

MAKING IT REAL: AFFIRMATIVE ACTION IN WORKPLACES

*SUBMISSION TO REGULATORY REVIEW OF THE AFFIRMATIVE ACTION (EQUAL
OPPORTUNITY FOR WOMEN) ACT 1986*

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NATIONAL PAY EQUITY COALITION

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The nature and magnitude of the problem the Affirmative Action Act addresses; change over time

The second reading speech on the AAA (House of Representatives, Hansard, 19 Feb 1986, p.862) stated the Government's commitment to women being able to enter and compete in the labour market on an equal footing with men. It was noted that neither individual employers nor the nation could afford to waste women's contribution to the community. Affirmative action programs were to identify discrimination and ensure EEO was a reality in large workplaces.

Significant inequalities identified were the male/female earnings gap and occupational and industrial segregation of work by type and level.

It is clear that the disadvantage and discrimination against women which led to the passage of the AAA have not yet been redressed or removed. The lingering effects of past discrimination and exclusionary practices still deny opportunities to women and result in lower levels of rewards for work than productivity and merit would support.

Full time adult women workers still only earn 83% of men's earnings for their ordinary time work and 79% overall. This figure had improved very slowly during the 1980s but has worsened slightly since 1991. Regression analyses of factors associated with women's lower earnings still consistently find an unexplained discrimination residue. This residue necessarily understates significantly the extent of discrimination since discrimination is often also embedded in other factors taken to explain earnings differences. For example, qualifications and years of experience will sometimes be used as invalid proxies of productivity or skill in ways which have discriminatory effects where women have less of those human capital attributes. Other factors often included as factors explaining earnings differences (such as marital status) have no legitimate role in wage setting.

Women are still underrepresented in management levels of most occupations in most industries and are still concentrated in a narrower range of occupations than men. The continuing great concentration of women in clerical, sales and service occupations has meant that improvements in some areas (eg professional and para-professional jobs and some areas of management) have been overshadowed since the female dominated occupations have been the fastest growing and make up such a high proportion of jobs overall.

It is significant that only a small proportion of sex discrimination complaints about employment are lodged by men and that fewer succeed. That supports the view that affirmative action/EEO has not been applied in ways amounting to reverse discrimination, for which sex discrimination legislation clearly provides complaints mechanisms and remedies. The incidence of sex discrimination complaints from women continues to increase.

A high proportion of complaints about sex discrimination in employment relate to sex based harassment. This highlights the continuing work detriment women experience through sex based harassment. There have been several high profile discrimination cases during the 1980s and 1990s revealing how sex based harassment operates through exclusionary workplace cultures to deny women access to many areas of employment. In the Horne & MacIntosh Case, women working in non-traditional jobs in construction were severely harassed and neither management nor unions acted appropriately to remedy the situation. In the Djokic Case, a woman meatworker had been excluded from better paying work as a cutter and was severely racially and sexually harassed when she did enter the better paid occupation. Other cases include the Barker case, and the Hill case. Sexually hostile work environments still provide boundary policing for sex segregation in occupations.

These cases show how exclusionary practices embedded in workplace culture persist longer than the discriminatory legislative provisions which historically prohibited women from entering a very wide range of jobs and resulted in crowding women into other occupations and streaming them into the education and training programs which would prepare them for the narrow range of occupational choices open to them. The Nadjovska and Banovic Cases showed how legislation (regarding manual handling) and workplace practices and job design interact in keeping women out of particular jobs while failing to protect women or men from injury. Manual handling limits were only removed from legislation in NSW in 1991. The National Tripartite Conference on Eliminating Discrimination from legislation and awards was only held in 1986 and action arising from it took several years to become effective even in a formal legal sense.

Discriminatory exclusion from employment was also reflected in exclusion from education and training for those jobs, particularly in trades jobs entered through apprenticeships. It has been considerably easier for women to enter occupations through off the job formal qualifications. There has been much better progress in professions than trades.

Occupational segregation has had a profound effect on the patterns of women's workforce participation since the relatively lower earnings available in the jobs open to women have been part of the environment in which women's choices about entering and re-entering the workforce have been made. Occupational crowding holds down women's wages since there is a ready supply of labour at low rates because of limited other options for employment.

There also is considerable research showing that periods of withdrawing from the paid workforce have an immediate effect on women's earnings and a very much greater effect on life time earnings and on maximum job level reached than the period of time for which women are absent for having and looking after children. Less workforce experience still remains one of the key correlates of women's lower earnings. Experience is still very highly correlated with job level.

Relatively few workplaces have paid maternity or paternity leave and many still do not provide flexible work arrangements (such as flexible start/finish time, capacity to accumulate time off, part time work). Childcare provision is limited and likely to become more so in light of recent Australian Tax Office Rulings about employer provided care. Childcare outside the workplace is becoming more expensive and less accessible. This means that women often have no choice but to leave the workforce or to take lower paying jobs which do allow them to accommodate work and family responsibilities. Workplaces generally still are not responsive to the life experience and needs of parents, families and women in particular.

Occupational segregation can provide a significant indicator of workforce discrimination and disadvantage. It is interesting to note that even in the US contract compliance programs which have as their key objective that the employment of women and minorities reflects their workforce availability (in the region, for job types and job levels), and where the sanctions are considerably greater than in Australia, most studies show less success in relation to skilled craft and trades jobs than other jobs.

Occupational segregation will not be decisively altered quickly, partly because of patterns of job growth and the very great concentration of women into the female dominated occupations where growth is fastest. Reducing or eliminating segregation is by no means the only indicator of ensuring EEO and eliminating discrimination. Strategies to ensure that relative job worth is appropriately measured and rewarded can mean that occupational segregation itself does not constitute disadvantage. Access to all types and levels of employment is important both from an economic and social justice point of view, and so are indicators about levels of reward and experience of work, both workplace culture (eg freedom from harassment, bullying etc.) and work arrangements (including conditions, such as flexible work arrangements, leave etc.).

In view of the complexity of the processes involved in reproducing and embedding occupational segregation in every aspect of employment (including workplace design, design of clothing and equipment, task and job design, work process design, measures of job value and reward, education and training systems, personnel policies and practices etc.) it is quite unrealistic to expect that major impacts can be achieved rapidly. Indeed that focus is likely to lead to very superficial approaches. In view of the very great time and resources involved in bringing about the present situation, it should be accepted that transformation will be long, slow, difficult - and very rewarding in moving towards more inclusive and productive work arrangements.

Similarly, the male/female earnings gap is multi-faceted, including both value of work issues and EEO issues. Working time (including part time, overtime, shift work, flexible work arrangements) is important. Job levels - women's underrepresentation in management jobs - matter. So does occupational segregation by occupation and industry. There are some characteristics of the industries in which women are concentrated which affect the earnings in those industries including exposure to import competition, export success, competition, geographic location, firm size, level of capitalisation, technologies, work processes, as well as forms of industrial regulation and wage setting which interact

with employment discrimination. Occupational entry may be subject to constraints, women's access to employment may be limited by a greater need to find employment locally, and geographic organisation of production may mean that over-supply of women needing to work locally keeps wages in particular areas lower.

There is also considerable evidence that wage fixing systems and institutions can affect women's earnings. It may be that traditional work value measures crystallised in the 1960s when manufacturing accounted for a higher share of employment and for jobs which had particular salience in wage fixing systems do not reflect well the value of work in the ever increasing proportion of service industry jobs. There is continuing concern that pay setting outside industrial relations institutions including enterprise based job evaluation, performance pay, productivity pay etc. do not recognise the value of the work done by women as well as that done by men. In those settings there may be even more effect from prejudices and relative bargaining position and power.

It would be quite unrealistic to expect major changes in the earnings gap in a brief period of time. The contributing factors are many and various and the solutions to almost all of them are long term and complex.

The federal government (and all governments) has an important role to play in supporting EEO and anti-discrimination objectives and initiatives. Australia is signatory to ILO Conventions on discrimination in employment and occupation and equal pay, to the UN Convention on Elimination of all forms of Discrimination against Women and to the International Convention on Civil and Political Rights, among others. These Conventions require states parties to take active steps to bring about the objectives of the Conventions.

The federal government and state and territory governments require EEO and anti-discrimination compliance in the public sector. States, Territories and the Commonwealth also apply discrimination requirements within their own jurisdictions. However, effective regulation in terms of EEO and discrimination requirements requires active programs at national level. In view of the proportion of larger organisations carrying out their activities across State and territory boundaries, it is fair, consistent and efficient for regulation to occur at national level.

The objectives and name of the AAA

NPEC recommends that the name of the Act be changed to the *Employment Equity for Women Act*. Affirmative action is understood by some people to require quotas and therefore may be misleading as a title for the Act. While there is some genuine confusion about the term affirmative action, it is also true that misinformation about affirmative action has been deliberately promoted by those who fundamentally disagree with efforts to create employment equity for women. A name change will not convince those who do not believe that women face discrimination in employment and that barriers exist to equal opportunity which are manifested at the workplace level. However changing the name to

reflect more accurately the objects of the Act will assist in clarifying confusion and misinformed opposition to affirmative action, as it has been applied in Australia.

While the objects of the Act are to eliminate discrimination against women in employment and ensure equal opportunity, there is no positive requirement on employers other than to report on a program. It is clearly the intention that employers be required to have a program. *NPEC recommends that it be made explicit in the Act that organisations are required to eliminate discrimination and create equal employment opportunity, in the same way as employers are required to ensure a safe and healthy workplace.*

Formulation of the positive obligation of the employer to ensure EEO and eliminate discrimination should include carrying over the current provision of the Act stating that nothing in the Act requires that a person be hired on a basis other than merit. This needs to be accompanied in guidance materials by explanations about the interrelationships of discrimination, measures to support development and opportunities of disadvantaged groups and merit. There should also be guidance about concepts and assessment methods regarding merit.

Coverage

NPEC recommends that coverage be extended to organisations with a payroll equivalent of 50 employees.

NPEC believes that all employers should have an obligation to ensure equity in employment. However it cannot be stressed enough that the extension of coverage is dependent on the resources made available to administer the Act. A reasonable ratio of staff to organisations covered is 1:50, which was the staffing establishment originally envisaged for the Agency (but not implemented) when the 100+ organisations became covered in 1988. NPEC recommends that this staffing ratio be established and maintained. The current staff ratio makes it impossible for the Agency to provide the industry assistance that many organisations expect and means that much of the Agency's work is confined to report handling and other administrative aspects of implementing the Act.

The paucity of resources devoted to implementing the Act is read by many women and employers as a sign of the Government's lack of commitment to the legislation.

It is feasible for employers with 50+ employees to develop a viable program. Arguably it is relevant to many organisations below this threshold. However it is estimated that extension below 50 would dramatically increase the number of organisations covered.

The Act is the only legislation which determines coverage based on organisations with more than one hundred employees. This places the Agency in a difficult position in maintaining a current register. While legally employers are required to self identify, it is

widely believed that many do not. Some suggest that around 400 organisations are not aware of the Act or are avoiding their obligations.

The burden of maintaining an up to date register would be greatly alleviated if coverage was consistent with the payroll basis used by the ASC and the Australian Taxation Office. NPEC recommends that the advice of the ATO be sought on the average payroll of organisations with more than 50 employees. NPEC further recommends that the ATO and the ASC regularly provide lists of organisations which fall above this threshold to the Agency and provide information on coverage and their obligation to self identify to employers. Registration as a business (for organisations which are covered by the Act) should be contingent on proof of registration with the Agency.

The present option in the Act for the Parent company to report on behalf of all its subsidiaries also causes unnecessary administrative complications in determining coverage and compliance. NPEC recommends that subsidiaries be required to meet the obligations of the Act on their own behalf. This avoids the untenable situation that holding companies with no or few employees are legally responsible for their subsidiaries. Each subsidiary which meets the threshold for coverage should have responsibility to develop its own program and report on it. That would clarify responsibility and accountability much more than the current arrangements in which a very good performance of one subsidiary compensates and covers up for a very poor performance by another. Attenuation of responsibility under current arrangements is particularly pronounced where subsidiaries are geographically distributed around Australia and reported on by a Sydney or Melbourne based holding company. It should be noted that this would also increase the number of organisations required to report, but coupled with the change to payroll rather than number of employees, would make the Act easier to administer.

The AAA and competition

Discrimination in employment has a negative effect on competition. The US Congress recognised this in the Declaration of Purpose in the Equal Pay Act 1963, s. 2:

(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differential based on sex:

- 1) depresses wages and living standards for employees necessary for their health and efficiency;
- 2) prevents the maximum utilisation of the available labour force;
- 3) tends to cause labor disputes, thereby burdening, affecting and obstructing commerce;
- 4) burdens commerce and the free flow of goods in commerce; and
- 5) constitutes an unfair method of competition

(b) it is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations to correct the conditions above referred to in such industries.

There are, of course, significant differences in the US and Australian approaches to affirmative action. However, there is a broad similarity of objective and very many of the same difficulties and resistances.

In response to claims that affirmative action has resulted in hiring less qualified people, the Office of Federal Contract Compliance points to evidence that productivity of firms subject to contract compliance requirements regarding workforce utilisation is not damaged by the programs, as might be expected if the claim were sound. Since about 22% of the US workforce is employed by federal contractors or subcontractors, comparative assessments can be made across firms which are and are not covered by contract compliance requirements. Contractor establishments showed higher increases in employment of minorities and women in the top three occupational categories compared with non-contractors. Studies during the 1980s showed that affirmative action had been effective in raising the occupational status of minority and female workers, including in higher skilled and white collar jobs (Studies for OFCC include: Jonathon S Leonard, Employment and Occupational Advance Under Affirmative Action, August 1984; Griffin Crump, Employment Patterns of Minorities and Women in Federal Contractor and Non-Contractor Establishments 1974-80: a Report of the Office of Federal Contract Compliance Programs, June 1984). Women's share of management jobs including top management jobs is considerably higher in the US than in Australia.

However, Glass Ceiling Commission reports still provide evidence of ongoing discrimination. Contract compliance debarments are very rare - four debarments were ordered in financial year 1994 regarding violations of conciliation agreements entered into to resolve violations of the Executive Order. The OFCC notes a wide variety of discrimination still occurring in all industries and job levels including quite blatant direct discrimination.

A recent study found that exemplary affirmative action programs recognised by Exemplary Voluntary Efforts awards, Opportunity 2000 awards help a company's stock values (while major discrimination cases damage stock values). The OFCC has recently introduced Exemplary Public Interest Contribution Awards.

In Europe, equal pay provisions in the Treaty of Rome have been regarded as important in preventing unfair competition on the unlawful basis of sex discrimination in pay and seen as necessary to prevent "social dumping" through entrenching sex discriminatory pay in some countries while allowing an incentive for countries which have achieved less discriminatory pay to lower the standards achieved.

In Australia, there are many product and labour markets where all organisations in the market are covered by affirmative action requirements and there is no differential impact of the requirements on their relative position in the market. Reducing the coverage threshold to 50 (as NPEC recommends) would address any concerns that organisations just below the current threshold may derive some competitive advantage (or suffer a disadvantage) by not being covered by those same requirements.

It is important to note that a claim of effect on competition would have to be sustained by some evidence about the nature and extent of costs involved in the affirmative action program and their effects on competition. There is very little evidence indicating that substantial resources are devoted to affirmative action programs at all, let alone evidence of effects on competition. AWIRS certainly shows that most organisations (89% of all workplaces with over 20 employees, 82% of those with 100-199, 87% of 200-499 and 72% of those in the 500+ range) do not even have a manager with a job title including EEO/affirmative action and there is no information on what that means in terms of time and resources for programs in the organisations which do have such managers. However an increasing number of organisations do have written policies on EEO/affirmative action.

The effects on competition have to be considered in terms of effects on market entry and that would have to be established, if it is considered to exist. Then further consideration would be required of the public benefit effects. It is clear that governments have for a long time regulated some aspects of employment in the public interest including occupational health and safety, minimum employment standards, contracting arrangements etc. Recognition of unequal bargaining power between sellers and buyers of labour in some parts of the labour market and the public interest in the overall community benefits of fair employment practices have provided a sound basis for regulation.

Effects on competition certainly have to be demonstrated at a higher level than a simple employer preference for not having regulation and a hypothetical claim of an effect on relative competitive position. In any case, relative competitiveness (which has been the basis of some claims about the AAA's effect on competition) is not really the issue in regulatory reviews under the NCPA, where the real focus is whether there are significant barriers to market entry.

However, there is clear evidence that sex discrimination exists in the labour market. It is also clear that the labour market is characterised by imperfect knowledge of employers about women's productive capabilities and by unequal bargaining power in relation to women. Women's lesser bargaining power and the resulting disadvantage in enterprise bargaining have been established many times. The UN Committee on CEDAW has specifically drawn attention to the situation of women in enterprise bargaining in Australia and requested monitoring of it. The poorer bargaining position has many aspects, including lower union density, less effective representation through unions (partly related to ability to participate and achieve leadership positions), less access to industrially strategic employment (partly related to discriminatory exclusions from strategically located occupations), occupational dispersion (eg clerks are spread in small numbers across many enterprises and industries), higher concentration in small workplaces etc.

Contract compliance

NPEC strongly supports the continuing application of contract compliance to organisations which fail to meet the requirements of the Act. It would be untenable if the Government continued to do business with organisations which flout their legal obligations.

The contract compliance policy has proved a useful tool as an incentive for compliance with the Act. While some employers profess to care little if they are named in Parliament, many are persuaded by the possibility that they would be ineligible for a government contract or other forms of financial assistance. The increasing use of contracting out means that more and more organisations are directly affected by the contract compliance policy.

A side benefit of contract compliance is that it has helped the Agency to identify organisations covered by the Act. The issue of coverage is discussed in more detail elsewhere in this submission. The reference to the Act in standard contract forms has alerted many organisations to the fact that they are covered. While the onus is on employers to self identify, the reality is that many of the smaller organisations are not aware of their legal obligations in this area.

Not only does the contract compliance policy provide a quick and easy way of identifying employers, it is also administratively easy and inexpensive to apply.

NPEC recommends that the Contract Compliance Policy be extended to apply to those organisations who fail to self identify, and those who fail during an audit to convince the Director of their good faith efforts to comply with the AAA.

NPEC recommends that there be a review of the administrative arrangements for the application of the contract compliance policy to ensure that all information related to contracting includes reference to the obligations of employers to self identify to the Agency, that relevant staff are aware of the procedure and that a monitoring process be established for measuring the application of the policy.

Government contractors and government grant and funding recipients should also be required to meet EEO requirements specifically but not only in the areas of recruitment, selection, promotion, retrenchment, remuneration and conditions, training and development opportunities. Further guidance should be prepared for contractors and grant and funding recipients on this, including the standards referred to in this submission. Contractors and receivers of government grants and funds should also be specifically required to comply with anti-discrimination requirements as a condition and term of their contracts, grants or funding.

Equal employment opportunity and compliance with discrimination legislation ought to apply to all contractors and grants recipients and not be restricted to organisations covered by the AAA. This would be a good overall public policy support for the

government's discrimination legislation and overall support for EEO. It would also clarify and ensure that smaller organisations have the same requirements in this regard as larger ones. This could accelerate the diffusion of EEO awareness, skills and knowledge throughout the workforce across a wide variety of product, service and labour markets.

Costs and benefits - welfare and equity; broad economic effects; consumer interests; effects for women

There are social justice and human rights considerations in affirmative action. In a democratic society, it is simply unacceptable for people to be denied opportunities to participate in and achieve rewards of employment on the bases of attributed or actual characteristics unrelated to their productive capacities. The rejection of category based discrimination has been one of the key human rights principles since the beginning of the United Nations Organisation and is the foundation of the constitutions of many countries because its implications are profound. Even if there were no economic impacts (which of course there are) in discrimination, equality is fundamentally compromised where people can be discriminated against on the basis of irrelevant actual or attributed characteristics. That discrimination is essentially unjust.

Lack of access to the full range of social and economic opportunities necessarily affects capacity for full political participation including access to representative and decision-making positions throughout the society. When the contribution of women is underutilised and undervalued, the whole community is the poorer for it and hands down for the future a diminished and demeaned society.

Women's abilities to lead full and satisfying lives are decisively affected by their capacities to achieve economic independence, including ability to leave violent or otherwise unsatisfactory relationships. Economic independence of women also has effects on women's needs for government support through welfare and other systems. Women's access to resources and opportunities affects their incentives and abilities to undertake further training and education and so improve their life time earnings and their capacity to contribute to their own retirement incomes. If women have the opportunity to earn more either through pay which better recognises their productivity or through access to better paid work, they are in a better position to purchase goods and services and so create additional demand and employment in the economy.

There also are economic considerations at the level of the organisation and the economy. Wherever sex discrimination affects women's choice of occupations (and education and training) or affects employers recruitment, selection and promotion practices, the productive capacity of labour is not being used to its maximum. Underrepresentation of women in leadership positions results in organisations recruiting less able men and incurring considerable opportunity costs. There is also a lot of waste in women's labour not being used at its most productive. Women's education investments do not yield their full dividend where labour market and employment structures and arrangements do not permit them to make full use of their human capital endowments.

Organisations' investments in recruiting and developing women do not produce maximum benefit where rigid employment practices force women to leave their employment. Organisations generally mis-recruit around a third of the time, according to research by Schmidt and Hunter. Some of this is influenced by discriminatory assumptions. Recruitment of workers who are less productive involves significant direct and opportunity costs. Investment decisions (across types of labour, labour/capital investments, specific product markets etc) are also affected by relative prices of women's and men's labour and can be distorted where the rates paid are affected by sex discrimination unrelated to productivity.

Requirements, standards, auditing and reporting

The AAA should be amended to provide that reporting on developing and implementing a program consists of providing an employment profile, analysis of issues, analysing progress from the previous year and developing program initiatives for the next year. While the current requirements are based on the eight steps currently in the Act, NPEC recommends that the eight steps be removed and replaced with principles and elements of program development. It should be required that programs be formal, written and public and should provide opportunities for participation by unions and employees.

It is impossible to judge definitively the efficacy of a program, based only on a written report. NPEC recommends that the current 5 level assessment be the basis for an audit of four percent of organisations covered by the Act. The selection of organisations for audit could be random, or based on size or industry or issue. The selection could take account of complaints, profiles, reports etc. Audits could be done at various levels. The Director already has powers to require extra information and there could be a call for information on a specific aspect of the organisation's activities or data for focused reviews. The Agency should publish an annual auditing strategy and a report on its audit program. It is essential for the legitimacy of the audit that this be done by agency staff and not contracted out.

The five level assessment process must be founded on agreed standards. It is acknowledged that setting standards in this area is not easy. There are many issues that need to be resolved. Standards need to be general enough to apply to the diversity of organisations covered by the Act and in sufficient detail to provide organisations with guidance on the requirements of the Act. There are guides and practice notes on equal employment opportunity which provide a basis for developing standards and these can be further developed, using the results of research on effective programs.

While the focus of the standards should be on outcomes, NPEC recognises that there are factors outside of the control of the organisation which impact on its EEO achievements. These include local, micro and macro economic issues which affect the context for a program at an enterprise level. NPEC recommends that organisations report against their 'good faith' efforts to implement a program. The report should include information on the activities the organisation has undertaken to implement standards. The chance that an organisation might be audited would deter organisations from making claims in their

written reports which cannot be substantiated, in the event of an onsite audit. Some practitioners would appreciate the support of possible audit in resisting pressure to exaggerate or distort reports. It could probably be assumed that the higher the organisation had been rated, the more embarrassing naming for unsatisfactory audit against minimum standards would be.

There is a need to develop standards which set minimum compliance, are realistic and meet the requirements to remove discrimination and ensure equal employment opportunity. The emphasis on good faith efforts will enable the audits to be based on genuine efforts and real activity.

NPEC recommends that all organisations covered by the Act be required to report on their program, including good practice organisations. The Agency's monitoring role would be compromised if it is not able to collect, analyse and aggregate information on women's employment status for all organisations covered by the Act. While some organisations might claim that they have achieved equal employment opportunity and therefore should be exempted from reporting, NPEC submits that any organisation which is genuinely committed to equal employment opportunity for women should not find structured reporting onerous. The notion that reporting is an impost fails to recognise that the removal of discrimination and the creation of equal employment opportunity is an active process which should be monitored, evaluated and able to be demonstrated in a public report.

The requirement to report acts as a trigger for monitoring and review of the program. The report form is easy to follow and useful as a guide to program development and any organisation with a basic human resource management system, a computer and a staff member with responsibility for the program can update reports with minimal effort. The issue for organisations is to allocate the resources needed to develop and implement a program. Reporting is only a small element of the requirement and should assist rather than hinder an organisation's genuine efforts.

It should also be legislatively required that organisations report on affirmative action in their Annual Reports and to the Australian Securities Commission. This would not involve extra record-keeping beyond the AAA requirements. It would be consistent with the AAA logic of enabling and building support for affirmative action/EEO through providing the community with information about the activities and achievements of organisations.

A key feature of the approach proposed is to add workplace program reviews to the desk audit which has been carried out through assessment of reports to date. On site reviews could include discussions with CEOs, visual inspection of the worksite, interviews with management and non-management personnel, and review of relevant data including personnel policies and information. Reviews could conclude with a conference in which the review findings are discussed. Organisations should have a period of time in which to prepare an Action Plan for lodging with the audit report, if they wish to do that. There could be a provision limiting how frequently an organisation could be subject to a

worksite review and the duration of a review. There would have to be provisions about confidentiality of data and conditions of access.

There is a tension between highly specifying requirements so organisations have a full picture of their obligations and having standards which are so detailed that much of them will not apply in any specific organisation. There is a danger that if the standards are too limited they could apparently (although not legally) diminish the obligations of organisations in relation to both the AAA and the SDA and so mislead organisations about their responsibilities.

Standards should be developed progressively in key areas of employment rather than attempting a comprehensive coverage of all areas before any could be implemented. Since the standards would articulate, expand and explain and not substitute for the broad requirements regarding discrimination and EEO, the absence of standards in a particular area for a period of time would simply maintain the status quo. The standards or the absence of them could not, for example, reduce the legal meaning of the SDA and could not prevent anyone from lodging complaints about discrimination.

The staged development of standards would mirror the process in the occupational health and safety jurisdiction, where broad legislative coverage and some regulations continued while codes were developed - for example, in areas such as manual handling, provision of amenities, machine guarding, code of practice for HIV infection, code of practice for the control of workplace hazardous substances etc.

Clearly, some areas of employment attract more discrimination complaints than others and they should be the subjects of the first standards and codes. The main areas of discrimination complaints are sex based harassment, discrimination in recruitment, in classification and in dismissal. In NSW in 1997 these accounted for around 84% of employment discrimination complaints. Another major area would be pay equity. It could be expected that the areas of greatest complaint could be those in which most significant improvement is needed and could be effected in a wide range of organisations. In all these high priority areas, there has been significant work on producing guides, codes and standards. A common form of recruitment discrimination arises when recruitment is by word of mouth among existing employees who are already a highly segregated group and this imposes an insuperable barrier to new entrants.

The proposals outlined in this submission add to the range of regulatory strategies which increases the chances of achieving a good fit between the type and seriousness of the issue and the approach used. A wide range of regulatory strategies is characteristic of the occupational health and safety jurisdiction. An interesting example of an integrated range of regulatory responses and strategies in the affirmative action area is the Fair Employment Commission in Northern Ireland, which can investigate with and without complaints, negotiate agreements, make orders and impose sanctions including contract compliance.

Alternative models - eg self regulation; incentives eg tax, subsidies, training incentives, licensing, accreditation, standards (voluntary/regulatory), service charters, quality assurance schemes

Some regulatory theories propose that self-regulation is a more mature form of regulation than government regulation. Self-regulation often does emerge as a practical and satisfactory option after a period of government regulation in which standards development and education and training occur.

Effective self regulation requires a sound set of standards against which performance can be assessed. Such a framework has not yet been developed for the AAA. In any case, performance to date indicates that there is a considerable range of commitment regarding affirmative action requirements, with a small proportion of organisations pursuing high standards and some refusing to do the most minimal compliance. Without a sound framework, it would be difficult to assess what incentives should be applied to. Similarly, licensing cannot credibly be moved out of a regulatory framework until requirements have been quite specifically identified.

Quality assurance schemes run by consultancies, industry bodies etc - perhaps along the lines of the five star occupational health and safety assessments - could perhaps be developed over time in the light of the organisation studies used for formulating standards and broader work on program drivers and success factors. The examination requirements would be resource intensive and apply only to a limited proportion of organisations. It would be hard to justify expenditure of substantial resources on this work at the expense of work to improve performance of low achieving organisations. It may be that of a credible quality assurance and accreditation system can be developed to meet the needs of high achieving organisations, it could be done on a fee for service basis - possibly by contracted consultants rather than by government.

A greater understanding of how affirmative action works in the workplace may lead to identification of key drivers to which incentives could be attached. Accreditation arrangements are likely to apply only among the small proportion of organisations who do seek recognition as employers of choice for women.

Any move away from government regulation at this point in the evolution of the affirmative action regulatory framework would fatally compromise the legitimacy of the legislation. There are already some legitimacy challenges for the Act in the widespread public knowledge that not all organisations required to self-identify and report do so, not all organisations provide truthful and balanced reports on their programs, some practitioners have a very low level of knowledge and skill in the affirmative action/EEO area, some organisations devote almost no resources to their programs, some organisations have repeatedly been named with no apparent ill effects etc. Government abandoning support for the legislation by ceasing contract compliance or moving away from government involvement in and control over the regulatory framework and processes would bring an end to further efforts on affirmative action/EEO in all but a small number of organisations.

Relationship with discrimination jurisdiction

The discrimination jurisdiction is complementary to the affirmative action jurisdiction and cannot take its place. The AAA has a more promotional character although it also has a regulatory role. The AAA is to address systemic discrimination where the effects of discrimination may be very widespread and have large aggregate effects for women generally without being sufficiently critical to a person or group to sustain the time, resources, and effort required to meet the complex evidentiary and legal requirements of a successful indirect discrimination case. It is interesting that the US Executive Orders providing for contract compliance initially only prohibited discrimination. In its final report to President Eisenhower, the President's Committee on Government Contracts, headed by Vice-President Nixon, concluded:

Overt discrimination in the sense that an employer actually refuses to hire solely because of race, religion, color or national origin is not as prevalent as generally believed. To a greater degree, the indifference of employers to establishing a positive policy of non-discrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.

Affirmative action requirements were subsequently introduced by President Kennedy. The Nixon administration later issued regulations providing a blueprint for developing affirmative action programs including numerical goals, in 1970.

There has been considerable effort more recently by the US Office of Federal Contract Compliance to emphasize that numerical goals have never been designed to be employment quotas or preferential treatment, stressing that the real consideration is good faith efforts in relation to reasonably attainable goals regarding workforce utilisation.

In Australia, the affirmative action and sex discrimination legislation was originally envisaged as an integrated approach to employment discrimination and EEO. The connection should be formally legislated through powers for the Director of Affirmative Action to refer matters to the Sex Discrimination Commissioner for investigation and for the SDC to provide a report on an investigation for tabling in Parliament. The report of the Sex Discrimination Commissioner would set out whether the SDC considers that a prima facie case of unlawful discrimination as defined in the SDA apparently exists. It would not be appropriate for the AAA to be involved in individual complaints which should be referred to and dealt with in the sex discrimination jurisdiction.

Both the SDC and DAA should be empowered to carry out conciliation with organisations, leading to binding agreements about addressing discrimination and EEO issues. Both should be empowered to issue orders in relation to EEO and discrimination (but not to impose penalties etc.) Both should be empowered to issue standards with the status of a code of practice under the legislation. At present, the SDC can issue guidelines under the SDA. However, the standards should have the same status as a code of practice under occupational health and safety legislation - a breach of the code can

contribute to evidence of a breach of the legislation (without being itself a breach); compliance with the code can mitigate liability for a breach of the legislation (without substituting for the provisions of the principal Act).

The Director's and the SDC's powers to make orders arising from reviews or investigations should be restricted to requiring actions necessary for compliance with the Act and would not include any authority to impose any penalties other than the sanction of naming as already provided for non-compliance with the Act's requirements. Any enforcement action or appeals should be dealt with through the Federal Court although this should be framed and implemented as an option of last resort.

A preferable option would be for reports prepared on audits or investigations to be referred for tabling in Parliament. This would be more in keeping with the legislative scheme and approach to sanctions underlying the AAA.

There has been considerable public discussion over the years about the effectiveness and desirability of adding other groups who experience disadvantage and discrimination to the AAA. On the one hand, there is a desire to have recognised and addressed other category-based forms of discrimination. On the other, there is a need to ensure that the legislation, processes and formats specifically address the key employment issues involved in discrimination on bases other than sex. It may well be that the finding that EEO/affirmative action legislation has not produced significant benefit for women from non-English speaking backgrounds, women with disabilities and Aboriginal women may indicate that different approaches and strategies are needed. There should be organisation based studies of the employment issues in those areas and consideration of what would best contribute to effective EEO programs including consideration of whether there should be separate specific legislation.

The role of the Agency

The Agency needs to build closer relationships with industry, through its recruitment criteria and practices and through establishing a system of industry advisers. There is a need for advisers to be based in States and Territories, particularly if NPEC's recommendation regarding requiring subsidiaries to comply and report on their own behalf is implemented. Consideration should be given to developing industry networks, based on existing industry groups and by encouraging development of groups in other areas. Support could be provided to the groups on a trial basis including provision of limited funds for the groups to resource specific projects agreed to be relevant to improving capacity to address specific affirmative action issues in the industry. If the trials were successful, government could consider moving to matched funding.

Involvement of private sector organisations in searching for better affirmative action solutions has had some success through the New Zealand EEO Trust and through the employer networks in the UK and the US.

With appropriate resources, the AAA could also commission organisation studies from high achievers.

There is a need for better information to be collected about the position of women in the AAA coverage area and outside it. The DAA should prepare every two years a report on the position of women in the Act's coverage, against agreed benchmark indicators. The Office of the Status of Women should prepare an overall report on the position of women in the labour force including the DAA's report. The OSW report should also draw on AWRs data and on reports from the Department of Workplace Relations and the Office of the Employment Advocate. The abolition of the ABS Women's Year Book means that key indicators on the position of women are not readily accessible and further consideration should be given to reintroducing that very useful publication. The report should draw on qualitative as well as quantitative data including information from the sex discrimination jurisdiction and from peak employer, union, women's and human resource management practitioner organisations. The report would provide a means of identifying improvements and challenges in the full realisation of the objectives of the AA Act.

Conclusion

The objectives of the AAA are - not surprisingly - far from achieved. Women are still discriminated against and disadvantaged in the workplace. Key indicators include relative earnings, and distribution across job types and job levels. They also include the experience of discrimination and rigid and unresponsive work arrangements.

This situation still is diminishing women's social contributions and undermining women's capacities to participate fully in all aspects of social, economic and political life, and receive the appropriate rewards and recognition.

There is a continuing need for government regulation, program support and development and leadership.

On the limited information available, it must be concluded that the AAA has led to some improvement in organisation's efforts to improve the position of women without incurring significant costs and certainly without incurring costs at a level where it could be claimed realistically to affect competition, and specifically market entry. On the other hand, it could easily be demonstrated that past and existing discrimination still affects women's ability to compete fairly in the labour market. Sex discrimination is a structural rigidity in the labour market, affecting overall efficiency, productivity and capacity for adjustment.

There is an overriding public benefit from both social justice and economic perspectives for continuing and improving the affirmative action framework.

The directions NPEC sees as most useful involve setting standards, audits, and enhanced capacity for both the Director of Affirmative Action and the Sex Discrimination Commissioner to make orders to improve compliance with the Act. There should be

continued use of the naming sanction, for non-reporting, failing to meet necessary standards and failing to self-identify for reporting. Contract compliance should continue, demonstrating the government's commitment to its own legislation and providing a powerful market based incentive for compliance. EEO and anti-discrimination requirements should be included in government contracts and government grants.

RECOMMENDATIONS

NPEC recommends that the name of the Act be changed to the Employment Equity for Women Act.

NPEC recommends that it be made explicit in the Act that organisations are required to eliminate discrimination and create equal employment opportunity, in the same way as employers are required to ensure a safe and healthy workplace. Formulation of the positive obligation of the employer to ensure EEO and eliminate discrimination should include carrying over the current provision of the Act stating that nothing in the Act requires that a person be hired on a basis other than merit.

NPEC recommends that coverage be extended to organisations with a payroll equivalent of 50 employees.

NPEC recommends that the staffing ratio one staff member for each 50 organisations covered be established and maintained.

NPEC recommends that the advice of the ATO be sought on the average payroll of organisations with more than 50 employees. NPEC further recommends that the ATO and the ASC regularly provide lists of organisations which fall above this threshold to the Agency and provide information on coverage and their obligation to self identify to employers. Registration as a business (for organisations which are covered by the Act) should be contingent on proof of registration with the Agency.

NPEC recommends that subsidiaries be required to meet the obligations of the Act on their own behalf.

NPEC strongly supports the continuing application of contract compliance to organisations which fail to meet the requirements of the Act.

NPEC recommends that the Contract Compliance Policy be extended to apply to those organisations who fail to self identify, and those who fail during an audit to convince the Director of their good faith efforts to comply with the AAA.

NPEC recommends that there be a review of the administrative arrangements for the application of the contract compliance policy to ensure that all information related to contracting includes reference to the obligations of employers to self identify to the Agency, that relevant staff are aware of the procedure and that a monitoring process be established for measuring the application of the policy.

Government contractors and government grant and funding recipients should also be required to meet EEO requirements specifically but not only in the areas of recruitment, selection, promotion, retrenchment, remuneration and conditions, training and development opportunities. Further guidance should be prepared for contractors and grant and funding recipients on this, including the standards referred to in this submission.

Contractors and receivers of government grants and funds should also be specifically required to comply with anti-discrimination requirements as a condition and term of their contracts, grants or funding.

Equal employment opportunity and compliance with discrimination legislation should apply to all government contractors and grants and funding recipients and not be restricted to organisations covered by the AAA.

The AAA should be amended to provide that reporting on developing and implementing a program consists of providing an employment profile, analysis of issues, analysing progress from the previous year and developing program initiatives for the next year.

NPEC recommends that the eight steps be removed and replaced with principles and elements of program development. It should be required that programs be formal, written and public and should provide opportunities for participation by unions and employees.

NPEC recommends that the current 5 level assessment be the basis for an audit of four percent of organisations covered by the Act.

The Agency should publish an annual auditing strategy and a report on its audit program

The five level assessment process must be founded on agreed standards.

NPEC recommends that organisations report against their 'good faith' efforts to implement a program. The report should include information on the activities the organisation has undertaken to meet the standards.

It should also be legislatively required that organisations report on affirmative action in their Annual Reports and to the Australian Securities Commission.

Standards should be developed progressively in key areas of employment rather than attempting a comprehensive coverage of all areas before any could be implemented.

The Director of Affirmative Action should be empowered to refer matters to the Sex Discrimination Commissioner for investigation and the SDC empowered to provide a report on an investigation for tabling in Parliament.

Both the SDC and DAA should be empowered to carry out conciliation with organisations, leading to binding agreements about addressing discrimination and EEO issues. Both should be empowered to issue orders in relation to EEO and discrimination (but not to impose penalties etc.) Both should be empowered to issue standards with the status of a code of practice under the legislation

There should be organisation based studies of the employment issues for women from non-English speaking backgrounds, women with disabilities and Aboriginal women and consideration of what would best contribute to effective EEO programs including consideration of whether there should be separate specific legislation.

The DAA should prepare every two years a report on the position of women in the Act's coverage, against agreed benchmark indicators. The Office of the Status of Women should prepare an overall report on the position of women in the labour force including the DAA's report.