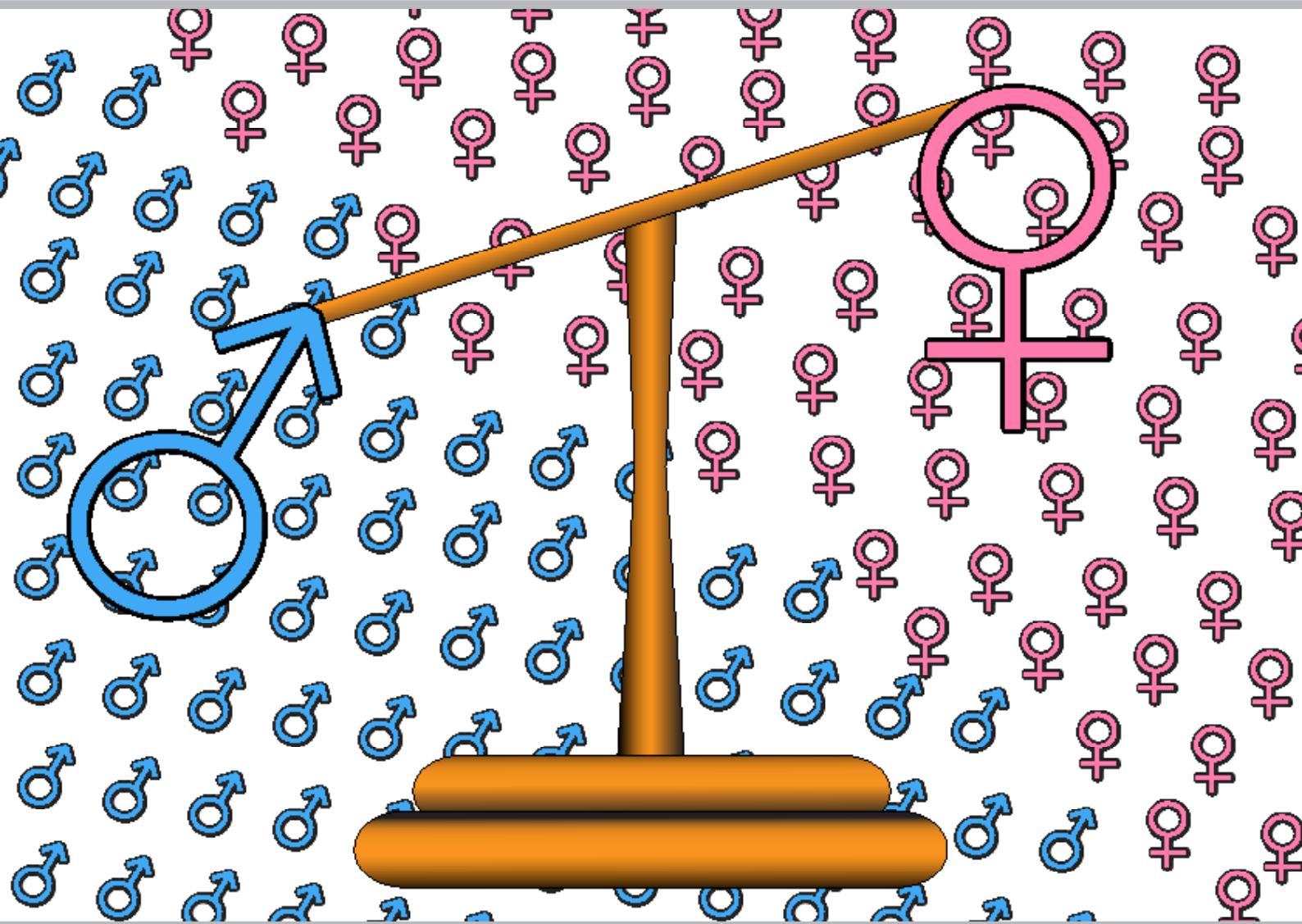


RULE OF LAW

INSTITUTE OF AUSTRALIA

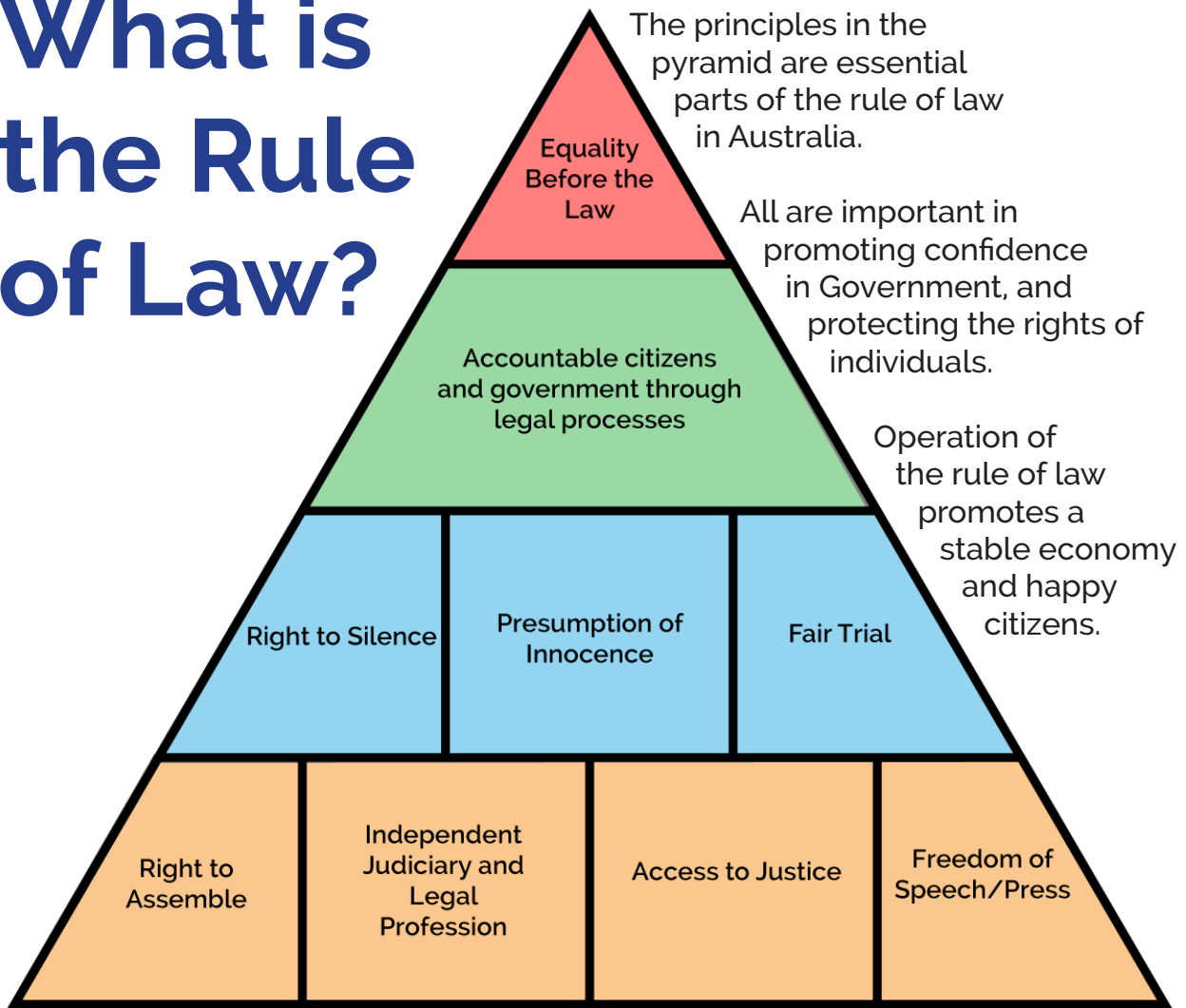
Gender Equality & the Rule of Law



The Rule of Law Institute of Australia (RoLIA) is an independent, not-for-profit organisation which promotes discussion of the rule of law in Australia. It supports principles such as access to justice, the presumption of innocence, fair trials as well as accountability and transparency in government.

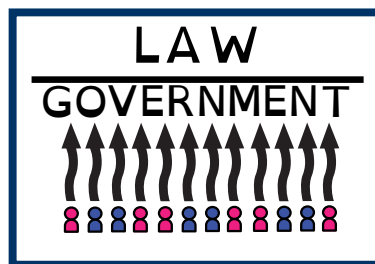
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What is the Rule of Law?



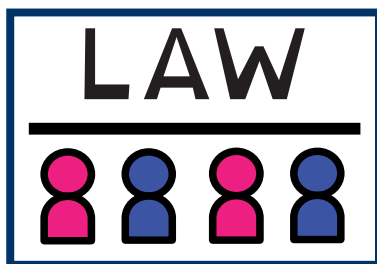
The rule of law is a legal concept which requires the use of power to be controlled by the law to ensure equality before the law.

Maintaining the rule of law is often noted as being the best way to preserve human rights.



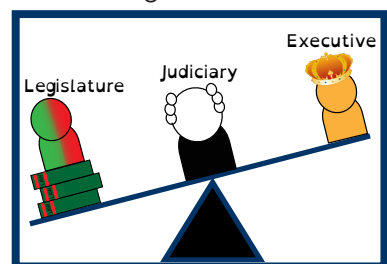
The separation of powers in Australia ensures that power is balanced between the three arms of government and that there are checks on their use of power.

The Judiciary is especially important in ensuring the integrity of the Australian Constitution and that the Legislature and Executive act according to the law.



If people believe the law is unjust, they may not want to follow it. Ideally people should feel the law is just and want to follow it.

The process of changing the law through democratic processes ensures that the law remains up to date with the needs of society.



WOMEN, EQUALITY AND THE RULE OF LAW

The rule of law is a concept which embraces and supports human rights principles. It is stated in the *Universal Declaration of Human Rights (1948)* that the best way to protect human rights is through the rule of law, and that the law should not make distinctions between men and women in their enjoyment of human rights.

The rule of law does not have anything to say about what laws contain but it requires that laws and legal processes are accessible, clear, able to be followed, and fair so that all people are equal before the law.

For people to be equal before the law it is well established that:

- legal processes should be open and accessible to all
- a person has the right to be heard
- the outcome of the legal process should be based on the law, not based on a person's social status or characteristics.

Access to Justice

All people regardless of their status and characteristics are entitled to access legal processes to protect their legal rights.

This does not mean that all legal solutions or rights are available to everyone. For example: an adult cannot apply to have access to the special rights given to children during the criminal justice process since a different set of rights and entitlements exists for adults.

In a democratic nation the law should reflect the values and expectations of the people. The rights and freedoms which people have are decided by the Parliament. This means that the Government is responsible for ensuring that people have adequate access to legal processes to protect their rights.

Characteristics of social status

Economic status	is a person wealthy? poor? High or low socio-economic status?
Race/ethnicity	what is the person's background in terms of race, ethnicity, and culture?
Sex/gender	a person's biological sex, and gender
Religion/beliefs	Catholic, Anglican, Muslim, Hindu or no religion.

Just Outcomes Under the Rule of Law

1. Have all parties had their legal rights protected and upheld according to the law?
2. Have the characteristics or social status of the person interfered with them receiving procedural fairness in a legal proceeding?

If the answer to

1. is 'yes', and
2. 'no'

then according to the rule of law this is a just outcome because the law has been followed.

What is a Just Outcome?

In Australia, while the rule of law principle is protective of key aspects of procedural fairness in the legal system, and requires functioning democratic processes to ensure that the law can be lawfully changed it does not provide a guide to what the substance of law should be.

For example: The rule of law principle does not require that there are laws to outlaw sex discrimination, however, if such laws exist they must provide for equality before the law, be consistent with the constitution, and provide a process which enables all parties involved to have a chance to put their case.

Equality before the law and Discrimination Law

In addition to the idea of equality before the law and access to justice, laws exist which make discrimination on the grounds of race, sex, disability, age, and other characteristics **unlawful**.

These laws provide for equality before the law, but also include legal processes for challenging issues of discrimination within the community. Legal processes for resolving issues of discrimination are essential, and the rule of law ensures that these processes remain fair for stakeholders:

- a person who has been discriminated against
- a person who has been accused of discrimination

An essential part of equality before the law is that if a complaint of discrimination is made both the complainant and the alleged discriminator are entitled to present their side of the story.

SEX DISCRIMINATION ACT 1984 (CTH)

The *Sex Discrimination Act 1984 (Cth)* or “SDA” was introduced to make sex discrimination based on attributes such as their sex, marital status, pregnancy or potential pregnancy, breastfeeding or family responsibilities unlawful. On the **1 August 2013** discriminating against a person on the basis of their sexual orientation, gender identity or intersex status was also included in the SDA.

Note: there are also acts under state and territory law which deal with discrimination.

The SDA was one of the longest debated Bills in the history of the Australian Federal Parliament. Whilst some state and territory Governments had anti-discrimination laws dealing with race and sex discrimination, the passing of federal laws was a broader fulfillment of Australia’s international obligations in terms of the following international instruments:

INSTRUMENT	SIGNED	RATIFIED	PRINCIPLES
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	1980	1983	<ul style="list-style-type: none"> • Eliminating discriminatory laws • Promote equality between men and women in the legal system • Establish legal processes and bodies to protect women from discrimination • Eliminate discrimination against women by persons, organisations and governments.
International Covenant on Civil and Political Rights (ICCPR)	1972	1980	Promotes civil and political rights such as suffrage (right to vote) and other economic, social and cultural rights being equally available to women as they are to men.
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1972	1975	
The Convention on the Rights of the Child (CRC)	1990	1990	Provides for equal treatment of children regardless of their sex or other characteristics.

PROCESS FOR MAKING A SEX DISCRIMINATION COMPLAINT

Complaint made to the Australian Human Rights Commission (AHRC)

A complaint can be about alleged unequal treatment based on someone's sex, marital status, pregnancy status, breastfeeding, family responsibilities, sexual orientation, gender identity, or intersex status.

The AHRC invites all parties together to conciliate and attempt to resolve the issue

Conciliation involves parties coming to a resolution through discussion. When complaints are settled there can be financial settlement, apology, or other actions taken by other party such as an employer reinstating a person.

If an issue cannot be resolved through conciliation, the complaint can proceed to the Federal Circuit Court (FCC) or the Federal Court (FCA)

Court proceedings are costly and take time. Sex discrimination is a very complex area of law, and if a complaint is successful it could lead to financial compensation for the person bringing the complaint or other binding orders being made.

The court hears the case and makes a decision by applying the principles in the SDA and with reference to case law

Sex discrimination is defined in the SDA and there is a complex body of common law which is relevant depending on the case. The common law is evolving all the time and provides guidance for judges in applying the SDA.

RULE OF LAW POINT: FAIRNESS IN LEGAL PROCESSES

The SDA does not make the act of sex discrimination a criminal offence. However, as with the presumption of innocence in criminal matters, a person alleged to have committed an act of discrimination is presumed not to have done so until a court has heard the evidence on both sides and found in favour of the complainant.

This right to equality before the law, whether you are the complainant or the alleged discriminator, is part of procedural fairness and an important principle of the rule of law.

There is however an offence in the SDA which attracts a fine of 10 penalty units (\$170 per unit) if a person or organisation publishes or displays an advertisement that states they intend to do an act that is unlawful under the SDA.

WHAT IS SEX DISCRIMINATION?

People are able to make a complaint of sex discrimination if they feel they have been discriminated against on the basis of one of the following characteristics:

- sex
- marital status
- pregnancy status
- breastfeeding
- family responsibilities
- sexual orientation
- gender identity
- intersex status

It is unlawful for such discrimination to occur in public life during the course of:

- work, remuneration and superannuation
- education
- when providing goods, services or facilities
- accommodation and housing
- buying or selling land
- clubs
- and in Commonwealth Government laws and programs

To prove sex discrimination has occurred the complainant must do the following:

- show that the person making the complaint has received **less favourable treatment** because of one of their characteristics and,
- that the person discriminating would treat a person of the opposite sex, or alternate gender, orientation or status **more favourably** in the same or similar circumstances.

HOW TO QUESTION WHETHER DISCRIMINATION HAS OCCURRED?

Has the person been treated less favourably because of one of their characteristics?

Would the person accused of sex discrimination treat a person of the opposite sex, alternate gender more favourably in the same or similar circumstances?

To prove sex discrimination has occurred there does not need to be proof offered that a person intended to discriminate, or that they had a motive. It is enough that the two questions above are answered 'yes' to say that sex discrimination has occurred.

CASES ON SEX DISCRIMINATION

Leves v NSW Minister for Education [1986] NSW Equal Opportunity Tribunal

Catchphrase: Discrimination in an educational setting on the basis of sex.

Melinda Leves made a complaint on the *NSW Equal Opportunity Tribunal* under the *Anti-discrimination Act 1977 (NSW)* that she was receiving less favourable treatment in terms of her education at a public high school.

Melinda attended Canterbury Girls' High School, and her twin brother Rhys attended Canterbury Boys' High School. At the time it was not possible for students to choose which school to attend, there were 6 public schools in the area, 4 of which were co-educational.

While the core subjects at each school were the same, the electives were different:

	Year 8 Subjects Available for Melinda	Year 8 Subjects Available for Rhys
School	Canterbury Girls' High School	Canterbury Boys' High School
Circumstances	Single sex girls' high school in the Inner West of Sydney	Single sex boys' high school in the Inner West of Sydney
Number of subjects to be chosen	2	3
	French	Asian Social Studies
	Greek	Greek
	Italian	Italian
	Home science	German
	Textiles and design	Technical Drawing
	Music	Technics (Wood and Metal)
	Commerce	Music
	Art	Commerce
		Art

The Equal Opportunity Tribunal found that Melinda has received unfavourable treatment because she did not have access to _____. The court found that these subjects provided a better opportunity to seek employment than the subjects offered to Melinda Leves at Canterbury Girls' High School.

This case was an important milestone in pointing out that discrimination limited the choice of women in education and was unlawful according to the law of NSW. This case forced the NSW Education Department to carefully consider how it could promote gender equality through its subject offerings.

CASES

Ho v Regulator Australia Pty Ltd [2004] FMCA 62

Catchphrase: woman treated unfavourably when given task at work which would not be given to a man

The applicant in this case alleged discrimination on the basis of her sex because in her workplace she was always asked to change the towels in the men’s bathroom.

The court found that it was a job which had always been done by “one of the girls” and that:

‘The request would not have been made if Mrs Ho had been a man. Appropriate comparators in the circumstances are the male employees in the workplace. They were not and would not have been asked to undertake this menial task. It follows that in making the request to Mrs Ho that she change the towels in the men’s washroom, Mrs Kenny treated Mrs Ho less favourably than a man would have been treated in the same circumstances.’

Driver FM
at 151 in *Ho v Regulator Australia Pty Ltd [2004]*

Case Citation: _____

Catchphrase: _____

Details _____

Case Citation: _____

Catchphrase: _____

Details _____

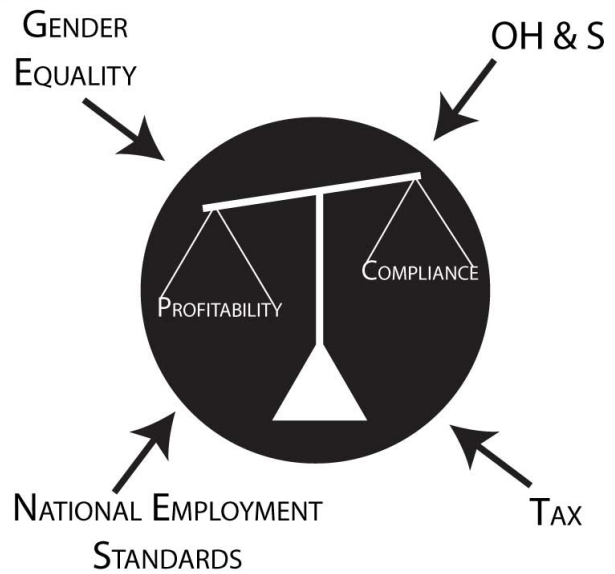
REGULATING GENDER EQUALITY IN BUSINESS AND THE WORKPLACE

LEGAL REGULATION OF BUSINESS

Gender equality is an area where the Federal Government has recently expanded regulation of the private sector. The *Workplace Gender Equality Amendment Act 2012 (Cth)* which was passed in December 2012 to provide minimum standards for gender equality in the private sector.

Is there room to improve gender equality in the Australian workforce?

Yes. Inequality in terms of remuneration is one area where the gender gap is particularly pronounced. The difference between the lifetime income of men and women from age 25 provides a glimpse of the problem:



EDUCATION	WOMEN (\$ IN MILLIONS)	MEN (\$ IN MILLIONS)
Year 11 or below	1.26	2.13
Year 12	1.52	2.55
Certificate	1.34	2.49*
Diploma	1.70	3.08
Bachelor	2.14	3.66
Postgraduate	2.49*	3.78

R. Cassells, et al., AMP.NATSEM - Smart Australians Education and Innovation in Australia, Issue 32, (October 2012), <<http://www.natsem.canberra.edu.au/storage/2-Cassells%20-%20DEEWR%20presentation%20final.pdf>> accessed 30/04/2013.

Some other statistics provide further context for workplace gender equality in Australia:

- The pay gap between male and female managers in ASX200 companies is 11.1 per cent higher than the national average, at 28.3 per cent.
- Women only comprise 9.2% of executives in the ASX 500 companies, and only 12 ASX 500 companies have female CEOs.
- The statistics cited come from various reports from the Australian Census of Women in Leadership see: <http://www.wgea.gov.au/lead/2012-australian-census-women-leadership>

Some countries, such as Norway, have passed laws to provide mandatory quotas for executive level positions, but this is not currently on the agenda for either the major parties in Australia.

An economic argument offered for removing the gender gap is that it will lead to greater productivity overall in the Australian economy, and increase Australia’s gross domestic product. Achieving equity in terms of remuneration would increase household incomes, and reduce reliance upon the government provided aged pension due to increased superannuation savings of female workers because of higher income according to a report by Goldman Sachs.

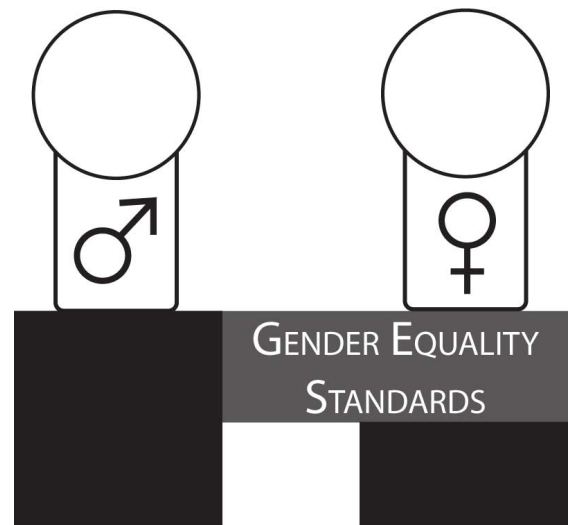
See: Tim Toohey et al., ‘Australia’s Hidden Resource: The Economic Case for Increasing Female Participation’, Goldman Sachs JBWere Investment Research, (November 2009), <http://www.voced.edu.au/content/ngv51944>

WORKPLACE GENDER EQUALITY REPORTING FOR EMPLOYERS

At the heart of the new regulatory scheme, established by the *Workplace Gender Equality Act 2012 (Cth)*, is that employment decisions should be made first with respect to the individual merit of employees, not on the basis of providing for gender equality.

Gender Equality Indicators (GEIs), have been defined under consultation with stakeholders by the **Workplace Gender Equality Agency (WGEA)**, which aim to ensure women receive equal remuneration (\$) and entitlements for the same work as their male counterparts across the private sector.

While the aims and objectives of WGEA are broader than its predecessor's, the Agency itself does not have any powers which allow it to force businesses to change their practices.



What is the new process?

Non-public sector employers with greater than 100 employees must lodge an annual report each April from 2014 to the WGEA describing their status with regard to standards based on the GEIs, which are:

- gender composition of the workforce
- gender composition of executive and management level positions
- equal remuneration between women and men
- practices such as flexible working arrangements for employees, and support for those with family or caring responsibilities
- evidence of consultation with employees on gender equality in the workplace
- matters specified by the Minister for the Status of Women



The report must be made available to employees, shareholders and unions for comment. For the period April 1 2013 – March 29 2014, employers must produce a report addressing the above GEIs. From then on they must address minimum standards based on the GEIs as set by the Minister for the Status of Women. Consultations with relevant stakeholders for setting the minimum standards is set to continue through to 2014.

Employers who do not submit a report can be “named and shamed” by the WGEA in a report to the Minister. Where an employer is not meeting the minimum standard set for GEIs, the WGEA must provide assistance and advice to improve their compliance.

EFFECTIVENESS OF GENDER REGULATION

- How difficult/costly will it be for employers to supply information on the GEIs?

- What challenges may arise for employers in notifying employees and unions of their level of compliance with GEIs?

- What if the Minister sets the minimum standards at a level which is too low to achieve GEIs?

- What if the Minister sets the minimum standards at a level which is too high for businesses to comply?

The gender equality indicators will force business to examine their own corporate culture. This will inevitably raise questions in the strategies used in human resource management. Whether the scheme strikes the right balance according to society's standards, between regulation and social outcomes, remains to be seen.



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