AFEI submission to Senate Education, Employment and Workplace Relations Committee Inquiry

Equal Opportunity for Women in the Workplace Amendment Bill 2012

March 2012

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Australian Federation of Employers & Industries

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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 on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. We have been the lead employer party in running almost every major test case in the New South Wales jurisdiction and have been a major employer representative in the award modernisation process under the Fair Work Act.

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

Submission

1. The removal of current reporting requirements under the *Equal Opportunity for Women in the Workplace Act 1999* is to be welcomed given their onerous operation and the frequently unhelpful burden they imposed on many employers.[1] Our preference was that these requirements be replaced with a greater emphasis on assistance and useful information on arrangements which are effective for the organisation.

2. Instead, the *Equal Opportunity for Women in the Workplace Amendment Bill 2012* (the Bill) significantly increases the regulatory burden for employers by extending legislative coverage to all employers and employees, widening the Objects of the Act and empowering the new Workplace Gender Equality Agency (the Agency) with expanded and invasive functions. AFEI is extremely concerned about the as yet unknown ambit and operation of the new provisions. The content of reports for the gender equality indicators (as currently identified in the Bill) is not yet determined and the minimum standards are not yet set. As a consequence the full effect of the proposed legislation is uncertain and open ended. What is apparent is that an additional layer of labour market regulation is to be imposed on the Australian economy via the gender equality standards and there is a wide Ministerial discretion to continually expand that scope. Moreover, given the provisions of the Bill, the regulation appears to be highly aspirational and, in practice, unworkable.

[1] AFEI submission to Review of the Equal Opportunity for Women in the Workplace Act 1999 - http://www.fahcsia.gov.au/sa/women/pubs/general/eowa_kpmg_rpt/Documents/kpmg_submission/EOWW_Review_Submission/U1055_ORG_NAT_Australian%20Federation%20of%20Employers%20and%20Industries.htm

3. A notable omission from the expanded section 2A Objects of the Act is the reduction in regulatory burden for employers. Despite the Explanatory Memorandum emphasising simplified and streamlined reporting requirements, the Bill introduces an onerous data gathering exercise and reporting framework for employers.[2] The range of content in the gender equality indicators which are to be reported[3] make it difficult to see how gathering and preparing data for reporting (even in a standardised on-line format) will be simpler or streamlined for employers who already have many other reporting obligations. At the outset, data is to be required on employment matters such as recruitment, wages and classification, promotion, transfers, termination and harassment.[4] It is highly likely other items may be added.[5] Areas to be reported are not confined to employment matters, introducing further regulatory uncertainty. They are to include "*any other matter*" specified in an instrument made by the Minister.[6]

4. The reporting requirements are intended to meet the Agency's data sets and process needs in establishing its standards for compliance. The standardised format is for comparability purposes for the Agency, not to ease regulatory impact on industry.[7] Having established standards and targets, these will operate in effect as de facto targets and quotas imposed by the Agency across industry.

5. Our concern is that industry considerations have been overlooked almost entirely in this revised legislative framework. The process of consultation (section 33A) provides no reassurance that the industry standard determined by the Minister and the Agency will be reasonable and appropriate, or even workable. The intention of the Act can broadly be described as working to achieve identical labour market profiles for men and women with little regard for

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[2] Explanatory Memorandum pages 3; 7; Julie Collins MP Media Release, *New Bill To Improve Gender Equality In the Workplace,* 1 March 2012.
[3] Subsection 3(1B); Explanatory Memorandum page 16
[4] Explanatory Memorandum page 16
[5] Subsection 3(1A) and 3(1B); Explanatory Memorandum page 16
[6] Paragraph 10(1)(f); subsection 3(1C)
[7] Explanatory Memorandum page7

business constraints and objectives. The Minister has only to consult with the "*relevant persons*" listed in subsection 31(3) "as *the Minister considers appropriate*".[8] Regrettably there is no mandatory requirement to consult with industry where the Agency makes no recommendation to do so or where the Minister does not consider this appropriate. The Explanatory Memorandum adds that while paragraph 10(1)(aa) specifies Agency consultation with relevant employers and employee organisations when developing benchmarks, "*this is not to limit broader consultation*" with gender equality special interest groups.[9]

6. As currently drafted the proposed 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.

Setting minimum standards — Subsection 3(1) Definition of "minimum standard"; Section 19 Minister will set minimum standards in relation to gender equality indicators.

7. AFEI is opposed to legislated minimum gender equality standards. Conformance with standards as the means of achieving workplace gender equity raises issues for the improved efficiency and productivity of Australian businesses. Human resource practices in organisations vary considerably for a multiplicity of reasons including product and labour market conditions and organisational viability. These vary across and within industries and over time for reasons unrelated to gender.

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[8] Subsection 33A(2)

[9] Explanatory Memorandum page 19

8. The setting of standards (or targets) falsely assumes that it is entirely within the employer's capacity to produce the requisite outcomes. There are many intervening factors which are beyond the employer's control. These include product demand conditions and labour supply conditions which are inevitably reflected in the composition of the workforce and how it is deployed. Irrespective of market conditions, relevant employers will now be required to comply with Agency standards on the gender equality indicators or face loss of government procurement work, government financial assistance and reputational damage. Consequently, employers who face these extrinsic constraints may be unfairly penalised for failure to comply with industry standards.

9. There is a vast diversity in private sector organisational structure and operation. Standards which set gender proportions for appointments, classification, employment status, transfers, training, promotions, etc (the gender composition of the workforce indicator) are predicated on a static model of a permanent, hierarchical workplace with unlimited opportunities for training and advancement through layers of management — the public sector model. This contrasts with diversity in the private sector. For example, large sectors of private industry rely heavily on casual and contract workers — the so called *"patterns of potentially insecure employment"* [10] which it appears the standards will seek to redress. This approach fits neatly with the union campaign to eradicate casual and contract employment but will not assist industry to be flexible and adaptable in the face of industry demand conditions.

10. Although it is intended that the minimum standards be consistent across and within industries, subsection 19(1) allows the Minister to set minimum standards that apply to a particular class or classes of relevant employers. This is an apparent recognition that there may not be the requisite degree of homogeneity across an industry to meet the desired industry standard. This is acknowledged in the

[10] Explanatory Memorandum page 13

Explanatory Memorandum which further adds: "*Potentially an instrument made under new subsection 19(1) may make different provision with respect to different relevant employers and different reporting periods*". What does this tell us about the actual ability of all relevant employers to make the requisite gender equity adjustments required by the standard? The fact that such a provision has been made is an acknowledgement of the unworkable standards approach. It demonstrates that a single or even multiple standards are not actually deliverable in the real world. Industry cannot operate within this contrived central planning which the Agency has determined is in the best interest of industry.

11. Setting gender equality indicator standards is directed to one objective, statistical gender neutrality/equality in the workplace as measured on an aggregated basis. It does not recognise that employers provide pay and conditions at levels needed to attract and retain labour that are sustainable for the enterprise. They want the best person for the job. They are constrained by the need to remain viable in the markets in which they operate. They are not in business to engineer social change. It is difficult to see how innovation and improvements in enterprise efficiency and productivity can be engendered by having to comply with above legal minimum employment standards based on aggregated industry data.

12. For example, how is the equal remuneration standard to be established? Subsection 3(1)(c) provides for an indicator for equal remuneration between men and women. Remuneration is not defined in the Bill. The Explanatory Memorandum states that the indicator will enable the collection of aggregate information about remuneration between women and men performing the same or comparable tasks within and across occupations and industries.[11]

[11] Explanatory Memorandum page 14

13. What will be the measure of equal remuneration in the standard? How will it be determined, at an aggregate level, that the job, the work performed, the output and worth to the enterprise are actually comparable and the components of remuneration are comparable?

14. Aggregate remuneration statistics do not give any information about the composition of those earnings or how they are determined. The contributing factors to differences in remuneration across industries and occupations are numerous and varied, including factors such market conditions, capacity to pay, attraction and retention issues and the specific circumstances of individuals and enterprises. For this reason, lower or higher rates for apparently comparable tasks do not provide a measure of inequitable remuneration.

15. The assumption underlying the proposed legislation appears to be that a standard for equal remuneration can be determined by using aggregated statistics across an industry or occupation determined on the basis of reported worker characteristics — presumably industry, classification, qualification, wage rate, gender, age, experience and hours worked. These are labour market supply side characteristics of the worker which pay no attention to how or why pay levels are reached and the myriad other determinants of pay levels. There is no consideration of capacity to pay and worth to the employer.

16. In order to establish comparability there must be a systematic and thorough analysis of the alleged comparable work value of comparator positions and an examination of the causes of differences in rates paid. There is no understanding that even two employees with apparently identical qualifications and experience may have significantly different work performance and capability.

17. Fair Work Australia in the Equal Remuneration decision recognised the multiplicity of factors, unrelated to gender, which contribute to differences in rates of remuneration between enterprises:

> *Differences in rates of remuneration between any one enterprise and another are to be expected. Indeed there are significant differences within the SACS industry itself. The reasons for differences between enterprises will be many and varied and are the result of the peculiar circumstances of each enterprise. In the public sector they may include considerations of relativities within the public sector, issues of restructuring and productivity, attraction and retention issues, cost of living factors, industrial negotiations, bargaining, informal dispute settlements, arbitrations, historical fixations for paid rates awards and the general disposition of various governments. It goes almost without saying that it is also difficult to identify the quid pro quo for a particular wage rate in a particular agreement.*[12]

18. In that case, the Full Bench observed that to establish the extent to which the gap between public sector rates and private sector rates was gender based would require an examination of the causes or probable causes of the differences in rates.

19. We fail to see how equal remuneration standards for an industry or occupation could be set without such examination.

[12] [2011] FWAFB 2700 at paragraph 277

Agency standards will exceed legal minimums set by Fair Work Australia

20. Within any industry there will be a range of pay rates set by the market which extend beyond the legal minimum. These over award rates are determined by the circumstances of the enterprise and the labour market. Any standard generated by the range of reported rates to the Agency will necessarily reflect these higher than legal minimums and operate as a new inflated wage minimum for relevant employers. This is despite the fact that at the safety net level the wages prescribed by modern awards are consistent with the principle that there be equal remuneration for work of equal or comparable value.[13]

21. Despite there being range and diversity of practices across an industry, the gender equity 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 conditions above the legal minimum properly set by the statutory wage fixing authority, particularly by a body which has no such authority.

22. Large enterprises tend to pay at higher rates than smaller enterprises. As a consequence, the standards will reflect these higher rates and conditions. However, the standards are also to be used in providing advice and assistance to non relevant employers, those with less than 100 employees.[14] It is unacceptable to subject industry to wage and condition standards promulgated by a body which has no statutory wage fixing authority. It is also unacceptable and unfair that standards which are based on data reported by

[13] Fair Work Act Section 134 (1) (e)
[14] Explanatory Memorandum page 7

large employers (many of whom have a strong business case to be equal opportunity employers of choice) are to be used to "educate and inform" smaller employers who have no such capacity.

Flexibility should remain tailored to needs of individual and enterprise, not an industry standard

23. The Minister will have the power to set standards for the gender equality indicators which include "*practices relating to flexible working arrangements*".[15] Setting standards for flexibility arrangements [16] to create uniform outcomes erodes the principle that these work arrangements should be tailored to the genuine needs of the individual and the enterprise. We have already seen practices relating to flexible working arrangements severely curtailed by union actions which have sought standardised arrangements rather than an individual approach.[17] There has been a coordinated union strategy to limit the full suite of employment conditions that can be subject to flexibility. The proposed legislation will ensure a standardised outcome. Consequently, employers will be less able to provide those arrangements appropriate for the circumstances of an individual worker but which would not be feasible across their entire workforce.

24. The Explanatory Memorandum states that this gender equality indicator:

> *"also complements other legislative measures, such as those contained within the National Employment Standards under the Fair Work Act 2009, and the recent amendments to the Sex Discrimination Act 1984 extending coverage to men in relation to caring responsibilities."* [18]

[15] Subsection 19(1)
[16] Subsection 3(1)(d)
[17] See industry submissions to the 2012 Review of the Fair Work Act including AFEI: http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/AustralianFederationofEmployersandIndustries.pdf
[18] Explanatory Memorandum page 14

25. Despite this statement the imposition of an industry standard for flexibility does not "complement" these obligations; it undermines them. The employee right to request flexibility was enshrined in WorkChoices legislation, which was continued and expanded in the *Fair Work Act 2009 (Cth)*, as well as in anti discrimination legislation. In addition, individual and enterprise arrangements routinely provide for flexible work arrangements. These are enforceable rights; any employee who believes they have been denied access to more flexible or appropriate arrangements has recourse to both industrial and anti discrimination tribunals. However, the arrangements have been agreed on an individual or enterprise basis, unlike the proposed legislation which will impose industry wide standards for compliance purposes. In this regard we note the explanatory material accompanying the introduction of the Fair Work Act:

> '***Can Fair Work Australia impose a flexible working arrangement on an employer?***
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> *No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognizes the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.'* [19]

[19] Australian Government National Employment Standards Discussion Paper page 12

Definition of Remuneration

26. Remuneration is not defined in the Bill. The Explanatory Memorandum refers to the ILO Convention (No 100) concerning *Equal Remuneration for Men and Women Workers for Work of Equal Value.*[20] This is not a precise definition for comparison purposes. The omission of a definition of remuneration in legislation which provides for setting standards for an equal remuneration gender equality indicator is a further indication that this legislation will be unworkable.

Additional Reporting obligations

27. The Bill imposes additional reporting requirements for employers requiring them to make the public reports generated for the purposes of complying with the new legislative scheme. They are required to make the public reports accessible to employees and shareholders, inform unions that a public report has been lodged and notify all parties of the opportunity to comment on the public report.[21]

28. Apart from the additional regulatory burden involved in these notification requirements, it is unclear how "*as soon as reasonably practicable*" will be interpreted and what will be taken into consideration in establishing reasonable practicability. Notifying and making reports accessible to employees will incur additional costs, however, these will be exceeded by the cost and complexity of notifying and providing reports to shareholders and unions.

[20] Explanatory Memorandum page 14
[21] Sections 16, 16A and 16B

29. The requirements to notify employee organisations and the time frames involved appear to be deliberately drafted to maximise opportunity for employees and unions to comment on the content of reports and minimise employer opportunity to respond. The Bill allows a 28 day period after lodgement in which the employer may respond to comments.[22] There is an unlimited time frame for other party comments, all of which may prompt further investigation of the employer by the Agency at any time.

30. These obligations also carry with them a greater exposure for non compliance for employers, who, even with low levels of union membership or involvement in their workplace, will have to identify each employee organisation that has members who are employees and provide them with copies within seven days. Employees are under no obligation to disclose union membership to their employer.

Information which may be published

31. The Bill provides protection against the publication of personal information and information relating to remuneration. These are important protections for employers and employees. However, subsections 13C(3) and 16(4) provide that particular personal information may be published or used if the individual to whom the information relates consents in writing to the publication or use of the information. This subsection should be deleted as employer consent to publication is not required. Under no circumstances should information about remuneration be published without the consent of the employer. Further, it is a standard provision in contracts of employment that remuneration provisions remain confidential.

[22] Subsection 15(2)

32. It is equally concerning to employers that despite section 16 applying to the reporting period commencing on 1 April 2012, subsection 16(3) of the *Workplace Gender Equality Act 2012* does not apply in relation to that period. This is because, as explained in the Explanatory Memorandum:

> "*when a relevant employer has made the public report accessible to employees and shareholders, subsections 16(3) and (4) do not apply. A relevant employer is not required to exclude from the report information that is personal information, information relating to remuneration and information of a kind specified in an instrument made by the Minister under section 14A.*"[23]

33. Further, the Minister may by legislative instrument, specify the kinds of information which must not be published under section 15 and must not be used in a report of the Agency under section 12. Section 14A of the Bill provides for other types of information to be declared. A notable omission from non published material in the Bill is commercial - in confidence - information and there is no certainty that this would be specified by the Minister. It should be.

No waiver for compliant organisations

34. Under the current regulatory regime, reporting requirements could be waived for organisations if the organisation had taken all practical measures to satisfactorily address equal opportunity employment matters. This could accommodate the constraints and circumstances of individual enterprises. It also provided an incentive to reach appropriate compliance levels. Regrettably the Bill makes no such provision. If we are to have legislation at all it should be reasonable legislation and there should be an exemption mechanism.

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[23] Explanatory Memorandum page 38

35. This is a data driven approach for blanket regulation which will affect all employers. The standards and their subsequent revisions will result in continually shifting goal posts creating a no-win situation for employers who face market, labour supply and financial constraints beyond their control. The Bill's provisions for reporting requirements and setting standards will not provide certainty and continuity for employers in reporting and complying.

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