposed to the setting of minimum standards, particularly given the fact that the legislation imposes adverse consequences upon employers for failure to meet or improve against each and every minimum standard. Regardless of how broadly or narrowly classes of employers are defined it would appear to be impossible to determine fair and valid minimum standards. Different employers, even within the same industry, often have very different operations and staff profiles. For example, in the labour hire industry, one labour hire company may specialise in the on-hiring of construction workers while another may specialise in the on-hiring of nurses. Applying the same minimum standard relating to the proportion of male / female employees to both employers would be unfair and inappropriate. Also, in some areas it will be impossible to obtain a valid and fair measure of performance without an excessive amount of red tape. For example, to obtain a valid and fair measure of pay equity performance, every job performed by males and females in a workplace would need to be analysed in terms of the duties performed, level of responsibility, skills, qualifications, hours worked, performance, experience, etc. Subjecting an employer to adverse consequences simply because the average salary of their female employees is significantly less than the average salary of their male employees (or vice versa) would be extremely unfair and invalid.

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Item 21 - Subsection 3(1) – Repeal of definition of "*trade union*"	**Opposed**	Given the proposed reporting obligations in the Bill, this is a vital definition. If the term "employee organisation" is preferred, this term needs to be defined as *"an organisation of employees registered or recognised under the Fair Work (Registered Organisations) Act 2009."*
Section 3(1) – Definition of "*remuneration*"	**Proposed additional definition**	It is extremely important that *"remuneration"* is defined, and in broad terms. Under section 14 any information in a public report "relating to remuneration" must not be published by the Agency. Also, an employer is not required to provide "information relating to remuneration" to employees, shareholders and members under section 16. Accordingly, the definition of "remuneration" is critical to the operation of the legislation and should not be left to the workplace parties, the Agency or the Courts to determine what the term means. A failure to include an appropriate definition is bound to lead to disputes and litigation. The EM (at page 14) states that: "*The ILO Convention (No. 100) concerning Equal Remuneration for Men and Women workers for Work of Equal Value may provide guidance around elements that may comprise remuneration.*" (Emphasis added) Convention number 100 states that: *"the term **remuneration** includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment".*

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		The definition in Convention No. 100, whilst broad, is not sufficiently clear given the importance of the term "remuneration" under the Bill. Ai Group proposes the following definition: *'Remuneration includes:* • *salary and wages;* • *incentive-based payments and bonuses;* • *allowances;* • *penalty rates;* • *leave payments;* • *benefits, including company cars, telecommunications, company loans, etc;* • *superannuation;* • *the provision of company products and services to the employee;* • *payments and benefits associated with salary sacrifice arrangements; and* • *any other payment or benefit paid directly or indirectly, whether in cash or in kind, by the employer to the employee and arising out of the employee's employment'.* The above definition is practical and essential. All of the above items are necessarily excluded from the information to be published by the Agency, and circulated to employees.

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Item 35 – Paragraph 10(1)(a) – Functions and powers of Agency	**Supported**	We support the proposed paragraphs 10(1)(a) and (aa). Benchmarks are useful and, as provided for in the Bill, should be for information purposes only with no adverse consequences for employers whose performance is below a benchmark. Linking compliance to benchmarks would result in similar problems to those outlined above (at Item 17) regarding minimum standards.
Item 39 – Paragraph 10(1)(f) – Functions and powers of Agency	**Supported**	The proposed new paragraphs 10(1)(ea) and (f) are very important. The Agency needs to work with employers in implementing the legislation, including minimising the regulatory burden on employers. Paragraph 10(1)(ea) does not replace the need for a new objective to be included in Section 2A. For example, the Minister should have an obligation to minimise the regulatory burden upon employers when making legislative instruments.
Item 42 – Subsection 12(2A) – Agency to submit reports to Minister	**Supported**	The timeframes in this subsection are appropriate.
Item 44 – Section 13 – Contents of public report	**Amendment proposed**	In section 13, the words *'the Minister must'* should be replaced with *'the Minister may',* particularly given the expansive definition of 'gender equality indicators' in the Bill.

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Item 46 – Section 13C – Personal information	**Amendment proposed**	Ai Group is pleased that the Bill provides a mechanism for personal information to be withheld by the Agency. However, paragraph 13C(3) of the Bill allows for personal information to be published with the consent of the individual to which it relates. Paragraph 13C(3) needs to be amended to prevent personal information being published unless both the employee and the employer consent in writing. The publication of personal information about one employee can cause dissatisfaction amongst other employees (e.g. if the employee is perceived to have received special treatment) and hence the employer's consent to publication is important.
Item 46 – Section 14 – Information relating to remuneration	**Amendments proposed**	Section 14 is an extremely important section. Information relating to remuneration must not be published. As explained above, a broad definition of "remuneration" needs to be included in the Bill. Subsection 14(2) should be deleted from the Bill. Employers should not be subjected to requests from the Agency, or pressure from employees and unions to agree to the publication of information relating to remuneration.

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Item 46 – Section 14A – Information of a kind specified by the Minister	**Amendment proposed**	Section 14A is an important provision which will provide the flexibility for other types of information to be declared not suitable for publication. Given that the reporting system is yet to be developed, this flexibility is necessary. The EM (at page 24) states that this information could include information that is commercial-in-confidence. *Example* *If one of the matters for a gender equality indicator that relevant employers must report on relates to an issue that is likely to involve employers having to provide 'commercial-in-confidence' information in the public report, the Minister may determine by legislative instrument that this information be excluded from publication by the Agency."* Ai Group proposes that the Bill expressly prohibit the publishing of information that is commercial-in-confidence.

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Item 52 – Section 16 – Relevant employer to make public reports accessible to employees and shareholders	**Amendment proposed**	Subsection 16(1) of the Bill requires an employer as soon as reasonably practicable after lodging a public report with the Agency under section 13A, to inform employees, shareholders and members of the lodgement of the public report. The employer must also make the public report available to employees, shareholders and members as soon as practicable after the report's lodgement (subsection 16(2)). The EM (pages 25-26) provides an example of the "*as soon as reasonably practicable"* requirement under subsections 16(1) and (2): "***Example*** *In the case of employees, this could include notification and advice provided through the employer's normal means of communication with staff, including, for example, staff newsletters, workplace meetings and any other existing consultative means, provided that the method used ensures that the information concerning the relevant employer's public report is transmitted widely to all staff.* *In the case of shareholders of a public company, it may be reasonable to expect a longer lag-time between lodgement and notification, based on the more limited opportunities to communicate with shareholders and members. Fulfilment of this provision in the next available Annual Report, and on an employer's website, should they have one, would be considered adequate in satisfying the requirements of this provision.*"

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		In the case of shareholders of a public company, we agree with the example in the EM (above) that the next available Annual Report would be an appropriate time to notify and make available to shareholders the public report. This is also the appropriate time for registered organisations, clubs etc to notify their members. However, this timing appears to conflict with the natural and ordinary meaning of the words in the Bill. The requirement to inform shareholders and members "*as soon as reasonably practicable"* after the public report's lodgement with the Agency would be costly and burdensome for employers and should be removed from the Bill*.*
Item 52 – Section 16A- Relevant employer to inform employee organisations of lodgement of public report	**Opposed**	Ai Group opposes sections 16A. Firstly, the Bill removes the definition of "trade union" from the legislation and opens up significant doubt about what an "employee organisation" would be (see Item 21 above). Secondly, the process of advising unions of the lodgement of the public report will increase the likelihood of unions using the report for industrial purposes. Unions have access to the public reports on the Agency's website. Also, an employer is required to provide its employees with access to the public report. Any employee is able to contact a union should he or she have any concerns about the public report. These protections are sufficient. If Section 16A is retained, despite our objections, a provision should be included in the Bill stating that the requirement does not apply if the employer could not reasonably be expected to have known that any employees were a member of an employee organisation. This is consistent with the EM (page 26) but should be included in the Bill.

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		Even though we oppose section 16A, we are pleased that the Government has come to the view that a requirement for unions or employees to sign the public reports (as pressed by unions) would be unworkable. The problems with this proposal include: • It would lead to the unions using the reports to pursue industrial objectives; • It would lead to unions refusing to sign reports until union demands are met; • It would lead to delays in the lodgement of public reports, by employers which would expose employers to adverse consequences under the legislation. • Apart from HR staff it is unlikely that any employee would have sufficient knowledge of an employer's operations to be able to verify the information contained within the public report. • The salary information in the report is typically confidential and not appropriately shared with employees outside the HR Department.
Item 52 – Section 16B – Relevant employer to inform employees and employee organisations of the opportunity to comment	**Amendments proposed**	For the reasons identified above, regarding section 16A, the references to employee organisations in section 16B should be deleted.

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Item 55 – Section 18 – Simplified outline of Part IVA	**Amendments proposed**	The first dot point should be deleted. Ai Group opposes the setting of minimum standards (see Item 17). The last dot point should be deleted. Government procurement policies are not part of the Bill and therefore should not be referred to in the simplified outline of Part IVA of the Bill.
Item 55 – Section 19 – Minister will set minimum standards in relation to gender equality indicators	**Opposed**	Ai Group opposes the setting of minimum standards. See Item 17. If subsection 19(1) is retained despite our objections, the words *"the Minister will"* should be replaced with *"the Minister may".* Also, the words *"Before 1 April 2014"* should be replaced with *"Not before 1 April 2014".*
Item 18 – Section 19A – Agency may review compliance with Act	**Amendments required**	Subsection 19A(1)(a) should be amended to delete the reference to minimum standards. Ai Group opposes the setting of minimum standards. See Item 17.
Item 18 – Section 19C – Relevant employer fails to comply with Act if employer fails to improve against minimum standard.	**Opposed**	Ai Group opposes the setting of minimum standards. See Item 17. Section 19C would operate unfairly. This section fails to take into account circumstances where an employer is performing at an acceptable or high level in respect of some gender equality indicators where minimum standards apply but fails to meet or improve against one or a few minimum standards. Such circumstances should not constitute a failure to comply with the Act.

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Item 55 – Section 19D – Consequences of non-compliance with Act	**Opposed**	Section 19D specifies the consequences for an employer who fails, without reasonable excuse, to comply with the Act. It is unfair to subject employers to consequences for non-compliance with the Act beyond the requirements to: • lodge a public report with the Agency (section 13A); • make public reports accessible to employees and shareholders (section 16). If an employer is locked out of Government contracts because the employer has been named in an Agency report, millions of dollars of work could be lost, with a consequent devastating effect on the business and its employees.
Item 71 – Section 33A – Minister to consult before making legislative instruments	**Supported**	Such consultation is very important. It is employers who will need to implement and comply with this legislation, not unions and special interest groups, and therefore the views of employer representatives need to be given substantial weight.
Item 73 – Application, saving and transitional	**Supported**	We have not identified any problems with this Item.