



Submission to the Minister for the Status of
Women / *Department of Families,
Housing, Community Services and
Indigenous Affairs (FaHCSIA)*

Workplace Gender Equality Act 2012
Gender Equality Indicators: Issues Brief

By the Australian Mines & Metals
Association (AMMA)

January 2013



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 94 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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1 Introduction

1. On 9 January 2013, the Acting Minister for the Status of Women called for submissions on Gender Equity Indicators under the *Workplace Gender Equality Act 2012*.
2. This submission provides a preliminary response on behalf of the Australian resource industry, based on the Issues Paper issued by the Workplace Gender Equality Agency (WGEA).
3. It is impossible to respond in greater detail at this stage, in the absence of specific proposed draft indicators.
4. Further consultation on more specific and developed proposals will be essential to properly implement indicators under the amended legislation. We look forward to addressing more specific proposals and draft indicators well prior to their proposed adoption.
5. Further consultation will also be critical to ensuring this process delivers the “light touch” regulation sought by government and that government does work “cooperatively with reporting organisations to help them achieve compliance”¹.

1.1 Resource Industry Perspective and Approach

6. AMMA represents significant numbers of resource industry employers with gender reporting obligations under the Act. Approximately 60% of all AMMA members employ 100 or more employees.
7. The industry is proud to have initiated and worked with government to develop the Australian Women in Resources Alliance (AWRA). AWRA is a proactive industry initiative dedicated to facilitating the increased attraction and retention of women in resource employment.
8. This submission does not seek to reargue the policy approaches in the amended legislation. Rather, it addresses the specific considerations raised in the Issues Paper.
9. The questions in the issues paper concern employer views and experiences, and address proposed imposts upon employers.
10. The responses of employers will need to be accorded significant weight, both at this stage and as these consultations progress on the substantive issues. This is not an academic exercise generating interesting data for research; it is formal consideration of imposing substantial additional regulation and costs on employers, and doing so within a prescribed legislative framework.

¹ Workplace Gender Equality Agency (2012), *WGE Act at a glance*.
http://www.wgea.gov.au/About_WGEA/The_Act/Branded_act_at_a_glance_wgea.pdf

11. AMMA is a member of the Australian Chamber of Commerce and Industry (ACCI) network. AMMA recalls with approval the ACCI submission on the amending legislation (March 2012) which raises a number of industry concerns highly germane to this review, which remain outstanding.

1.2 Statutory Context

12. The Objects of the Act in s2A sets clear parameters for any indicators. The wording of the objects supports many of the concerns in this submission. It is clear this exercise should:
 - a. *'support employers to remove barriers'*, s.2A(b).
 - b. *'promote, amongst employers, the elimination of discrimination'*, s.2A(c).
 - c. *'foster workplace consultation'*, s.2A(d).
 - d. *'improve the productivity and competitiveness of Australian business through the advancement of gender equality'*, s.2A(e).
13. The exercise of the power to make indicators and report on indicators (s.13) must be exercised subject to these objects, and in furtherance of them. This requires an approach which is "supportive", "fostering", "promotional", and which contributes to "improving productivity and competitiveness".
14. It is also relevant to recall what the objects do not include. There is no intention to gather information on an academic or speculative basis, and no basis to impose impractical or burdensome requirements without proper regard to the regulatory, cost and administrative impacts on relevant employers.

1.3 Cost Assessment

15. Some very skeletal proposals are appended to the Issues Paper. This is far too underdeveloped to respond to in detail at this stage.
16. It is readily apparent however that any indicators and reporting measures must be examined from a practical and cost perspective prior to being adopted. The "Examples of Reporting Matters" provided to date would impose considerable costs and difficulties in compliance.
17. To properly exercise her powers under the Act, and to have any hope of furthering gender equality in relevant employers, the Minister will need to satisfy herself on practicality and cost concerns prior to adopting such concepts.

1.4 Consultation

18. We note the announcement of 23 January 2013 that Carol Schwartz AO will lead the consultation. AMMA looks forward to meeting with Ms Schwartz on behalf of resource industry employers.
19. Sections 31 and 33A(2) of the Act address consultation, including in relation to advisory committees.

20. AMMA wishes to be considered both for this initial consultation and longer term, as a key representative of industry for the purposes of s.31, and specifically s.31(3)(a).

2 Issues Paper Questions

2.1 Key Outcomes (Q1 and 2)

21. **Q.1 Proposed Key Outcomes:** Section 3 of the *Workplace Gender Equality Act 2012* contains statutory definitions for interpretation, including the following:

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 specified in an instrument under subsection (1A).
22. The best way to reflect the intent of the Act is to apply the words of the Act.
23. AMMA can see no reason why these concepts should be reworded into an additional, overlaid set of “key outcomes”.
24. **Q.2 Proposed Key Outcomes:** AMMA does not consider the five key outcomes in the Issues Paper necessary nor properly reflective of the intent of the Act (Q.1). The words of the Act should be used unchanged instead.

2.2 Priority Reporting Matters (Q3 and 4)

25. This exercise will best deliver on its purposes if it prioritises and concentrates on measurable and quantifiable matters, rather than inherently subjective and ambiguous procedural and consultative considerations.
26. **Q.3 Priority Measurable Outcomes:** This can only be properly responded to when draft indicators are issued. Employers would generally favour concise, measurable information, backed up by case studies and research to promote good practices.
27. Employers do not support the automatic setting of both measurable and process indicators for each objective – we do not read the Act as requiring such an approach. The wording of the Issues Paper is ambiguous on this, and should be clarified consistent with the Act.

28. **Q.4 Priority Process indicators:** We recall the stated intention of the agency to “remain a ‘light touch regulator’, working cooperatively with reporting organisations to help them achieve compliance, and educating Australian workplaces on the undeniable social and economic benefits of gender equality”².
29. A great deal more work would be required to operationalise any of the proposed process indicators in a usable form that is consistent with the stated intentions of the legislation and the agency.
30. The Issues Paper draws attention to a fundamental problem. It divides the indicators into the “measurable”, and by implication the “non-measurable” or subjective. If something is not measurable, it is not suitable to impose as a universal reporting obligation on relevant employers.
31. The resource industry is concerned that company processes, strategies and policies are unlikely to be measurable, are unavoidably subjective, would place an undue reporting burden on employers, and will not yield useful information.
32. Surveys of samples of relevant employers, or case studies, may be far more effective. Consideration may be given to pursuing a deeper analysis in fewer workplaces on these non-measurable issues.
33. **Workplace Relations Obligations:** Employers’ extensive existing workplace relations obligations also need to be considered:
- a. “Consultation on issues concerning gender equality in the workplace” particularly in regard to flexible and family friendly work arrangements is already governed by the *Fair Work Act 2009* (FW Act), including both the National Employment Standards and enterprise agreements made under the Act.
 - b. This is publicly available information. An additional reporting obligation doesn’t need be imposed.
34. **Trade Unions:** In many relevant workplaces in the resource industry processes for communication and consultation are agreed between trade unions and employers, often appearing in enterprise agreements following bargaining. This written documentation should answer any queries on consultation, and could be analysed without a reporting obligation.
35. Trade unions also have a right to enter workplaces to investigate (and inspect documentation about) a suspected breach of the FW Act, an award or enterprise agreement. There is no justifiable reason for an additional reporting requirement on the ‘availability and utility’ of employment terms, conditions or practices relating to flexible working arrangements.

² Workplace Gender Equality Agency (2012), *WGE Act at a glance*.
http://www.wgea.gov.au/About_WGEA/The_Act/Branded_act_at_a_glance_wgea.pdf

2.3 Usefulness (Q5 and 6)

36. **Q.5 Currently collected information:** It is difficult to provide information on what employers currently collect without seeing more specific proposals for indicators, and knowing the scope of what is being asked.
37. Employers are far more likely to collect, or be able to easily compile, measurable factual data on employee characteristics. We are very sceptical regarding the usefulness, or reliability of some of the more subjective and imprecise information being considered.
38. **Q.6 Most Useful Indicators for Employers:** Quantitative, measurable information (perhaps backed up with case studies and in depth research) is likely to be more useful to employers than subjective or process based information, which is going to be difficult to assess and apply to their circumstances.

2.4 Other Possible Considerations: Impact on Business (Q7 and 8)

39. **Q.7 Most Difficult Indicators:** Key potential sources of difficulty lie in:
 - a. Extending or changing existing concepts from the EOWA framework.
 - b. New concepts, including:
 - i. Being asked to report on non-quantitative matters, e.g. the process indicators.
 - ii. Unclear and potentially prejudicial comparisons, such as those proposed for equal remuneration.
40. Employers need to see proposed indicators in more detail, but foresee that the process indicators and pay equity indicators are likely to be highly problematic.
41. Difficulties, high additional costs and potential legal prejudice will arise where the information sought is not routinely or easily collected, or would require substantial data gathering (and data cleansing³) not obtainable from each company's HRIS⁴.
42. It may be asserted that these changes will be useful to employers, but whether this is borne out on a cost benefit basis remains to be seen.
43. **Sensitivity:** AMMA recalls a concern of employers as the legislation was considered by the Parliament:

ACCI is also concerned that information which will be required to be collated may be sensitive in nature, and provided without any context,

³ To validate the data and protect employee privacy

⁴ Human Resource Information Systems.

may be misleading and could damage the interests of the reporting firm.⁵

44. This concern, as with many identified during the legislative process, remains unanswered.
45. Of particular concern is the degree of exposure employers may face on account of a requirement to collect sensitive records on attributes which may appear to form the basis of decision making. This, in turn, is likely to result in costly litigation and/or additional process to provide a defence to any potential litigation.

Q.8 Alternative Approaches: This question will best be addressed during the next stage, in responding to more concrete proposals and detailed draft indicators.

46. However there are existing alternative sources of information on pay equity, the availability of family friendly measures and workplace consultation (the procedural considerations). These include: academic research, surveys, census data, case studies etc.
47. Where there are gaps in the existing information base a more targeted approach should be evaluated, such as commissioning research or surveys of a sample of relevant employers.
48. AMMA will be very happy to work with government to further develop this concept as an alternative to attempting to gather procedural and pay equity information from all relevant employers.

2.5 Other Possible Considerations: Timing (Q9 and 10)

49. **Q.9 Phasing In:** Phasing measures in over time should be actively considered by government as a measure to most effectively implement its legislative intent.
50. **Q.9 Phasing In:** An identification of which matters should be phased in can only follow more developed draft indicators.

2.6 Other Possible Considerations: Assistance (Q11)

51. Employers will clearly require assistance in complying with revised gender reporting obligations, and any new minimum standards.
52. There is an established practice, particularly in implementing new employment regulation, of government partnering with industry to provide information assistance through industry associations. See for example: DEEWR's *Fair Work Education and Information Program*.
53. Consideration should be given to such a programme to support the new gender equity reporting requirements.

⁵ ACCI Submission to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Equal Opportunity for Women in the Workplace Amendment Bill 2012, paragraph 8

2.7 Other Possible Considerations: Industries (Q12)

54. Diversity between industries and sub-industries favours a concise and measured approach to developing a tight core of effective and balanced indicators. It should dissuade government from too expansive or imprecise an approach.
55. We foresee that the indicators could raise particular issues for some industries. However it is not possible to provide any more meaningful response prior to seeing draft indicators.

3 Equal Remuneration

56. Employers have concerns with the proposed equal remuneration indicators. These include:
57. **Subjectivity:** Employers are concerned not to be asked to navigate uncertainty and not to be asked to make subjective judgements in complying with their obligations under the amended legislation. Any reporting on equal remuneration should be restricted to concrete, proportionate and easily accessible information.
58. **Prejudice Against Other Obligations:** Employers have existing pay equity obligations and liabilities under the FW Act, including in relation to possible equal remuneration orders, obligations under awards and agreements⁶, award reviews, minimum wages and adverse action claims. There are also a myriad obligations and liabilities under anti-discrimination legislation at the State and Commonwealth level.
59. Employers should not in any way be legally prejudiced by the proposed information collection on equal remuneration. Employers must not be required to compile information for this exercise which can be used as a basis for commencing litigation against them at some later stage.
60. **ASX:** The ASX Corporate Governance Principles and Recommendations, see ASX-listed companies disclose in their annual reports achievements against various gender objectives, including the proportion of women in senior management and wider company roles.
61. This substantial body of information may be able to be used by the WGEA without imposing additional reporting obligations on a number of relevant employers. We request that this idea be reviewed and responded to.

4 Minimum Standards

62. The second stage of this the indicator process is described as follows:

The WGE Act requires that minimum standards be set prior to the commencement of the 2014–15 reporting cycle. These will be the subject of further consultation with stakeholders and the public over the

⁶ And there is a pay equity objective in relation to the making of the modern awards.

course of 2013. Minimum standards are intended to be a small but meaningful set, tied to a select few reporting matters, with the primary aim of enabling the Agency to best target its education resources.⁷

Minimum standards will not come into effect until the 2014-2015 reporting period.⁸

63. There is no specific question on the minimum standards in the Issues Paper. However:
- a. If these are to genuinely be “industry specific minimum standards” industry representatives must be genuinely engaged with.
 - b. AMMA foreshadows a clear interest in being consulted on this issue to ensure resource industry employment is properly taken into account.
 - c. It is vital that sufficient time be allowed for consultation with industry.
 - d. Minimum standards are also not the only tool in the arsenal of the WGEA, with ongoing scope for:

Simple and effective measures (that) include national campaigns, working with industry to develop voluntary codes and guidelines, further education to the wider community, and building capacity for industry to develop their own tailored arrangements that meets the unique circumstances of the industry and enterprise.⁹

64. Another significant concern is the interaction of any minimum standards under this Act, and the minimum standards and obligations under the workplace relations system.
65. Employers already have substantial legal obligations to observe prescribed minimum standards in employment under the FW Act (enterprise agreements, awards, the National Employment Standards and the pay equity provisions).
66. We foresee substantial difficulties and uncertainties in overlaying a further layer of minimum standards that impose different obligations on employers.
67. AMMA notes s.19 of the amended Act, which directs the Minister to set minimum standards in relation to “specified gender equality indicators, specified relevant employers and specified reporting periods” by 1 April 2014.

The inclusion of the qualifier “specified” clearly foresees that not all indicators can or should be translated into enforceable standards.

⁷ Issues Paper, p.3

⁸ Workplace Gender Equality Act 2012 – Departmental Factsheet:

http://www.fahcsia.gov.au/sites/default/files/documents/11_2012/factsheet_amended_201112.pdf

⁹ ACCI Submission to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Equal Opportunity for Women in the Workplace Amendment Bill 2012, paragraph 8