



THE WORKPLACE GENDER EQUALITY ACT 2012
(CTH): RETHINKING THE REGULATORY APPROACH

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I INTRODUCTION

A Background to Gender Inequality in Australian Workplaces

For almost 30 years, Australia has had affirmative action or equal opportunity legislation. Despite this, women still face gender inequality in the workplace and the glass ceiling is still firmly in existence. The 2012 Australian Census of Women in Leadership found that women comprise only 9.2 per cent of executives in ASX 500 companies.¹ The Census also found that there has been ‘negligible growth in the number of female executives.’² This is concerning as it means women are not in the ‘pipeline’ to board positions.³ Similarly, a 2013 report by BlackRock found that the growth of women on boards continues at a ‘glacial pace.’⁴

Another area of concern is the persistent gender pay gap. In November 2012, the gender pay gap stood at 17.6 per cent, which is slightly poorer than the previous year.⁵ On average, a woman working full-time earns \$261.60 per week less than a man.⁶ The effect of this on a woman’s superannuation savings is also significant:

¹ Equal Opportunity for Women in the Workplace Agency, *2012 Australian Census of Women in Leadership*, 9

<http://www.wgea.gov.au/sites/default/files/2012_CENSUS%20REPORT.pdf>

Accessed 24 September 2013.

² Ibid 4.

³ Ibid.

⁴ BlackRock, *Glacial change in diversity at ASX 200 companies: can corporate Australia escape the imposition of diversity quotas?* (4 June 2013) Workplace Gender Equality Agency, 2

<http://www.wgea.gov.au/sites/default/files/BlackRock_Glacial_Change_in_Diversity_at_ASX200_companies.pdf> Accessed 24 September 2013.

⁵ Workplace Gender Equality Agency, *Gender Pay Gap Statistics* (February 2013), 1

<<http://www.wgea.gov.au/sites/default/files/2013-02-Gender%20pay%20gap%20statistics.pdf>> Accessed 24 September 2013.

⁶ Ibid.

women generally have 59 per cent the superannuation of men at retirement age.⁷ Many people may point to a woman's choice to take time out of the workforce to have children as the reason for a decrease in superannuation. However, there is research to suggest that the disparity exists even in the case of a woman who has taken no time out of the workforce and does not have children.⁸ Nor can maternity leave explain the inequality that emerges at the very start of a woman's career: a 2012 report by Graduate Careers Australia found that male graduates start out on a median salary of \$55,000 and female graduates on \$50,000.⁹ Despite possessing the same qualifications, male graduates are receiving higher starting salaries than their female counterparts across a wide range of industries.¹⁰

B The role of law?

The reality is that unconscious bias and discrimination against women has not been eradicated, and simply being female in the workplace comes at a price. This is at odds with the recognition by both the Australian community and government that gender equality is a necessary pursuit. Gender equality represents the values of social justice and diversity, but has also been linked to increased productivity and competition. The government has particularly used the economic justification for gender equality as a main selling point since first enacting affirmative action

⁷ See Prue Cameron, 'What's choice got to do with it? Women's lifetime financial disadvantage and the superannuation gender pay gap' (Policy Brief No. 55, The Australia Institute, July 2013) 2.

⁸ Ibid.

⁹ Graduate Careers Australia, *Graduate Employment: Long-term Prospects Stronger* (14 December 2012), 2 <<http://www.graduatecareers.com.au/wp-content/uploads/2011/12/GCA-GradStats-2012.pdf>> Accessed 24 September 2013.

¹⁰ See *ibid* 8.

legislation in 1986.¹¹ More recent research undertaken by Goldman Sachs suggests that closing the gender gap would boost Australia's GDP by 11 per cent.¹² Given the social and economic benefits of gender equality, achieving substantive equality for women is an important issue requiring serious consideration and workable solutions.

The lingering question is why has past legislation failed thus far to achieve true gender equality? Is there even a role for law to play in this area? This paper will examine the new *Workplace Gender Equality Act 2012* (Cth) ('WGE Act') to consider whether it is possible for law to have an impact on a social issue like gender equality. I will explore the potential effectiveness of the new Act by firstly comparing it to its predecessors: the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) and the *Equal Opportunity for Women in the Workplace Act 1999* (Cth). At first, it may seem that although the WGE Act offers improvements, it ultimately suffers from the same weak enforcement mechanisms of the past. However, the WGE Act's potential for success can be found through understanding the intended regulatory approach of the Act.

This paper will show that the WGE Act utilises an alternative regulatory tool known as 'informational regulation.' This tool attempts to achieve social change and

¹¹ Margaret Thornton, 'Proactive or reactive? The Senate Report on the Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth)' (2012) 25 *Australian Journal of Labour Law* 284, 288.

¹² Goldman Sachs JBWere, *Goldman Sachs JBWere release research on gender participation and productivity* (30 November 2009) <http://www.gs.com.au/documents/about/mediaroom/2009/gender_research_report_2009.pdf> Accessed 24 September 2013.

influence behaviour by improving the availability of information.¹³ Informational regulation can be considered a form of ‘light touch’ or ‘soft’ regulation.¹⁴ By contrast, ‘hard strategies’ or ‘command and control’ legal regulation involves the traditional use of rules and sanctions.¹⁵ In this paper, I will particularly draw on Arie Freiberg’s work on informational regulation to demonstrate how the WGE Act’s provision for information disclosure and education may improve its chances of success.¹⁶ Finally, I will argue that the value of hard rules and sanctions has been overstated and that when dealing with a complex social issue like gender equality, soft regulation like informational regulation may provide a better way for the law to effect change.

It should be noted that the WGE Act removes the past usage of the word ‘women’ in the title of the Act in order to be gender neutral and apply to both men and women. This paper, however, will focus on gender equality in the context of women because it is generally women who, in practice, experience gender disadvantage.¹⁷ The WGE Act is not the only piece of legislation aimed at achieving gender equality for women. The *Sex Discrimination Act 1984* (Cth) (‘SDA’) also plays a significant role in prohibiting discrimination against women in the workplace. Section 7D of the SDA even permits the taking of special measures for the purpose of achieving substantive equality between men and women. This provision has also

¹³ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007), 96.

¹⁴ See, eg, John Howe and Ingrid Landau, 'Light Touch' Labour Regulation by State Governments in Australia' (2007) 31 *Melbourne University Law Review* 367.

¹⁵ *Ibid* 370.

¹⁶ Arie Freiberg, *The Tools of Regulation* (The Federation Press, 2010).

¹⁷ See also Reg Graycar and Jenny Morgan, 'Equality Unmodified?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 175, 177.

been interpreted as permitting 'hard' forms of affirmative action such as quotas.¹⁸ However, s 7D does not actually require employers to take special measures and it has rarely been implemented in practice.¹⁹

The SDA has received comprehensive consideration in the literature, including in the form of regulatory analysis.²⁰ Instead, I have chosen to focus solely on the WGE Act because it is a new piece of legislation and an under-explored area within the discourse on gender equality. I have also chosen to explore the WGE Act through a broader regulatory framework because this best reveals the scope and intended operation of legislation in general. As Smith suggests, we need to consider how other regulatory methods, such as education, support direct legal regulation.²¹ By looking at legislation broadly, and not just the rules and sanctions created, we are better able to make an informed judgment on whether an Act can be successful in practice.

¹⁸ *Jacomb v Australian Municipal Administrative Clerical & Services Union* (2004) 140 FCR 149; Sarah Stephens, 'Adopting, a positive action approach to sex discrimination' (2010) 35 *Alternative Law Journal* 36, 36.

¹⁹ Stephens, above n 18, 36.

²⁰ See especially Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105.

²¹ *Ibid* 106.

II WORKPLACE GENDER EQUALITY ACT 2012: CHANGE OR

MORE OF THE SAME?

A Lessons from the Past

In order to judge whether the WGE Act can have an effective role in redressing gender inequality in the workplace, it is important to firstly understand the weaknesses of previous equal employment opportunity ('EEO') legislation. The Hawke government passed the first legislative attempt to promote the participation of women in the workforce through the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) ('AA(EOW) Act'). The 1986 Act applied only to private sector employers with more than 100 staff and to all higher education institutions.²² This limitation has continued in subsequent legislation, including the 2012 Act.

The AA(EOW) Act required employers to develop affirmative action programs that incorporated 8 steps, including: consulting with unions and employees, reviewing employment policies to identify discrimination, setting objectives and numerical forward estimates and monitoring progress.²³ The Affirmative Action Agency was also established and a report was required to be submitted to the Agency on an annual basis. Non-compliance did not relate to any failure to achieve substantive outcomes, but rather the mere failure to submit a report.²⁴ The sanction for not submitting a report was to be named in Parliament in the Agency's annual report.²⁵ After a review of the Act in 1992, an additional sanction was added to bar

²² *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) s 3.

²³ *Ibid* s 8.

²⁴ Thornton, 'Proactive or reactive?', above n 11, 286.

²⁵ *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) s 19.

non-compliant companies from competing for government contracts, but this sanction has never been enforced.²⁶

The AA(EOW) Act was criticised by scholars and Valerie Braithwaite described it as ‘loose, gentle and weak’ legislation.²⁷ Arguably, there were two major faults with the Act. Firstly, it was concerned only with the *process* of submitting a report and did not prescribe substantive outcomes or require the employer to take specific actions to encourage gender equality.²⁸ Due to the lack benchmarks, employers could essentially give their own meaning to the requirements to ‘set objectives’ and make ‘forward estimates.’²⁹ This approach raises doubt over the quality of employers’ reports. The Agency did have limited resources to assess some reports, and in 1995 it introduced a five-point assessment scale ranging from non-compliance to outstanding level of progress.³⁰ However, these classifications did not relate to actual outcomes the employer had achieved in the workplace, but rather how well the reports complied with the eight steps under the Act.³¹ Again, the focus was on the process and not real outcomes.

²⁶ Valerie Braithwaite and Janine Bush, 'Affirmative Action in Australia: A Consensus-Based Dialogic Approach' (1998) 10 *National Women's Studies Association Journal* 115, 118; Thornton, 'Proactive or reactive?', above n 11, 290.

²⁷ Valerie Braithwaite, 'Designing the process of workplace change through the *Affirmative Action Act*' in Moira Gatens and Alison Mackinnon (eds), *Gender and Institutions: Welfare, Work and Citizenship* (Cambridge University Press, 1998) 107, 117.

²⁸ See also Alison Mackinnon, 'Towards gender equality: two steps forward, one step back? Equal opportunity from Hawke to Rudd' in Gerry Bloustien, Barbara Comber and Alison Mackinnon (eds), *The Hawke Legacy* (Wakefield Press, 2009) 45, 48; Beth Gaze, 'The Ambiguity of Affirmative Action in Australia' (1998) 15 *Law in Context* 136

²⁹ Thornton, 'Proactive or reactive?', above n 11, 286.

³⁰ Gaze, above n 28, 158.

³¹ *Ibid.*

Strachan and Burgess undertook an independent study of reports submitted to the Agency between 1993-1999 to assess their quality.³² They found that about one quarter of complying organisations met their legal requirements by submitting a report, but in reality did very little to advance equal employment opportunity.³³ Strachan and Burgess also assessed the reported policies instituted by the organisations and discovered problems with the reporting process.³⁴ Given that the organisations were only required to tick a box, Strachan and Burgess discovered that it was likely that some were overstating the actions they had taken, for example in the area of childcare assistance.³⁵ The reality of the AA(EOW) Act's operation meant that employers could market themselves as promoting gender equality, without actually making significant internal changes.

The second problem of the AA(EOW) Act was its weak enforcement mechanisms. The Act's only real sanction was 'naming and shaming,' yet there appeared to be no real shame involved. In their study, Strachan and Burgess concluded that a 'number of employers do not care if they are named in parliament.'³⁶ Margaret Thornton has even claimed that some employers regarded being named in Parliament as a 'badge of honour.'³⁷ Of course, not all employers lack interest in achieving gender equality and many are committed to changing their practices regardless of the threat of sanctions, as they see it as more productive for their

³² Glenda Strachan and John Burgess, 'W(h)ither Affirmative Action Legislation in Australia?' (2000) 5(2) *Journal of Interdisciplinary Gender Studies* 46.

³³ Ibid 53.

³⁴ Ibid 54.

³⁵ Ibid 55.

³⁶ Ibid 50.

³⁷ Thornton, 'Proactive or reactive?', above n 11, 286.

business. But where employers do not see the value of gender equality practices for their business, the issue on how to best utilise law to encourage compliance is particularly critical. Despite the AA(EOW) Act's weaknesses and its benign approach to enforcement, employers still complained about the Act.³⁸ Eventually, it became the subject of a review by the Howard government in 1998.

The review led to the AA(EOW) Act being repealed and replaced with the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ('EOWW Act'). The Affirmative Action Agency became the Equal Opportunity for Women in the Workplace Agency ('EOWA'). The EOWW Act provided an even less effective framework for achieving equal employment opportunity for women than the AA(EOW) Act and led to what Andrea North-Samardzic has described as the 'devolution of Australia's EEO regulatory framework.'³⁹ Generally, the Howard era has been criticised by feminist scholars as being a step backwards for women's rights.⁴⁰ In relation to the EOWW Act, Thornton attributes the decline to the Howard government's neo-liberal deregulation agenda and fear that 'affirmative action' carried the connotation of quotas (hence the change in the Act's title).⁴¹

Despite the AA(EOW) Act's faults, it showed more promise than its successor. The EOWW Act reduced the already limited reporting requirements under

³⁸ Ibid.

³⁹ Andrea North-Samardzic, 'Looking Back to Move Forward: The (D)evolution of Australia's EEO Regulatory Framework' (2009) 20 *The Economic and Labour Relations Review* 59.

⁴⁰ See, eg, Mackinnon, above n 28; Anne Summers, *The End of Equality: Work, Babies and Women's Choices in 21st Century Australia* (Random House, 2003).

⁴¹ Margaret Thornton, 'EEO in a Neo-Liberal Climate' (2001) 6(1) *Journal of Interdisciplinary Gender Studies* 77, 91. See also North-Samardzic, above n 39, 65.

the AA(EOW) Act. It removed the ‘eight step’ affirmative action program under the old Act and introduced new ‘workplace program’ requirements, which included data relating to the workplace’s profile.’⁴² The EOWW Act particularly intended to remove the requirements to set ‘objectives’ and ‘forward estimates’ under the old eight-step program.⁴³ Instead, employers were allowed to choose their own priority issues and identify the relevant action to be taken.⁴⁴ The removal of ‘forward estimates’ reflected the wariness surrounding requirements to set quantitative goals and supports Thornton’s theory of the government and employers’ fear of quotas. Admittedly, compliance with the requirement to set ‘forward estimates’ was the lowest out of the eight steps under the AA(EOW) Act.⁴⁵ Still, the eight steps allowed for some form of standardisation, whereas under the EOWW Act, organisations were completely free to choose the form of their reports.

The lack of standardisation made it difficult to compare reports for the purposes of evaluation, meaning that the EOWW Act also removed the Agency’s ability to assess the reports according to its five-point classification model.⁴⁶ As such, the employer itself undertook the only evaluation of reports.⁴⁷ There was no independent auditing, and the EOWW Act also removed the requirement to consult with unions (step three under the old eight step program). The EOWW Act did not

⁴² Explanatory Memorandum, Equal Opportunity for Women in the Workplace Amendment Bill 1999 (Cth); *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 13.

⁴³ Thornton, ‘Proactive or reactive?’, above n 11, 286.

⁴⁴ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 13.

⁴⁵ Gaze, above n 28, 157.

⁴⁶ See also Belinda Smith, ‘Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict’ (2006) 28 *Sydney Law Review* 689, 722.

⁴⁷ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 13(3).

even require employers to improve on their previous reports or explain a lack of improvement. It appears that the whole system relied on employers' willingness to self-regulate, yet provided very little external pressure for them to assess their own practices or take the contents of their report seriously. This is particularly a problem in the case of employers who do not already recognise the value of gender equality, and without such external pressure will not feel the need to assess their practices. Even in the case of committed employers, many will likely face resourcing constraints, and without some external pressure they may eventually relegate gender equality issues to a low priority status.

Additionally, the EOWW Act made it easier for an employer to be excused from reporting. Under the AA(EOW) Act, the Agency could waive reporting requirements if it was satisfied that the employer had complied with the Act (including the eight step program) for three consecutive years.⁴⁸ Given that the EOWW Act removed the eight-step program, employers could instead be granted a waiver if they could demonstrate 'all reasonably practicable measures' had been taken to 'address the issues relating to employment matters that affect equal opportunity for women in relation to the employer's workplace.'⁴⁹ The phrase 'all reasonably practicable measures' meant that the Agency could take into account any limits or constraints the employer faced,⁵⁰ hence it was an easier test to satisfy. The requirement of three consecutive years of compliance with the Act was retained. It is questionable why any waiver of reporting was needed in either Act, particularly if the goal is long term and lasting equal employment opportunity for women. If employers

⁴⁸ *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) s 13A.

⁴⁹ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s13C.

⁵⁰ North-Samardzic, above n 39, 64.

can be exempt after only three years, then some employers who feel that they have no direct business interest in redressing gender equality may lose momentum and stop having regard to gender equality issues. Even employers who do have an interest may start to put gender issues on the backburner if they are faced with competing interests or a lack of resources, and are already exempt from reporting.

B Workplace Gender Equality Act 2012

Having identified the deficiencies in the preceding Acts' regulatory frameworks, the next issue is whether the new WGE Act further weakens Australia's approach to equal employment opportunity for women or offers real improvements. The WGE Act received assent on 6 December 2012, but with some of its changes not taking effect until the 2014-2015 reporting period. The first notable change of the WGE Act is the change in the Act's title and renaming of the EOWA to the Workplace Gender Equality Agency ('WGEA'). This move to gender neutral language may be viewed by some as a backward step.⁵¹ When the AA(EOW) Act was first enacted, it was viewed as a radical (and promising) step to recognise the specific disadvantage faced by women as opposed to gender neutral discrimination.⁵² However the WGE Act's gender neutrality is unlikely to be a significant weakness. As many feminist scholars have noted, we should promote the idea of men sharing domestic work and caring responsibilities.⁵³ For example, allowing men access to flexible working arrangements can positively serve the women's rights movement.

⁵¹ See, eg, Thornton, 'Proactive or reactive?' above n 11, 287.

⁵² Gaze, above n 28, 169.

⁵³ See, eg, Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395, 397.

Whilst the gender neutrality issue is unlikely to be determinative of the WGE Act's success, its ability to generate substantive equality will be very important. As has been demonstrated, the previous versions of the Act focused too much on process and not enough on achieving substantive outcomes. When the EOWW Act was reviewed in 2009, most submissions also made this complaint.⁵⁴ The WGE Act attempts to address this by making a number of changes. Firstly, beginning with the reporting period of 1 April 2013 to 31 March 2014,⁵⁵ employers will be required to include information relating to gender equality indicators ('GEIs') in their annual reports to the WGEA.⁵⁶ This will replace the old EOWW Act reports.

The WGE Act introduced five GEIs,⁵⁷ and the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* (Cth) ('2013 Instrument') specifies further matters in relation to each GEI, which the Minister is required to do under the WGE Act.⁵⁸ The first GEI requires employers to provide information relating to the gender composition of the workforce. Relevant matters include each employee's, classification (manager or non-manager), occupation and employment status.⁵⁹ It is possible to view this as similar to the requirement under the EOWW Act for employers to provide a 'workplace profile' and at first glance does not appear to offer any real change. However, the matters

⁵⁴ KPMG, 'Review of the Equal Opportunity for Women in the Workplace Act 1999 Consultation Report', Report for the Office of Women, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, 2010, 50.

⁵⁵ *Workplace Gender Equality Act 2012* (Cth) sch 1 cl 1(1)

⁵⁶ *Ibid* s 13.

⁵⁷ *Ibid* s 3(1).

⁵⁸ *Ibid* s 13(3)

⁵⁹ *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* (Cth) sch 1 cl 1.

specified in the *2013 Instrument* for this GEI allows it to go further than past attempts. For the current reporting period (April 2013 – March 2014), Employers are required to report on the existence of strategies or policies to support gender equality.⁶⁰ From 1 April 2014, employers will also have to provide information, categorised by gender and manager/non-manager, in relation to: the composition of recruitment applications; the composition of applicants interviewed; the composition of applicants appointed to positions; the number and proportion of employees awarded promotions; and the number and proportion of employees who have resigned.⁶¹

In addition to these more extensive content requirements, this GEI intends to gather the data in a more standardised format than under the EOWW Act.⁶² Generally, all of the GEIs offer an improvement on previous legislation because, at the very least, they require a standardised form for employers' reports. This allows reports to be compared to competitors' reports and evaluated, which, as has been demonstrated, was not possible under the EOWW Act. Admittedly, this was also somewhat possible under the AA(EOW) Act. Yet, unlike the AA(EOW) Act's eight steps, the other GEIs relate to specific issues of gender equality.

In this sense, the other GEIs are entirely new developments and are aimed more at achieving substantive outcomes. The second GEI is the gender composition of governing bodies of relevant employers. This will generate information regarding

⁶⁰ Ibid sch 1 cl 1.2.

⁶¹ Ibid sch 2 cl 1.3–1.7

⁶² Explanatory Memorandum, Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth) 13.

the number of women on the organisation's board or other governing authority.⁶³ Employers will also have to provide information on any targets that have been set and the existence of a selection policy or strategy.⁶⁴ Even though the *2013 Instrument* set no external targets, this still demonstrates movement away from the previous fears surrounding any mention of targets or quotas. The third GEI is equal remuneration between women and men. This GEI requires the employer to provide information on remuneration policies, whether a pay gap analysis has been undertaken and any action taken as a result of a pay analysis.⁶⁵ Ultimately, these two GEIs demonstrate progress toward the acknowledgement of two particularly persistent gender inequality issues in Australia: the glass ceiling and gender pay gap.⁶⁶

The fourth GEI is the availability and utility of flexible or supportive working arrangements for employees with family or caring responsibilities. The *2013 Instrument* also provides for extensive content requirements in relation to this GEI.⁶⁷ This GEI acknowledges another particularly important gender equality issue in Australia, because it is usually the woman who bears the burden of family or caring responsibilities. As Smith argues, gender inequality will persist unless the notion of the ideal worker being 'unencumbered and always available' to work is challenged.⁶⁸

⁶³ This GEI is intended to complement the new ASX guidelines requiring ASX listed companies to provide information on the number of women on their boards, in senior management and across their organisation. See *ibid* 14.

⁶⁴ *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* (Cth) sch 1 cl 2.

⁶⁵ *Ibid* sch 1 cl 3.

⁶⁶ See Introduction.

⁶⁷ See *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* (Cth) sch 1 cl 4.

⁶⁸ Belinda Smith, 'What Kind of Equality Can We Expect From The Fair Work Act?' (2011) 35 *Melbourne University Law Review* 545, 549.

By including this GEI, the WGE Act is arguably taking a step towards normalising the idea of flexible work arrangements in workplace cultures. It will also clarify what measures employers are already taking to support workers with family or caring responsibilities. As such, this information can also be potentially used to uncover deficiencies in employers' approach to flexible working arrangements.

The fifth GEI is consultation with employees on issues concerning gender equality in the workplace. The importance of consultation, particularly in relation to flexible work arrangements under the fourth GEI, will be further explored in the next part of this paper. Lastly, the WGE Act also permits the Minister to introduce new GEIs (provided the Minister consults with the WGEA and employer and employee groups).⁶⁹ This provides flexibility to address new gender equality issues as they emerge.⁷⁰ This avenue has been utilised to create a sixth GEI under sch 1 cl 6 of the *2013 Instrument*. Under this sixth GEI, employers are required to report on sex-based harassment and discrimination in the workplace. This includes matters relating to prevention strategies, grievance processes and workplace training.

Overall, it is not difficult to conclude that the WGE Act is an improvement compared to its predecessors. The AA(EOW) Act and EOWW Act essentially allowed organisations to resist change and put in minimal effort because the Acts prescribed very little content requirements for reports. By contrast, we have seen that the WGE Act requires employers to provide more extensive information in their reports and acknowledge specified gender inequality issues through the GEIs. Yet,

⁶⁹ *Workplace Gender Equality Act 2012* (Cth) s 3(1)(f).

⁷⁰ Explanatory Memorandum, *Equal Opportunity for Women in the Workplace Amendment Bill 2012* (Cth), 15.

the collection of information and data alone cannot force substantive outcomes. As such, a key issue is whether the WGE Act goes far enough to redress the lack of benchmarks or targets in the AA(EOW) Act and EOWW Act. The WGE Act's answer to this problem is to provide that the Minister is required to set minimum standards for each GEI in a legislative instrument by April 2014.⁷¹ The Minister must also consult with the WGEA and relevant stakeholders in developing the minimum standards.⁷²

This means that for the 2014-2015 reporting period, employers will be required to meet minimum standards. The minimum standards set the level of achievement expected for each GEI and may relate to quantitative outcomes or evidence of actions taken that are aimed at improving quantitative outcomes.⁷³ Although the minimum standards have not yet been created, the Explanatory Memorandum claims that the development of the standards will be industry specific and evidence-based.⁷⁴ The WGEA will analyse the information it collects in order to advise the Minister on the development of the minimum standards.⁷⁵

It is debatable whether the minimum standards will enable the WGE Act to achieve substantive outcomes. Although it is difficult to assess this before the standards are released, there are some potential flaws. For example, as Carolyn Sutherland notes, there is a danger that the standards will be set too low and cause

⁷¹ *Workplace Gender Equality Act 2012* (Cth) s 19(1).

⁷² *Ibid* s 33A, 19(1).

⁷³ Explanatory Memorandum, *Equal Opportunity for Women in the Workplace Amendment Bill 2012* (Cth), 28.

⁷⁴ *Ibid* 28-29.

⁷⁵ *Ibid* 28.

employers who are already exceeding the standards to lose motivation or interest.⁷⁶

Sutherland still appears to retain some optimism regarding the new system, and describes it as an ‘outcomes-based system,’ because employers report on outcomes instead of processes.⁷⁷ Thornton takes a more cautious approach and has written (in relation to the Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth), just before the WGE Act was passed) that to conclude there had been a shift from a procedural to a substantive approach would be an ‘over-statement.’⁷⁸

Thornton’s comments are perhaps in response to what constitutes compliance with the minimum standards.

The greatest potential downfall of the minimum standards system is that employers are not actually required to meet the new standards in order to comply with the Act. Instead, employers who fail to meet a minimum standard are only required to improve on their own performance, rather than actually achieve the standard.⁷⁹ An employer who does not show improvement will be considered non-compliant with the Act, unless they have a reasonable excuse.⁸⁰ Employers are given two years to improve, meaning no employer can be found non-compliant on this basis until 2017.⁸¹ Some may question what purpose the introduction of minimum standards can have if the WGE Act is not actually going to require them to be met. Yet, there are still a number of benefits to the requirement to improve on previous reports.

⁷⁶ Carolyn Sutherland, 'Reframing the regulation of equal employment opportunity: The Workplace Gender Equality Act 2012 (Cth)' (2013) 26(1) *Australian Journal of Labour Law* 102, 111.

⁷⁷ *Ibid* 104-105.

⁷⁸ Thornton, ‘Proactive or reactive?’, above n 11, 290-291.

⁷⁹ *Workplace Gender Equality Act 2012 (Cth)*, s 19C.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

As has been demonstrated, one of the significant failings of the EOWW Act system was that it did not require employers to monitor progress, improve or explain a lack of improvement. By redressing this, the WGE Act has for the first time taken a step toward creating imperatives for employers to adequately self-regulate their behaviour. Another benefit of the Act's minimum standards system is that the WGEA no longer has to undertake a subjective evaluation of employers' reports. Instead, the standards will play an important part in generating objective expectations and will take the guesswork out of deciding the adequacy of a report. Also, by requiring continuous improvement, it is reasonable to expect employers to eventually attain the expected standard.

Although at first it is perhaps easier to write off the WGE Act's changes as void of substance, a deeper investigation reveals that the Act does contain these significant benefits. As such, this paper contends that it would not be an 'over-statement' to suggest there has been a shift from a procedural to a substantive approach, despite Thornton's reservations. The WGE Act shows a clear intention to address substantive issues and is aimed at achieving results. Admittedly, while there has been a shift in intention, we will still have to wait for the release of the minimum standards before making any final conclusion on the Act's ability to actually achieve substantive outcomes.

The second significant deficiency of the AA(EOW) and EOWW Acts was the weak enforcement mechanisms in place to deal with non-compliance. Unlike the substantive approach issue, critics are less likely to conclude here that the WGE Act

offers improvement. The WGE Act appears to essentially retain the same ‘naming and shaming’ approach of AA(EOW) and EOWW Acts. The WGEA can name non-compliant employers in a report to the Minister or by electronic or other means, such as on the WGEA’s website or in a newspaper.⁸² As with the EOWW Act, an employer is non-compliant if it fails to lodge a report on time or comply with the WGEA’s request for additional information on the report.⁸³ The WGE Act also creates additional categories of non-compliance: a failure to meet the new consultation requirements and including false or misleading information in a report or information to the WGEA.⁸⁴

Given that it has been demonstrated that, in the past, employers have generally been indifferent to being named, critics may consider the WGE Act’s retention of this approach to be its downfall. Some may question why there has not been greater development to the compliance framework since 1986. They may also argue that new categories of non-compliance under the WGE Act arguably cannot make a significant difference if the Act still depends on a ‘naming and shaming’ approach that is devoid of real shame. However, the next part of this paper will demonstrate that the WGE Act actually has improved its compliance framework, but realising this requires an examination of the Act beyond its most obvious enforcement mechanisms. It also requires an understanding that not all employers are swayed by the threat of sanctions. Some may genuinely be committed to gender equality, regardless of potential penalties, because they see it as good for business. Despite this commitment, if they

⁸² Ibid s 19D.

⁸³ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 19; *Workplace Gender Equality Act 2012* (Cth) s 19D

⁸⁴ *Workplace Gender Equality Act 2012* (Cth) s 19D.

lack the necessary capability to implement change, this will prevent action. In such cases, sanctions may be irrelevant, as the issue is capacity and not commitment. As such, an effective regulatory framework needs to consider how to both influence resistant employers and assist willing employers.

The WGE Act also retains the sanction making non-compliant employers ineligible to compete for Commonwealth government contracts,⁸⁵ despite it never actually being invoked to date. However, there is reason to believe that this sanction will be taken more seriously under the WGE Act, based on the context of the Act's changes. Under the EOWW Act, it was relatively easy to comply as employers created their own programs and it was essentially a system of mindless check-the-box compliance. As a result, both the employers and EOWA likely paid less attention to issues of compliance. Under the WGE Act, however, it is far more likely that the checking of reports will be taken more seriously. Firstly, the WGEA has been given an auditing function, which allows it to check compliance with the Act or the minimum standards by requesting relevant information from employers.⁸⁶

Secondly, the introduction of minimum standards and improvement requirements also demonstrates that the quality of reports is being taken more seriously. Employers will now also have to pay greater attention to their reports, which is further signified by the requirement that the Chief Executive Officer of the organisation sign off on the report.⁸⁷ This is also important in generating the idea that gender issues need to be taken more seriously at the executive level. The WGE Act

⁸⁵ Ibid s 18.

⁸⁶ Ibid s 19A.

⁸⁷ Ibid s 13(5).

also removes provisions allowing certain employers to have their reporting requirements waived.⁸⁸ Overall, these changes send the message that the government is taking the reports more seriously than in the past, and as such it may be more willing to enforce the preclusion of non-compliant employers from the Commonwealth procurement framework. This is further made apparent in the WGEA's new procurement principles and user guide, which reaffirm the government's commitment and aim to strengthen the former Agency's procurement policy.⁸⁹ Ultimately, however, it is only possible to guess whether this sanction will be utilised, as under the Act there still appears to be a discretion: non-compliant employers 'may' not be eligible to compete for government contracts.⁹⁰

The WGE Act ultimately appears to retain the unsatisfactory 'naming and shaming' provision and the under utilised government procurement sanction as its main enforcement mechanisms. Although we have seen that the WGE Act has made a number of other improvements relating to substantive outcomes, some critics may question whether this can be enough if the Act does not go further in encouraging compliance. This paper, however, will demonstrate that the effectiveness of the WGE Act is not dependent on these enforcement mechanisms. The key to understanding the real value of the WGE Act is to not utilise a narrow conception of law which views legislation's effectiveness as dependent on enforceable rules and sanctions. The next part of this paper will demonstrate that the better approach to take when

⁸⁸ Explanatory Memorandum, Equal Opportunity for Women in the Workplace Amendment Bill 2012 (Cth), 25.

⁸⁹ Workplace Gender Equality Agency, *Workplace gender equality procurement principles* (2013) <<http://www.wgea.gov.au/learn/workplace-gender-equality-procurement-principles>> Accessed 8 October 2013.

⁹⁰ *Workplace Gender Equality Act 2012* (Cth) s 18.

evaluating the WGE Act's potential is to investigate the full regulatory framework of the Act. This requires a broader perspective on what types of regulatory tools are available to support rules. Particularly, an understanding of the WGE Act's use of informational regulation can reveal how new developments in the Act, such as information disclosure requirements and the WGEA's educational functions, can have a significant role in encouraging compliance. The next part of this paper will further demonstrate that these alternative regulatory methods are equally important to legal regulation as hard sanctions.

III A DIFFERENT APPROACH TO REGULATION

A Hard versus Soft Regulatory Approach

In order to fully appreciate the WGE Act's compliance mechanisms, we firstly need to examine the complete regulatory framework of the Act. This requires us to look beyond the traditional idea of law as consisting of a rule and a sanction for breach of the rule, also known as 'command and control' regulation.⁹¹ Using the 'command and control' model of regulation to analyse the WGE Act may lead to the conclusion that unless a breach of the Act is backed by a 'hard' sanction such as a penalty, the Act will be useless in achieving its objectives. Such a conclusion reflects only a superficial understanding of law and regulation. As Freiberg argues, the 'command and control' model is flawed in numerous ways: it fails to recognise that rule-enforcement is only one of the government's powers; it fails to acknowledge the role of non-state actors in regulation and it ignores global regulation and standards.⁹²

⁹¹ Freiberg, *The Tools of Regulation*, above n 16, 21.

⁹² *Ibid* 83.

Instead, to achieve a complete understanding of the WGE Act, we must firstly follow the advice of John Braithwaite and wean lawyers ‘off the obsession with regulation being only about rule compliance.’⁹³ Secondly, we require a theoretical regulatory framework that reflects this new perspective of law and can be utilised in an analysis of the Act. Recent regulatory literature can assist in this second requirement, as it has been shifting its focus away from ‘command and control’ regulation.⁹⁴ Particularly in the area of labour law, there is growing recognition that governments now have a wider range of regulatory tools at their disposal when attempting to influence behaviour.⁹⁵ Howe and Landau rightly recognise that an analysis only considering ‘hard’ law will give an ‘incomplete picture’ of how work is regulated in Australia.⁹⁶ In the regulatory literature, we now see greater consideration of what is considered ‘soft or light touch’ regulatory approaches, which includes methods such as: conditions on government procurement contracts, requiring corporations to develop codes of practice and the imposition of public disclosure requirements.⁹⁷

Freiberg has argued against the use of terminology such as ‘hard vs soft’ and ‘traditional vs alternative’ when examining regulatory design.⁹⁸ In Freiberg’s view, regulation should not be evaluated in terms of whether it is ‘hard’ or ‘soft’, but

⁹³ John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475, 500.

⁹⁴ Freiberg, *The Tools of Regulation*, above n 16, 83; Smith, ‘A Regulatory Analysis of the Sex Discrimination Act’, above n 20, 106.

⁹⁵ Howe and Landau, above n 14, 369.

⁹⁶ *Ibid* 371.

⁹⁷ *Ibid*.

⁹⁸ Arie Freiberg, 'Re-stocking the Regulatory Tool-kit' (Working Paper No 15, Jerusalem Forum on Regulation & Governance, June 2010) <<http://regulation.huji.ac.il/papers/jp15.pdf>> Accessed 22 October 2013.

whether it is 'it is effective, efficient and just and whether the transaction costs involved are reasonable and proportionate.'⁹⁹ Whilst Freiberg's points are valid, this paper utilises the terms 'hard' and 'soft' as useful way of distinguishing the different tools, which is in line with the conventional approach taken in the literature. Nonetheless, Freiberg's suggestion highlights an important issue: using these terms may lead to the impression that soft regulation is not really about law, or should be afforded a lower status in a hierarchy of regulatory tools. On the contrary, soft regulation is equally relevant when undertaking legal analysis of legislation, as it is necessary in order to properly gauge the intended operation of an Act.

Freiberg also argues that regulation is not just about enforcement.¹⁰⁰ It is true that regulation operates to change behaviour regardless of whether enforcement is necessary,¹⁰¹ and the WGE Act also intends to affect the behaviour of employers who are willing to participate but may lack the necessary capacity. However, evaluating the ability of soft regulation to encourage compliance in the case of an employer who may resist change is particularly necessary as this is the more contentious issue relevant to gender equality legislation. Cases where employers are resistant also particularly highlight the opportunity to utilise the law in a way that may achieve social change. Nonetheless, Part III B2 will also consider how the regulatory framework can assist willing but incapable employers, as this is also central to understanding how the WGE Act can be effective in achieving its objectives.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid

B *Informational Regulation Theory in Context*

One model of regulation that has been created as an alternative to command and control theory and has received the most attention in Australia is the idea of ‘responsive regulation’ first developed by Ian Ayres and John Braithwaite.¹⁰² Their theory is based on the idea that regulators need to be responsive to the realities of regulated actors and the environment in which they operate.¹⁰³ The model is characterised by a ‘pyramid of sanctions,’ where enforcement mechanisms escalate as you move up the pyramid in response to non-compliance.¹⁰⁴ For example, at the base of the pyramid you would find mechanisms such as education or persuasion.¹⁰⁵ As you move up the pyramid, the sanctions would escalate to naming and shaming and then to more punitive approaches such as penalties.¹⁰⁶

Although much of the recent literature has considered the pyramid model when undertaking regulatory analysis,¹⁰⁷ including in the area of sex discrimination law,¹⁰⁸ this paper contends that the pyramid model would not be the best means to undertake an analysis of the WGE Act. The intended operation of the WGE Act reveals that it was not created with an enforcement pyramid in mind. The WGE Act cannot be considered a complete pyramid, as its enforcement mechanisms are focused

¹⁰² Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

¹⁰³ *Ibid* 4.

¹⁰⁴ *Ibid* 4-5. See also John Braithwaite, ‘The Essence of Responsive Regulation’, above n 93, 480-484.

¹⁰⁵ John Braithwaite, ‘The Essence of Responsive Regulation’, above n 93, 482.

¹⁰⁶ *Ibid*.

¹⁰⁷ See, eg, Howe and Landau, above n 14, 394; Smith, ‘Not the Baby and the Bathwater’, above n 46, 705.

¹⁰⁸ See especially Smith, ‘A Regulatory Analysis of the Sex Discrimination Act’, above n 20, 108-109.

solely on tools that would come from the bottom of the pyramid, such as education. Without the more coercive sanctions, the Act not only lacks a complete pyramid, but the central feature of the theory. Ayres and Braithwaite's model relies on the idea that the soft tools at the bottom of the pyramid can be made more effective by the looming threat of the hard tools at the top of the pyramid.¹⁰⁹ As such, this theory, although containing some useful aspects, ultimately cannot assist in answering our question of how can the WGE Act can be effective despite the lack of hard sanctions. As Freiberg points out, the risk of using the pyramidal approach is that we will focus too much on enforcement and not enough on the 'day to day' influences on behaviour, such as codes of conduct, guidelines and information provision.¹¹⁰

Instead, this paper proposes that the WGE Act is best analysed through a different and less explored regulatory theory known as informational regulation. The use of informational regulation as an alternative to command and control regulation has been particularly considered in the context of environmental protection policy,¹¹¹ but it has yet to be comprehensively considered in the context of Australian equal employment opportunity legislation. Informational regulation is premised on the idea that by requiring large companies to disclose certain information, stakeholders will then exert the necessary pressure to force compliance.¹¹²

¹⁰⁹ Ayres and Braithwaite, above n 102, 4. See also Howe and Landau, above n 14, 394; Smith, 'A Regulatory Analysis of the Sex Discrimination Act', above n 20, 109.

¹¹⁰ Freiberg above n 98.

¹¹¹ See, eg, David W Case, 'Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective' (2005) 76 *University of Colorado Law Review* 379; Neil Cunningham, 'Section 4: Beyond compliance: next generation environmental regulation' in Richard Johnstone and Rick Sarre (eds), 'Regulation: enforcement and compliance' (Research and Public Policy Series No 57, Australian Institute of Criminology, January 2004) 55-60.

¹¹² Cunningham, above n 111, 55.

Freiberg classifies information regulation into three main forms.¹¹³ Firstly, legislation requiring information disclosure comprises a major part of this type of regulation, particularly as a way for governments to redress information asymmetries.¹¹⁴ Although Freiberg considers disclosure legislation primarily in the context of consumers,¹¹⁵ the theory can still be usefully applied in the context of gender equality in workplaces. Without disclosure requirements, it would be difficult for most employees or other interested actors to access relevant information held by employees. The WGE Act recognises this and requires reports to be disclosed to employees and unions.¹¹⁶

A second form of informational regulation involves the government providing information in order to generate ‘attitude change, capability development and norm formation or modification.’¹¹⁷ This is particularly important in the context of gender equality, as achieving change in workplaces requires the challenging of attitudes and norms as well as enabling employers to build the necessary processes and knowledge. This form of informational regulation encompasses a wide range of tools, such as: advice, education, training, advertising, information campaigns and legislative summaries.¹¹⁸ The WGE Act utilises such tools mainly through the WGEA, which has particularly been given the role of providing advice and assistance to employers

¹¹³ Freiberg, *The Tools of Regulation*, above n 16, 167.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 167-8.

¹¹⁶ *Workplace Gender Equality Act 2012* (Cth) s 16B.

¹¹⁷ Freiberg, ‘Re-stocking the Regulatory Tool-kit’, above n 98.

¹¹⁸ *Ibid.*

that fail to meet the minimum standards.¹¹⁹ However, the WGEA is not limited to assisting only employers in breach, as it also has the function of undertaking general research and educational campaigns aimed at improving gender equality in workplaces.¹²⁰ The WGEA's website provides such information and research reports, as well as legislative summaries to assist in understanding the new legislation.¹²¹ The WGEA is not even limited to assisting employers covered by the Act. It has been given a new function of advising employers who are not required to report under the WGE Act on how to achieve gender equality in their workplaces.¹²² In this sense, the educational scope of the WGEA has been broadened compared to former versions of the Agency under previous legislation.¹²³

Performance indicators or 'report cards' are the third form of informational regulation.¹²⁴ This form intends to provide information about performance to the public as well as feedback to regulatees, who will then be able to judge their own performance according to the standard.¹²⁵ In the WGE Act, this takes the form of the employers' reports and GEIs (and the later introduction of the minimum standards). According to Freiberg, the use of mandated performance indicators is based on the presumption that standards will rise after public disclosure due to 'shaming' of weak performers.¹²⁶ Yet, we have seen in the context of the AA(EOW) and EOWW Acts that naming and shaming was not a very effective enforcement mechanism. As such,

¹¹⁹ *Workplace Gender Equality Act 2012* (Cth) s 19E.

¹²⁰ *Ibid* s 10(1)(e).

¹²¹ See, eg, Workplace Gender Equality Agency, *Learn* (2013) <<http://www.wgea.gov.au/learn>> Accessed 22 October 2013.

¹²² *Workplace Gender Equality Act 2012* (Cth) s 10(1)(a)

¹²³ See also Sutherland, above n 76, 110.

¹²⁴ Freiberg, *The Tools of Regulation*, above n 16, 169.

¹²⁵ *Ibid*.

¹²⁶ *Ibid* 170.

it may appear that applying informational regulation cannot provide an answer to our question of how the WGE Act can still be effective despite using this same enforcement mechanism. By taking the broader approach to regulation, however, it is possible to see how the performance indicator tool can be bolstered through the other two main forms of informational regulation: disclosure and education.

Before elaborating on these two components of the WGE Act, it is important to return to one particular criticism of the AA(EOW) and EOWW Acts: the reliance on self-regulation. Thornton was particularly critical of the use self-regulation, viewing it as toothless and a product of the government's deregulation agenda.¹²⁷ We saw that in the past legislation, the problem was that it was left to employers to essentially decide what they would achieve. The WGE Act has addressed part of the issue through changes such as the GEIs and minimum standards. Yet in order to fully appreciate the WGE Act's changes, the necessity of corporate self-regulation needs to be understood. Firstly, this requires recognition that self-regulation is not necessarily the same as deregulation.¹²⁸ This has been a key concept within the literature considering regulatory alternatives to the command and control model. For example, Ayres and Braithwaite's work on responsive regulation aimed to 'transcend' the debate of state regulation of businesses versus deregulation in a neo-liberal society.¹²⁹

New regulatory theory has instead created the idea of 'meta-regulation,' which involves the state regulating the self-regulation being undertaken by actors such as

¹²⁷ Thornton, 'Proactive or reactive?', above n 11, 285-6; Thornton, 'EEO in a Neo-Liberal Climate', above n 41, 91.

¹²⁸ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); See also Smith, above n 46, 692.

¹²⁹ Ayres and Braithwaite, above n 102, 3.

corporations.¹³⁰ In the context of the WGE Act, we have seen that this involves employers reporting on the effectiveness of their self-regulation in relation to specified goals. The ‘meta-regulation’ aspect is that this report then enables the self-regulation to be assessed by the WGEA. Meta-regulation provides a more sophisticated way for the state to utilise organisations’ ability to self-regulate, rather than simply relying on deregulation. Christine Parker highlights the requirements necessary in order for this model to work.¹³¹ Firstly, as this model relies on the willingness of corporations to utilise their internal capacity to self-regulate, law and regulators need to *generate internal commitment* within corporations.¹³² Secondly, law and regulators should *increase external accountability mechanisms*, including judgment by the public and stakeholders.¹³³

This paper will apply informational regulation theory to the WGE Act in order to also show how the Act intends to facilitate adequate meta-regulation along the lines of Parker’s model. Ultimately, the link between these two regulatory theories will reveal that it is possible to change the behaviour of employers such that they will comply with the WGE Act, regardless of whether there is a threat of hard sanctions.

1 Information Disclosure and Consultation under the WGE Act

We have seen that based on Parker’s model of meta-regulation, public accountability mechanisms will be central to encouraging employers to comply with the WGE Act. Paradoxically, we have also seen that making employers publicly

¹³⁰ Freiberg, ‘*The Tools of Regulation*’, above n 16, 33-4; Parker, above n 128, 15.

¹³¹ Parker, above n 128, 246.

¹³² Ibid.

¹³³ Ibid.

accountable through ‘naming and shaming’ has achieved very little in practice. Examining the use of informational regulation in the form of disclosure in the WGE Act may allow us to reconcile these competing notions. The WGE Act contains a number of information disclosure requirements. Firstly, the submission of the employer reports to the WGEA itself is one type of information disclosure, particularly targeted at rectifying an information asymmetry between the government and employers. However, for our purposes it is the new disclosure requirements relating to third parties that provide a more useful insight into the WGE Act’s potential effectiveness. Before examining these new requirements, an exploration of the consultation requirements under the WGE Act can provide a useful context for how disclosure to relevant stakeholders may operate to encourage compliance.

Under the WGE Act, we saw that the fifth GEI requires employers to report on consultation with employees on issues concerning gender equality in the workplace. This GEI prevents employers from sweeping gender issues under the rug, as employers will likely need to inform employees of current gender equality issues in order to engage in the consultation. It also allows employees to be proactively included in the employer’s regulation process before the report is completed. As Smith argues, it is important for regulatory schemes to enable workers to participate in the framing of gender equality issues because it is the workers who will be directly affected by the employer’s conduct.¹³⁴ The fifth GEI aims to achieve this, but the government also appears to recognise the potential for employers to engage in ineffective consultation. Accordingly, the *2013 Instrument* provides for further matters to be included in the reports, which will likely assist the WGEA in evaluating

¹³⁴ Smith, ‘Not the Baby and the Bathwater’, above n 46, 711.

the consultation undertaken. Under the *2013 Instrument*, employers must specify the mode of consultation and the categories of employees consulted.¹³⁵ Including the categories of employees consulted is particularly important because it will reveal whether employers actually consult with the employees that are to be affected by the policies, as opposed to just upper management.

Apart from potential problems with the quality of consultation undertaken, past versions of the Act reveal that there is also a potential problem of employers not complying with the consultation requirements at all. The requirement to consult with employees is not new. Under the AA(EOW) Act, employers were required to consult with female employees and trade unions when developing their affirmative action program.¹³⁶ Despite this requirement, a 1994 Agency review of compliance with the eight steps program found that the consultation steps were ‘poorly performed’.¹³⁷ These consultation requirements were then removed in the EOWW Act. Although compliance had been weak, this move was criticised by commentators as a further way the EOWW Act diminished Australia’s equal employment opportunity framework.¹³⁸ Even though the WGE Act has responded by reintroducing consultation requirements, the remaining issue is why would the Act achieve compliance here when the AA(EOW) Act could not? This also reflects our more general question of what makes the WGE Act different so as to inspire compliance?

¹³⁵ *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No. 1)* (Cth) sch 1 cl 5.

¹³⁶ *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) s 8(1)(c)–(d).

¹³⁷ Strachan and Burgess, above n 32, 50-51.

¹³⁸ *Ibid* 61; See also Sutherland, above n 76, 111 n 90.

The answer to these questions leads us to the new disclosure requirements involving third parties under the WGE Act. Under the Act, employers are now required to inform employees, shareholders and unions of the lodgement of the report.¹³⁹ They must also provide the employees and shareholders with access to the report (whether electronic or otherwise).¹⁴⁰ Lastly, employers must inform employees and unions that they have an opportunity to comment on the report and they may give those comments to either the employer or the WGEA.¹⁴¹ If the comments are submitted to the employer within 28 days after the report has been submitted, the employer will be able to take the comments into account when providing additional information to the WGEA.¹⁴² Likewise, comments sent to the Agency within 28 days will allow the WGEA to consider the comments when requesting additional information under s 19A as part of reviewing the employer's compliance under the Act.¹⁴³

These changes, particularly the employees and unions' opportunity to comment, have been considered a significant development. Even the sceptical Thornton has written, in response to these new requirements, that 'for the first time in almost three decades, the legislation seeks to move from a solely procedural focus to a tentative regard for substantive equality.'¹⁴⁴ The value of these new disclosure requirements is that the WGE Act is recognising actors other than employers as

¹³⁹ *Workplace Gender Equality Act 2012* (Cth) ss 16, 16A

¹⁴⁰ *Ibid* s 16(2).

¹⁴¹ *Ibid* s 16B.

¹⁴² Workplace Gender Equality Agency, *Notification and access requirements* (2013) <www.wgea.gov.au/report/notification-and-access-requirements> Accessed 22 October 2013.

¹⁴³ *Ibid*.

¹⁴⁴ Thornton, 'Proactive or reactive?', above n 11, 288.

regulators for the first time. This creates a new way that the legal system can influence the internal cultures of organisations, because employers will have to answer to their employees as regulators, in addition to government regulators. Parker has also particularly espoused this idea in her work on new regulatory approaches toward corporate self-regulation.¹⁴⁵ Unlike command and control regulatory theory that does not recognise the potential for other actors as regulators,¹⁴⁶ Parker acknowledges that a key part of effective corporate self-regulation is to allow for feedback from ‘external stakeholders.’¹⁴⁷ Lastly, by turning these other actors into regulators, the WGE Act also adds another layer of support to the government’s attempt to rectify the information asymmetry, because it means the government is not solely relying on employers to provide information.

The WGE Act operates not to force substantive outcomes prescriptively, but by requiring the disclosure of information, which in turns enables stakeholders to impose internal pressure. This provides a more sophisticated use of the law than past versions of the Act, as it adds a backup accountability mechanism even for situations where ‘naming and shaming’ may not inspire compliance. The difference with the disclosure approach is that the comments, particularly from employees, have the potential to hit employers closer to home than a distant criticism from the government. Employers may be more willing to genuinely consult with employees as regulatory actors under the fifth GEI, as well as comply with the Act in general, if they face the risk of discontent from their workforce. This is also true regardless of whether hard sanctions like penalties are utilised, because it is the internal pressure

¹⁴⁵ See Parker, above n 128.

¹⁴⁶ Freiberg, ‘*The Tools of Regulation*’, above n 16, 83.

¹⁴⁷ Parker, above n 128, 292.

that employers are responding to rather than the risk of paying a fee. The WGE Act's use of information disclosure is critical to the success of this model. Without mandatory disclosure, most employees may never even become aware of the existence of the reports let alone of the opportunity to comment. Also, some employers may never feel the need to still include employees in the process. This was highlighted in KPMG's 2009 review of the EOWW Act, which found that a significant number of employees, particularly women, were not aware of employee involvement in developing and evaluating workplace programs.¹⁴⁸

The use of law to turn employees into regulators (by enabling their comments on employers' reports) may also prevent the employer from presenting its progress more favourably than the workplace's reality. We saw this problem arise in the context of reports under the AA(EOW) Act, when Strachan and Burgess found that employers were overstating the actions they had taken in areas like childcare assistance.¹⁴⁹ North-Samardzic's study into the weaknesses of the EOWW Act's reporting process revealed similar problems.¹⁵⁰ North-Samardzic undertook interviews with participants from three organisations representing different sectors (non-profit, university and private sector financial services).¹⁵¹ She particularly utilised organisations that were recipients of EOWA's Employer of Choice for Women award.¹⁵² Despite this, participants from the University of Macarthur and Townbank (a financial services organisation) revealed that the reporting process did not reflect the reality of gender equality at these workplaces. At Townbank, for

¹⁴⁸ KPMG, above n 54, 49.

¹⁴⁹ See Part II A. Strachan and Burgess, above n 32, 55.

¹⁵⁰ North-Samardzic, above n 39.

¹⁵¹ Ibid 66.

¹⁵² Ibid.

example, press releases and documents particularly featured the company's flexible work practices as an example of EEO initiatives.¹⁵³ However, interviews with women revealed that the policy was promoted, but 'not necessarily utilised' due to claims of business feasibility.¹⁵⁴

North-Samardzic findings show that there is a risk of ignoring the disconnect between the practices claimed by employers in reports and the actual experiences of female employees, because reports may be obscured by policies acting as 'window-dressing'.¹⁵⁵ North-Samardzic blamed the EOWW Act's accountability mechanisms favouring managerial discretion for this result.¹⁵⁶ Arguably, the WGE Act's disclosure changes have remedied this. For example, employees and unions could now provide comments on the reality of flexible work arrangements under the fourth GEI. In a situation where the employer claims to have policies supporting flexible working arrangements, but really the policies are rarely enacted, employees' comments would now be able to reveal instances where requests for such arrangements were refused.

Another risk revealed by North-Samardzic's study is that reliance on organisational culture is vulnerable to leadership change.¹⁵⁷ In the case of the University of Macarthur, this was particularly an issue as participants felt that EEO was better supported when the Vice Chancellor was a woman, but changes to the

¹⁵³ Ibid 72.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 73.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 71.

management team lead to gender issues being put on the backburner.¹⁵⁸ Whilst the WGE Act still relies on organisational culture to implement changes, it is also arguable that the new disclosure requirements somewhat reduce these risks.¹⁵⁹ By improving accountability and transparency through disclosure and removing reporting waivers, the WGE Act forces employers to be reminded of their commitments. Employers may choose to skew their performance results or ignore gender issues, but this would be pointless now that employees are free to reveal the truth. Admittedly, for some employers the issue will not be a lack of commitment, but resourcing constraints. Whilst the WGE Act's new accountability measures may still prevent employers from completely avoiding gender equality issues in such cases, its influence may be constrained if an employer's bottom line is its budget.

Although the WGE Act's new disclosure system has merit and the potential to increase employer compliance with the Act, it is important to acknowledge that there may be limitations in practice. Firstly, we need to be careful not to assume that all employers will be interested in the feedback they receive from employees and unions. In such cases, however, the allowance for comments to instead be given to the WGEA may assist in adding an extra layer of pressure on employers. In addition to the WGEA's power to request further information from an employer regarding their compliance after receiving the comments,¹⁶⁰ employers are also non-compliant if they give the WGEA false or misleading information.¹⁶¹ As such, employers will likely realise that it would be futile to ignore or contradict truthful comments submitted by

¹⁵⁸ Ibid 70.

¹⁵⁹ Part III C will also demonstrate the utility of using education to influence organisational culture.

¹⁶⁰ *Workplace Gender Equality Act 2012* (Cth) s 19A.

¹⁶¹ Ibid s 19B.

employees or unions. On the other hand, another potential limitation is that the WGEA may not be able to consider every comment received in practice.¹⁶² This will likely depend on the level of funding contributed to the WGEA by the government.

Ultimately, the value of the WGE Act's disclosure mechanisms depends heavily on the willingness of employees to engage in the process and make comments on the employer's report. As such, it may not be effective in all cases. Firstly, there is a risk that employees will be unwilling to provide criticism on the report for fear of jeopardising their position. This will particularly be the case if the employer does not institute a system allowing for employees to make their comments anonymously. There is no specific requirement in the WGE Act requiring employers to ensure anonymity. Although comments made to the WGEA through their online submission system ensure personal information is kept confidential, the WGEA encourages comments to be made to employers at first instance.¹⁶³ This may deter some employees who do not want to wish to confront their employers, but feel that they will not be taken seriously unless they take that step first.

Another flaw in informational regulation theory is that it is based on the idea that people will understand and be capable of responding to information.¹⁶⁴ However, as Freiberg points out, information 'affects different groups in society differently.'¹⁶⁵ Not all employees will have the capacity to understand the reports: they may find the information too complex, there may be a language barrier or they may doubt their

¹⁶² See also Sutherland, above n 76, 107.

¹⁶³ Workplace Gender Equality Agency, *Comments guidelines* (2013) <<http://www.wgea.gov.au/report/comments-guidelines>> Accessed 22 October 2013.

¹⁶⁴ Freiberg, *The Tools of Regulation*, above n 16, 176.

¹⁶⁵ *Ibid.*

ability to provide an adequate response. Even employees who are capable of understanding and processing the information may not possess the willingness to respond because they feel disempowered and believe that their contribution will not have any real influence over substantive outcomes in the workforce. Or, employees may possess the necessary knowledge and capacity, but may not have the time to contribute.

In these situations, the WGE Act perhaps contemplates the solution of unions providing comments instead of incapable or unwilling employees. Relying on unions, however, may not always be a reliable solution. As Smith argues, the decline in unionisation undermines the role of unions in regulatory schemes.¹⁶⁶ The problem is that there may not be a union presence at that workforce or the union may not possess the necessary inside knowledge to comment, particularly if employees capable of providing relevant information are not union members. Admittedly, this may not necessarily prevent unions from voluntarily undertaking comparisons of performance between workforces based on the reports themselves. Parker notes that a successful information disclosure strategy requires the state to regulate the quality of information to be provided, for example, by developing standards for key performance indicators, in order to enable interested parties to intelligently compare performance.¹⁶⁷ The WGE Act appears to have addressed this through the creation of the GEIs and later implementation of minimum standards.

Finally, in order for the WGE Act's information disclosure mechanism to achieve its intended outcome, it is not enough for the Act to simply require employers

¹⁶⁶ Smith, 'Not the Baby and the Bathwater', above n 46, 711.

¹⁶⁷ Parker, above n 128, 218.

to provide the reports. Employers will need to make the reports easily accessible to the employees and also institute a mechanism for returning comments that is not too cumbersome or complicated. Otherwise, the system's reliance on employee feedback may again be its downfall, particularly in the case of time-poor employees. The WGE Act only provides that the employer must provide access (electronic or otherwise) as soon as reasonably practicable.¹⁶⁸ Yet this does not take into account that some employers may choose an approach not suitable for their particular workforce. For example, using email rather than snail mail to send the reports and receive comments back may be more appropriate for white-collar office workers. However, while email may be an easier route for the employer, it is less likely to be the best approach for a workforce of blue-collar workers who are rarely at their desk or a computer and may be onsite away from the office during the day.

This part has aimed to explore how a broader use of the law through a soft regulatory tool such as mandatory information disclosure can successfully encourage employers to comply with the WGE Act. It does not, however, suggest that the use of information disclosure will be a successful approach in all cases. The limitations to the theory have been discussed in an attempt to demonstrate that there are some industries or workplaces where the disclosure mechanism may not have an impact. Despite this, the WGE Act's implementation of information disclosure is significant because it displays an understanding on the part of the legislature that there are more ways to bolster the effectiveness of rules other than the use of hard sanctions. As such, the WGE Act is taking a step in the right direction in its attempt to improve Australia's EEO regulatory framework.

¹⁶⁸ *Workplace Gender Equality Act 2012* (Cth) s 16(2).

2 Education and the WGEA

Education has perhaps been an underestimated area in analyses of regulation. In Howe and Landau's evaluation of state labour regulation, they cite an overemphasis on educational strategies as one of the reasons behind laws being rendered ineffective.¹⁶⁹ However, exploring education as part of the WGE Act's regulatory framework is critical in determining its effectiveness. The WGE Act envisions the WGEA's educational functions as being another means for both improving compliance and achieving substantive gender equality goals. Rather than taking a punitive approach or providing for individual complaints to be taken to the courts, the Act proactively tries to encourage compliance through providing employers with assistance.¹⁷⁰ It is true that Agencies under former versions of the Act were also granted educational functions, and we have seen that those Acts were flawed. Howe and Landau may be correct in the sense that a reliance on educational strategies will probably not render effective an already ineffective legislative framework.

The WGE Act, however, is different because not only does it use education to bolster the effect of the rules, but its other changes also bolster the use of education. The former Agency, EOWA, was able to provide information, assessment tools and training.¹⁷¹ Yet the supplying of information alone is perhaps a weak way of inspiring employer commitment in cases of particularly resistant employers. This is where the WGE Act's new reporting requirements may assist: the greater detail now required in

¹⁶⁹ Howe and Landau, above n 14, 398.

¹⁷⁰ See also Thornton, 'Proactive or reactive?', above n 11, 290.

¹⁷¹ Smith, 'Not the Baby and the Bathwater', above n 46, 720.

employers' reports firstly allows the WGEA to more accurately assess what is happening at workplaces. It can also use its new power of requesting further information from employers when reviewing compliance to really investigate problematic areas. The WGEA can then better tailor its educational programs and hence improve their effectiveness. Importantly, this also sends the message that the WGEA is not just supplying employers with information, but it is engaging in a collaborative process with employers to really understand and address their specific concerns.

Having identified that the WGE Act has improved the operation of educational strategies, it is now important to explore how education itself can make a difference to compliance with the Act. We saw that a key requirement of Parker's model on effective self-regulation was the facilitation of internal commitment within corporations.¹⁷² Particularly, if upper management do not care about gender equality issues, then they will be less likely to comply with the WGE Act or institute internal monitoring mechanisms. Provision for education is crucial to achieving internal commitment and challenging preconceptions that employers may hold. However, the use of education is not limited to just encouraging compliance from employers who do not already recognise the value of promoting gender equality at their workforce. Education is also useful for assisting employers who do wish to comply, but lack the necessary know how on how to change their practices. In such cases, the value of the WGE Act's regulatory framework goes beyond its enforcement mechanisms, as it accounts for situations where a potential sanction cannot provide a solution to non-compliance.

¹⁷² See Part III A. Parker, above n 128, 246.

For the first category of unwilling but able employers, education can have a greater influence in encouraging compliance than some critics may believe. The key to success is to utilise education as a tool for changing organisational culture and challenging particularly masculine policies. Maureen Fastenau's case study on Deloitte particularly highlights how a change in organisational culture can make a significant difference to the success of equal employment opportunity policies.¹⁷³ Deloitte hired a consultancy firm to investigate the high turnover rate of its female accountants.¹⁷⁴ The investigation revealed that most women had left because they felt dissatisfied with the organisational culture, the lack of work-family balance and the difficulties they faced progressing.¹⁷⁵ Interestingly, Deloitte's management found that adopting new flexible work policies did not solve the turnover problem.¹⁷⁶ Ultimately, management realised that they needed to address organisational culture and the problem of employees who utilised flexible working arrangements being viewed as lacking commitment.¹⁷⁷ Deloitte was then able to successfully overhaul its workplace culture.¹⁷⁸

Although this case study does not appear to be directly relevant to the utilising of educational strategies by a government agency, its lessons can be usefully applied in the context of the WGE Act to show how the WGEA can potentially achieve

¹⁷³ Maureen Fastenau, 'Explaining the Persistence of the Glass Ceiling' in Sara Charlesworth et al (eds), *Women and Work 2005: Current RMIT University Research* (RMIT Publishing 2006) 61, 66.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid 67.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

similar success. Firstly, it shows that it is possible to demonstrate to an employer that addressing gender equality in its workplace can have a positive effect on the business. Admittedly, Deloitte may have been a more willing employer than some, especially when the issue was linked to a direct business concern of turnover. As such, the first step would be for the WGEA to use targeted educational campaigns to illustrate how promoting gender equality can be good for business, even if some companies may not view it as particularly relevant. In cases where this is difficult to demonstrate, the WGEA could also use campaigns to assert the issue as a moral obligation and highlight its impact on the organisation's public image. The next step would be to provide tools to assist employers with creating and enacting relevant policies in practice. Lastly, and most importantly, the lesson learnt by Deloitte in relation to organisational culture needs to be applied. Namely, providing these tools and then leaving the employer to its own devices will not be enough. The WGEA needs to continuously use education campaigns to encourage genuine internal interest. This is where the WGEA can have its most meaningful impact in securing compliance, because lasting internal commitment is more likely where there is a cultural shift. If senior managers are particularly convinced, the organisation is not only more likely to comply with the Act, but it is more likely that substantive goals will be reached at that workplace.

The WGE Act also appears to recognise that in order to influence organisational culture in a way that encourages compliance, simply prescribing rules and sanctions is not enough. Rather, proactive and dynamic education and training is needed to truly create a change in attitude. One particular area where education could have an impact is the challenging of preconceptions relating to workers with caring

responsibilities who utilise flexible work arrangements. In such cases, simply following the rules of the WGE Act and implementing such arrangements does not necessarily equate to a real benefit for female workers. Some of these workers may face problems of being ‘shunted to the “mommy track”’.¹⁷⁹ They may receive poorer quality work and be less likely to be promoted. Fastenau found that a cause of this is a belief on the part of some male managers that flexible working arrangements are more of a lifestyle choice, and as such reflect the woman’s lesser career commitment.¹⁸⁰ The WGEA could use educational campaigns to challenge such conceptions and make employers understand that it is not a lifestyle choice, but rather a necessity for female employees trying to juggle their competing responsibilities.¹⁸¹

A regulatory framework that only prescribes rules and sanctions also will not achieve compliance in the case of organisations that are already culturally committed, but are struggling to implement gender equality measures. In practice, some employers may find it challenging to achieve gender equality goals or to even understand what exactly is expected in such endeavours. The WGE Act utilises a more effective regulatory framework by granting the WGEA the function of assisting such employers. The WGEA is also developing a new benchmarking system, which will be particularly of use in such situations. After the WGEA receives the reports under the new framework for 2013-14, it aims to analyse the data and also consult with employer groups to develop benchmarks for educational purposes.¹⁸² Employers

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 75.

¹⁸¹ See *ibid.*

¹⁸² Workplace Gender Equality Agency, *Benchmarks* (2013)

<<http://www.wgea.gov.au/lead/benchmarks>> Accessed 22 October 2013.

will then be able to use the benchmarks to compare their performance within the industry and develop gender equality strategies.¹⁸³

The WGEA can also have a beneficial role in assisting employers with implementing specific gender equality policies in practice. For example, an employer may wish to create an adequate flexible working arrangement policy that avoids the pitfalls previously discussed. The WGEA would be able to advise on such strategies. One potential solution, which worked in the case of Deloitte, is to require senior managers to monitor the quality of work received by women in their department compared to men in order to ensure their promotional opportunities were equal.¹⁸⁴ By suggesting voluntary internal accountability methods, the effectiveness of the WGE Act could be further strengthened. Other strategies may include appealing to managers' business sensibilities by explaining that it would be more efficient to adequately utilise the experience of all the staff, including those with flexible work arrangements, when distributing workloads.

Finally, some critics may wonder why the WGE Act does not just also include 'hard' strategies such as penalties as well as informational strategies such as education so as to cover all bases. This paper does not suggest that 'command and control' regulation will always be inappropriate.¹⁸⁵ Rather, it claims that for gender equality legislation in particular, the lack of hard sanctions does not necessarily signal a deficiency in the regulatory framework. As we have seen, the WGE Act's use of informational regulation allows for a broader use of law in a way that has the potential

¹⁸³ Ibid.

¹⁸⁴ Fastenau, above n 173, 67.

¹⁸⁵ See also Freiberg, *The Tools of Regulation*, above n 16, 181.

to inspire compliance in a range of circumstances. Command and control regulation, on the other hand, can be inflexible.¹⁸⁶ As such, it is likely not the best way of dealing with a complex social issue like gender equality.

This becomes apparent when one considers how the use of hard sanctions would operate in practice. For example, say a financial penalty is imposed if an employer does not meet a hypothetical minimum standard relating to flexible work arrangements. Even if the penalty serves as a deterrent, it may also cause a backlash in some cases in the form of employers hiring less women or giving them lesser quality work. We have seen that these are already issues that can be addressed through education strategies. It seems redundant to add penalties to the regulatory framework, as they will not eliminate the need for informational regulation and are not necessarily more effective. There are many layers to the gender equality issue, and no easy solutions. But when devising solutions, there needs to be careful consideration of how a change in one area can impact another area. Given this complexity, the WGE Act has taken a step in the right direction by considering the benefits of alternative forms of regulation like informational regulation.

IV CONCLUSION

This paper has sought to demonstrate that despite almost thirty years of arguably ineffective equal employment opportunity legislation, there is a role for law to play in the facilitating of gender equality in workplaces. All that is required is a rethinking of the regulatory approach. Once we move beyond the narrow conception of law consisting of a rule and a sanction for breach of the rule, we can discover the

¹⁸⁶ Ibid 182.

more effective ways of utilising the law to address a complex issue like gender equality. This paper has contended that the new WGE Act has made significant improvements on its predecessors by utilising informational regulation. Particularly, the use of information disclosure and education has strengthened the Act's regulatory framework. The Act's new approach displays a more sophisticated understanding of how to exert influence over actors, particularly through its regulation of corporate self-management by enabling employees to participate as regulators.

When Valerie Braithwaite described the AA(EOW) Act as 'loose, gentle and weak' legislation, she did not blame the Act's ineffectiveness on these characteristics.¹⁸⁷ Rather, she argued that these qualities could actually make the legislation more effective in the long term, as they could produce the 'psychological surrender that is a necessary part of changing culture.'¹⁸⁸ In the end, Braithwaite attributed the AA(EOW) Act's ineffectiveness to its poor implementation, resourcing and monitoring.¹⁸⁹ Twenty-six years later, the government appears to be following Braithwaite's logic. The fact that the WGE Act employs 'soft' tools of regulation, which may be viewed as weak by some critics, is actually the Act's biggest chance of success. The Act also appears to have rectified past problems in an attempt to make the most of this opportunity, particularly by improving reporting requirements through GEIs and minimum standards; introducing a standardised approach and broadening the WGEA's functions. Ultimately, we must wait until the WGE Act's new reporting requirements have fully come into effect, including the release of the

¹⁸⁷ See Part II A. Valerie Braithwaite, above n 27, 117.

¹⁸⁸ Ibid 108.

¹⁸⁹ Ibid.

minimum standards, before we will be able to see if the Act makes its intended impact.

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