

Ai GROUP SUBMISSION

Senate Finance and Public
Administration Committee

**Workplace Gender Equality
Amendment (Closing the
Gender Pay Gap) Bill 2023**

3 March 2023



Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a submission in response to the *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023* (**the Bill**) currently before the Senate Finance and Public Administration Committee (**the Committee**).

The Bill implements recommendations made by the then Federal Government in its 2021 review of the *Workplace Gender Equality Act 2012 (Cth)* as contained in the Department of Prime Minister & Cabinet's *WGEA Review Report* (**the WGEA Report**). The current Federal Government has made clear its election commitment to narrow the gender pay gap and has committed to implementing the Review's recommendations.

The Bill seeks to amend the *Workplace Gender Equality Act 2012 (Cth)* (**the WGE Act**) by:

- requiring the Workplace Gender Equality Agency (**WGEA**) to publish aggregate information relating to the relevant employer's performance and progress in achieving gender equality in respect of remuneration (recommendation 2 of the WGEA Report);
- requiring CEOs of relevant employers to cause certain WGEA reports – the Executive Summary and Industry Benchmark Report – to be given to all members of their governing body (recommendation 3 of the WGEA Report);
- aligning the WGE Act's references to sexual harassment in the WGE Act to include the *Sex Discrimination Act's 1984 (Cth)* definition of *sexually harass* and *harass on the ground of sex* (part of recommendation 5 of the WGEA Report);
- changing the title of the head of the WGEA from 'Director' to 'CEO' (recommendation 9 of the WGEA Report);
- changes to the terminology of "minimum standards" to "gender equality standards" used by the WGE Act in respect of an instrument (recommendation 3 of the WGEA Report).

The Bill is premised on an important economic and equity objective of narrowing the gender pay gap. The current national gender pay gap is reported as 13.3%; the lowest it has been on record, but a close return to pre-pandemic levels.¹

Ai Group has a strong commitment to gender equality and inclusive workforce participation. Businesses with a gender equal, diverse and inclusive workforce have improved performance.²

The closure of the gender pay gap should coincide with improved gender balance in workforce participation across and within industries and occupations, including in leadership positions and

¹ Media Release, *Workplace Gender Equality Agency*, 23 February 2023

² For example, see Gender Equity Insights 2020, *Delivering the Business Outcomes*, BCEC, WGEA Gender Equity Series, 2020.

occupations that command higher levels of pay beyond base salaries.

The Bill should also be viewed as part of a package of recommendations that were identified by the WGEA Report. These recommendations include reducing the regulatory burden on employers by adopting a more streamlined reporting process, (see recommendation 1). Ai Group looks forward to working with the Federal Government and the WGEA in respect of implementing the Review's remaining recommendations.

Ai Group does not, in principle, oppose the Bill.

We have, however, identified very specific amendments that would make the Bill operate more fairly on commencement and more consistently with the WGE Act's existing provisions. These are set out below.

WGEA's framework in publishing aggregate remuneration data

The reasons for the gender pay gap in Australia are complex and there is much misinformation that conflates the gender pay gap with discriminatory pay practices at an organisational level. The causes of the gender pay gap have been well documented³ and include:

- Australia's high levels of gender segregation by industry and occupation in comparison to other OECD nations;
- Women disproportionately to men working reduced hours or taking time out of the paid workforce to care for others and consequently limiting earnings potential; and
- Gender discrimination.

These factors are important to be captured in how WGEA publishes organisational gender pay gaps as they are likely to significantly vary as contributors of gender pay gaps in a range of different businesses operating in different industries. For example, a small to medium sized business in a heavily male-dominated industry may have a high gender pay gap because of the gender imbalance across the industry and its workforce, as opposed to its particular remuneration practices in like for like roles.

It is important that established factors causing the gender pay gap are dealt with in the WGEA's material to ensure that long-term structural, economic and cultural barriers identified by the She's Price(d)less Report are addressed beyond the role of individual businesses.

Publishing gender pay gap information –and personal information

The Bill at section 15A requires the WGEA to publish aggregate information, for each relevant employer for each reporting period for the purpose of showing the employer's performance and progress in achieving gender equality in relation to remuneration for the employer's workforce.

³ She's Price(d)less: The economics of the gender pay gap, KPMG, July 2022

Section 15A does not require a relevant employer to report any additional data to the WGEA relating to remuneration.

The purpose of section 15A is clear and limited to the employer's progress in achieving gender equality in respect of remuneration for the employer's own workforce. The purpose is not, for example, a public remuneration tracking tool or employer salary survey to compare the average quantum of wages between businesses – including those large and small businesses that operate across the spectrum of the WGE Act's definition of *relevant employer*.

To align with the purpose of section 15A, and to provide an appropriate safeguard to the role of the WGEA publishing remuneration data, 15A(4) should be amended to say (as underlined):

(4) However, the Agency must not publish information under subsection (1) that discloses, either directly or indirectly:

(a) personal information; or

(b) other information about the remuneration paid to a specific individual;

(c) the quantum, (including average quantum) of remuneration levels paid by a relevant employer.

Without such clarification, any publication of remuneration quantum, even on an average basis, could very easily expose the remuneration levels of a group of individuals identified by the class in which any such information appears and where the phrase "specific individual" referred to in section 15(4)(b) may not be applied to cover a class of more than one.

The need to protect personal information in respect of what the WGEA may publish, is currently recognized by the WGE Act at sections 13C(2), 14(1) and 14A(1). The Bill however, in proposing a series of statutory Notes under each of the sections 13C(2), 14(1) and 14A(1), as currently drafted, risks watering down these protections beyond what is necessary for the existing provisions to co-exist with the limited purpose and related protections set out in the Bill's section 15A.

In particular, the Bill's new statutory Note under section 13C(2) should be deleted. The Note creates confusion in attempting to describe the interaction between section 13C(2) and the Bill's section 15A relating to the publication of aggregate remuneration data. Section 13C(2) specifically prohibits the publication of personal information and is broadly consistent with the protection in the Bill's section 15A(4) in respect of the WGEA publishing remuneration information. Ai Group does not consider the note to be of any utility.

Problems with the Bill's application to retrospective reporting periods

Under section 34 of the Bill, the commencement of the Bill's requirement for the WGEA to publish gender pay gap information as set out in section 15A, would apply to *retrospective* reporting periods that commenced on 1 April 2022 for relevant employers who are not a Commonwealth

company or Commonwealth entity. For relevant employers who are a Commonwealth company or entity, section 15A would also apply to reporting periods that commenced on 1 January 2023.

As a general principle, Ai Group does not support the application of the Bill's provisions to retrospective reporting periods. Relevant employers and employees should be entitled to know in advance of a reporting period, how remuneration data collected will be used and publicised, particularly as it relates to remuneration.

The publishing of data collected from a retrospective reporting period is also at odds with the Bill's stated logic of applying public scrutiny as a motivator for an employer to review (and if necessary, adjust) its remuneration and employment practices across its workforce. That is, the publication of pay gaps by WGEA for relevant employers is to occur *prior* to employers being afforded the opportunity to review their remuneration structures in line with how WGEA may decide to publish organisational pay gaps that may differ from the reporting matrix.

For instance, it is unknown whether publication of such data will include a mechanism for relevant employers who wish to explain the reasons for or provide additional information (such as steps they have taken to address any gender pay gap). A similar mechanism is featured in the United Kingdom's gender pay reporting system and it would be appropriate and fair for employers to know if this is contemplated prior to the commencement of a reporting period in which certain measures may be addressed.

Ai Group does not support the application of section 15A to retrospective reporting periods. Section 34(a) should be amended to say 1 April 2023 and section 34(b) should be amended to say 1 January 2024.

Conclusions

With these discrete and targeted amendments, Ai Group does not oppose the Bill.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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