

EARLY STEPS: REGULATORY STRATEGY AND AFFIRMATIVE ACTION

**REPORT TO
THE DEPARTMENT OF WORKPLACE RELATIONS AND SMALL BUSINESS
IN RELATION TO THE REVIEW OF THE AFFIRMATIVE ACTION ACT
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The purpose of this report is to (1) outline four regulatory systems that can be found operating across a variety of regulatory contexts, (2) provide insights into how each system would operate in enforcing the Affirmative Action (Equal Employment Opportunity) Act, and (3) review data from the private sector that sheds light on which regulatory system is best suited to improving compliance while minimizing business and regulatory costs. The first two questions are addressed in Section 1 which canvasses the options of (a) complete deregulation, (b) incentive-based regulation, (c) command and control regulation, and (d) the enforcement pyramid. The third question is addressed in Section 2.

Section I: The Regulatory Options

Complete Deregulation

Equalising employment opportunities for women is clearly in the economic interests of Australian business who want to retain and attract excellent female staff and sustain the commitment of their female workforce. Firms are bound to be less competitive if they fully develop the human potential of only their male employees (Porter, 1990). The empirical evidence does bear this out. For example, the Women's Electoral Lobby submission to this review cites Burton (1997: 30):

A study by Covenant Investment Management in 1993 showed that companies with strong EEO programs outperformed the Standard and Poor's 500 stock market average by 2.4 percent a year over a five-year period, while companies with poor EEO records under-performed by 8 percent a year over the same period.

Further evidence is provided by Peetz for this review. Using national data from the 1995 AWIRS, he demonstrates that managers from companies with strong gender equity programs are most likely to report improved workplace productivity over the past two years.

In circumstances where achieving a desirable goal is in the economic interests of firms, there is a vast literature on the advantages of leaving it to market forces to deliver the incentives for reform (Ackerman and Hassler, 1981; MacAvoy, 1965; Moran, 1986; Peltzman, 1980; Stigler, 1971; Weidenbaum, 1979). On the other hand, labour markets, be they on the waterfront or in coal mines, are notorious for entrenched, dysfunctional practices which both inhibit competitiveness and disadvantage women. The Karpin Report (1995) has recognized the need for educational interventions to build a positive enterprise culture, and specifically to capitalize on the talents of women. Governments are reasonably viewed as having a responsibility to show leadership to work with industry toward renovating underperforming labour markets.

In the case of employment discrimination against women, the dysfunctional labour market practices are also breaches of fundamental human rights which Australia has international obligations to advance¹ (though not necessarily by affirmative action). Hence, the case against deregulation as a policy in this area is that limited regulation accomplishes the joint objectives of enhancing the competitiveness of the Australian labour market, guaranteeing fundamental human rights and meeting Australia's international obligations with regard to core labour standards, indeed securing the respect Australia has gained in international fora for some leadership toward taking

¹ By virtue of our having ratified International Labour Organization Convention 111, Discrimination (Employment and Occupation) 1958 and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

equality of employment opportunities seriously. As international relations theorists of “complex interdependency” point out (Keohane, 1984), it is very much in Australia’s economic interest to sustain its reputation as a nation that honours the spirit and the letter of the treaties it ratifies. In a world of complex interdependency, Geneva ambassadors whose nations have a reputation for keeping their promises negotiate better deals for their people at the World Trade Organization, the International Telecommunications Union, the World Intellectual Property Organization and other negotiation venues of this type.

We can come at this policy question from the other direction and say that the reason deregulation is advocated so forcefully in many domains is that regulation erodes competition and competitiveness. However, it is difficult to build a substantive case on how laws for equal opportunities for women jeopardise competition among firms. This is not a form of regulation that stultifies innovation in any way. Australia’s EEO laws are in no sense used as a non-tariff barrier to protect Australian firms from foreign competition. Obversely, EEO does enhance competitiveness in contests with foreign competitors which fail to develop the female half of their human capital.

The very limited sense in which the Affirmative Action (Equal Opportunity) Act could reduce competition is two fold. First, it would occur if a firm were precluded from tendering for Commonwealth contracts because of non-compliance with the Act. This has never happened, however. Even if a few firms did temporarily suffer this set-back, the negative effect on the competitiveness of the Australian economy would be minuscule in comparison to the positive effect.

As was pointed out at round table consultations and in submissions to this review, the reporting requirements entail costs in time. These costs could conceivably reduce

competitiveness. The intrusiveness of the legislation will be greater when legislative requirements have not been incorporated into the strategic plan and mainstream business activity of the firm. Such integration has been encouraged by the Affirmative Action Agency. Indeed, the legislation mandates the type of critical self-appraisal and education recommended by the Karpin Report through requiring companies to set aside time to review their personnel policies and practices, seek feedback from staff and evaluate their programs. It is of note that these integrative steps of the legislation are the ones that firms have been most reluctant to engage in (Braithwaite, 1993). Yet companies that have set aside time to work through the steps mandated in the Act do have superior equity programs (Braithwaite 1993) and, in turn, greater improvements in productivity (Peetz, this review). The critical factor in improving workplace competitiveness through the AA legislation is integration into mainstream business practice. If implementation followed the prescribed course of integration, reporting requirements would not be costly because they provide companies with a framework for an overall review of their strategic plan. Comments by some companies to the Affirmative Action Agency that they preferred not to have their reporting requirements waived in spite of their excellent track record supports this argument. Thus, implementation of the legislation seems most costly for firms that implement it minimally without seeking to use the legislation to genuinely improve gender equity in the workforce.

Overall, the case for complete deregulation is extremely weak. Moreover, any attempt to abolish equality of opportunity laws might risk profound social division in Australia. Abolishing the Affirmative Action Act could risk the kind of loss of faith in the fairness of the Australian economy that has had such detrimental effects on the commitment of many Aboriginal people to our economy. Deeply embedded in the Australian psyche is the notion that only if you are given a "fair go" will you "give it

ago". In such a culture, to deregulate what is seen as a "fair go" might be to play a dangerous game with our economic future.

Incentive-Based Regulation

If the analysis of the last section is correct, it might make economic sense to provide economic incentives for improved EEO performance (see Anderson et al., 1977). It is already the case that the costs of implementing an EEO program are tax deductible for Australian businesses required to report under the Act. Tax incentives could be extended and offered to firms which improved their employment opportunities for women. Such regulatory distortions of the tax system have quite significant costs in economic efficiency, however, as well as in revenue foregone. They render the tax system more complex and therefore more susceptible to avoidance. They impose significant additional paperwork burdens on both business and government.

Because these transaction costs of incentive-based regulation are always quite high, it should only be considered in circumstances where simpler regulatory interventions are failing badly. Roundtable consultations and submissions to the review suggest that while the legislation is bringing change more effectively in some quarters than in others, it is not the case that the current regulatory strategy is failing badly in Australia.

More informal (and low cost) incentives have a useful place in every system of regulation, however. Simple recognition of good performance has been shown to work surprisingly well in the regulatory context. Research on achieving compliance with nursing home regulatory laws shows that government inspectors who use informal praise are more

successful at improving compliance than inspectors who neglect praise (Makkai and Braithwaite, 1993).

More significant, perhaps, as an incentive to do the right thing is positive publicity for employers who have reached high regulatory standards. Good publicity for successful programs was valued more highly by industry than modest financial incentives to assist with child care programs or study leave schemes at the time of the 1992 Effectiveness review (Braithwaite, 1992). Over 85% of companies saw good publicity for high quality EEO programs as the most effective strategy the government could use to improve gender equity in the workplace. In contrast, only 68% endorsed modest financial incentives to assist with child care provisions and the like. In the words of one company executive, "That's the company's responsibility."

The Affirmative Action Agency has a track record of using the positive publicity approach in their annual awards for best practices sponsored by the business community. There is no reason why positive publicity cannot be extended by the Agency to those companies who have had problems in the past but who have successfully invested in overcoming discriminatory problems in their workplace. There is nothing to stop a Minister who has named a non-complying company in the parliament from congratulating that company in the parliament a year later when it has turned the situation around. One of the most effective regulatory strategies for simultaneously building corporate commitment to comply and political commitment to the regulatory agency is practised by some nursing home inspectorates in the United States: The local member writes a letter of congratulations to nursing homes when they have achieved the distinction of a maximum compliance score (Makkai and Braithwaite, 1993). What is the nature of the evidence that these letters count for something? The fact that management would frame them and display them at the entrance to the facility.

Other options might be to extend exemptions for reporting when firms achieve a desirable gender mix across the workforce and at the managerial level, and have a demonstrated plan in place to monitor equity issues. Another would be to exempt firms from the requirements of the Act if they submitted to a biennial EEO audit by an auditing firm accredited by the Affirmative Action Agency and that firm was able to certify to the agency that there had been continuous improvement in EEO performance during the two preceding years.

Command and Control Regulation

In its well documented submission to this inquiry, the Women's Electoral Lobby in effect advocates a move toward a more command and control form of regulation. It is argued that businesses employing down to 50 staff should be subject to "a robust and regular program of random audit". WEL cited the regular random governmental inspections to ensure air safety as a model. It is an expensive model. The Civil Aviation Safety Authority has a staff of 640 to inspect just one industry, and not a particularly large one (see further Grabosky and Braithwaite, 1986:122-124).

The problem with inspection programs that aspire to cover all significant workplaces in a nation is that, even with thousands of inspectors and a highly prosecutorial approach to their task, credible expected punishment costs of non-compliance cannot be delivered. For example, the US Occupational Safety and Health Administration through its deployment of a command and control approach has been estimated to engender expected sanction costs of cents rather than dollars for failure to comply with its regulations. Low probabilities of detection are what fundamentally drive these results.

It is a mistake to assume that an inadequate auditing program is better than no auditing program. Empirical studies of tax audits, for example, have shown that where audits are underfunded they can increase non-compliance as a result of targets learning from their audit that they can get away with non-compliance (Kinsey, 1986).

The Women's Electoral Lobby submission also proposes a move in the direction of command and control regulation via their suggestion that "best guidance" similar to the US Department of Labor's Uniform Guidelines on Employee Selection Processes be "built into the Act via regulation to provide guidance to the private sector". The worry about legislative mandating of best practice is that legislative change never keeps up with best practice. The risk of legislative mandating of guidelines in 1998 is therefore that practice is locked into 1998 levels for many years. Innovation can be stultified. Already there is evidence of some companies seeing themselves as ahead of the legislation and the regulators. At the time of the 1992 Effectiveness review, the following comments were made by high performing Band 1 companies:

"The Agency works to the lowest common denominator. The more experience you have, the fewer ideas you get from them"

"I think we have given more back than we have got out of them" (Braithwaite, 1992).

A healthy regulatory system acknowledges high performers in this way and uses them to set new and higher standards across the system. The introduction of specification standards must not jeopardize this important source of innovation and change. There are a variety of ways of avoiding this trap. One is to write guidelines which specify a number of alternative ways of achieving the outcome. Better still is to help industry with a "default" guideline which they must follow if they are unable to find their own tailor

made and superior solution. Under a "default" guideline, business is actively encouraged to deploy their managerial creativity to attain higher standards than those outlined by the regulators. This approach may be particularly useful in the context of affirmative action legislation. Smaller companies have consistently performed more poorly than larger ones in the way they have implemented the legislation, and one reason seems to be lack of understanding of both the problem of gender discrimination and possible solutions (Braithwaite, 1992).

Another compromise is for the Affirmative Action Agency to show leadership toward establishing voluntary standards for matters such as employee selection processes and equal opportunities in access to training through Standards Australia. Australia has a good record of standards being picked up by the International Organization for Standardization (ISO). The ISO is a kind of global vacuum cleaner that sucks world's best practice into its standards. It is an international learning network transacted through expert committees that are business-dominated, but that give a credible voice to other interested parties. Standards Australia and ISO standards have in general a much better record of flexible adaptation over time than national legislative standards. They influence corporate practices widely without preventing innovation with new and possibly better practices (Cheit, 1990).

All that said, the astute policy analyst may not want to rule out a shift of affirmative action regulation toward more command and control options in the future. Moreover, in the present, intensive audit and negotiation of firm and specific policies maybe a desirable option for organizations with appalling records of victimizing women. It is just that it can be imprudent to rush to command and control when subtler methods of cajoling and caressing compliance work better in most organizations most of the time.

The priorities for a cost-effective regulatory system are building commitment to compliance, averting a culture of business resistance to the law (Bardach and Kagan, 1982; Braithwaite, 1985; Rees, 1988, 1994), and avoiding games of regulatory cat and mouse by business actors who take pride in being clever at cheating the spirit of the law while seeming to honour its letter. The exceptions in contemporary regulatory thinking where it is said that one cannot afford to risk anything short of strict command and control are becoming more exceptional. For example, it was routinely said in regulatory debates that on something as life threatening as nuclear safety one could not afford any reliance on self-regulation. Today there is considerable agreement that intensive command and control regulation was a cause of the Three Mile Island nuclear disaster. Plant operators became rule-following automatons instead of systemic analysts of risk (Rees, 1994). The more self-regulatory, trust-based nuclear regulatory practices put in place in the US resulted in the number of Scrams (automatic emergency shut-downs) falling from an average of 7 to 1 per plant per annum during the 1980s (Braithwaite and Drahos, 1998: Chapter 8).

Moreover, the empirical evidence is now overwhelming that the best way to get human beings to obey the law is to persuade them that the law is a good law and that those responsible for enforcing the law use fair procedures (Tyler, 1990; Lind and Tyler, 1988; Makkai and Braithwaite, 1996). Build normative commitment to the law in this way and most businesses will comply with the law simply because it is the law. Precipitate punitiveness is often counterproductive by this account. At the time of the 1992 Effectiveness Review, businesses expressed far greater acceptance of punishment when criteria were clear and unambiguous (e.g. failure to submit a report) than when the criteria for satisfactory performance were "woolly" (Braithwaite, 1992). "Woolly" criteria involve regulatory investment in education so that a shared understanding of what standards mean

in practice is widespread. If this does not occur, application of these standards in specific instances risks being seen as unfair.

Commitment to the law is jeopardized when people feel they have not been given a fair go by the regulators. Command and control, a large corpus of experimental research has shown, engenders a process called psychological reactance (Brehm and Brehm, 1981) that moves individuals in the opposite direction to that commanded (see also Hoffman, 1983; Lepper, 1983). Obversely, there is evidence that when business people see regulators holding back on command and control, in a way they interpret as meaning they are trusted by the regulators, that feeling of trust increases voluntary compliance (Braithwaite, 1998; Braithwaite and Makkai, 1994).

The Enforcement Pyramid

There is systematic evidence that most employers say they would comply with sound EEO practices without the Affirmative Action (Equal Opportunity) Act (Independent Review Committee Survey, this review). Most of them in our experience are probably being honest when they say this. So why not abolish the Act? The reason is one oft remarked by wise old regulators - such as Nugget Coombs and Chester Bowles (1971). It is that there are a large group of firms who will obey the law unconditionally just because it is the law. There is another much smaller group of firms who will always seek to evade the law. But the largest group is the third: they are the firms who will comply so long as something is done to call to account the cheats in the second group. Deregulation frequently fails as a policy because it neglects this empirical experience we have inherited from our regulatory elders.

Equally, that experience shows that excessive or heavy-handed regulation of the first and second groups can undermine their voluntary commitment to comply. Anne Jenkins (1997) has shown that firms often fail to comply with the law when they have the best of intentions to do so because of poor management practices. Jenkins shows that to be successful in improving compliance with the law, regulators must build the "self-efficacy" of such managers. Punishment is not a good way of doing that: Jenkins found that punishment is more likely to reduce compliance than to increase it.

Securing compliance with EEO regimes is one of those areas which requires a lot of managerial self-efficacy. A manager who believes that structures of male domination in their organization are so entrenched that they are beyond change is incapable of changing them, even if she would dearly like to do so (Braithwaite, 1992). Instead of punishing them for failing to change things that they believe are beyond them, the objective of sound regulation is to build up the belief of individuals that they do have the managerial efficacy to be a change agent.

Kagan and Scholz (1984) conclude that there are three types of business law breakers and three associated regulatory strategies. One group are rational calculators who defy the law because they decide that the benefits of non-compliance exceed the expected cost of being found out. Kagan and Scholz suggest that a deterrence strategy is the best one for them. A second group of business people defy the law because they are "political citizens" rather than rational calculators; they are not convinced that the regulation is a sensible one. Education and persuasion that the law is in the public interest is the appropriate strategy for this group. The third group, like Jenkins' low self-efficacy managers, break the law because they are managerially incompetent. For them, Kagan and Scholz suggest, a management consultancy model of regulation is the most appropriate. All three types are represented among those who report to the

Affirmative Action Agency (Braithwaite, 1992). It is of some significance, therefore, that across all these types, the most popular strategy for improving EEO programs after the award of positive publicity was feedback and dialogue with companies.

The overwhelming explanation for poor performance by poor and high performers alike was the difficulty of knowing just how to set up an effective EEO program (Braithwaite, 1992).

The enforcement pyramid institutionalizes the notion that there are many types of managers for whom a law enforcement approach will be counterproductive (Grabosky, 1995). And there are other types of managers, such as Kagan and Scholz's rational calculators or Chester Bowles's (1971) persistent law evaders, with whom a deterrent approach is needed. The idea of the pyramid is to try education, persuasion and management consultancy first in order to avoid making things worse with the "political citizens" and "managerial incompetents". But then when the "rational calculators" abuse the trust extended to them by an educative approach, there is a need to escalate to deterrence to deal effectively with their non-compliance.

Effective regulatory agencies are cooperative, tough and forgiving (Scholz, 1984a, 1984b; Ayres and Braithwaite, 1992: 34). They try cooperation first, are tough when that trust is abused and they are forgiving when business responds to their tough response by putting their house in order. The idea is that regulators display a regulatory pyramid such as that in Figure 1. Even if they rarely escalate up through the tougher and tougher responses available in an enforcement pyramid, the display of that possibility can lend the regulator to an image of invincibility, as Hawkins' (1984) research on British water boards shows. Through signalling a willingness to escalate to tougher and tougher sanctions if there is not a positive response from business to cooperative regulation, the regulatory game is channelled down towards the cooperative base of the pyramid. The

paradox of the pyramid is that the tougher the heights to which regulators can escalate, the more cooperative the regulation is likely to be. Lop the top off the pyramid and you risk a highly adversarial, litigious form of regulation, such as one has with the adversarial legalism of much US regulation (Kagan, 1991)

During the early years of the Affirmative Action (Equal Opportunity) Act, it teetered on the edge of this precipice. Incorporating the possibility of ineligibility for Commonwealth government contracts was important in pushing it back from falling off the precipice into adversarial legalism. The Women's Electoral Lobby submission to this review makes this point well. It is also correct to point out that unless this sanction is actually used on occasion, it will lose credibility over time (see Heckman and Wolpin, 1976). Following this argument further, it is important to note that weakening the Affirmative Action Act in the Australian context may bolster willingness, opportunity and necessity for women to seek redress in the courts under sex discrimination legislation.

The Women's Electoral Lobby submission also alerts us to the need for graduation in an enforcement pyramid, though they do not couch their recommendation within this framework of analysis. WEL suggests that "the Government place on notice companies which show inadequate progress in achieving EEO (using the Affirmative Action Agency ratings 1 or 2 out of their 5 point scale) by publicising its intent that if they do not show clear progress within 12 months, it will cease to purchase goods and services from them, and will make them ineligible for access to any government program designed to assist business". There is encouraging evidence in the regulatory literature that this kind of watch list approach is ineffective. Even in the domain of international trade relations, the evidence that trade sanctions work is rather shaky (Chayes and Chayes, 1991, 1995; Hufbauer, Schott and Elliott, 1990). However, there is much stronger evidence that the pyramidal approach to trade sanctions of Section 301 of the US Trade Act has been

quite effective (Bayard and Elliott, 1992). Section 301 sanctions are rarely applied; the power is in “watch listing” of specific states and specific trade practices. Once states have been named and shamed on the watch list for erecting trade barriers, they do tend to work to get off the list. The WEL suggestion is worth serious consideration because it builds on this kind of empirical experience to suggest that Australia have in effect an EEO watch list. Indeed, there are a variety of other kinds of evidence that the power of the fear of sanctions that have never been experienced is greater than the power of sanctions that are experienced - the so-called “Sword of Damocles” effect in regulatory research (Dunford, 1990; Sherman, 1992; Braithwaite, 1997).

WEL also rightly points out that the existing Affirmative Action (Equal Opportunity) Act regulatory pyramid has no peak (beyond naming in parliament) for firms which are in no way dependent on contracts with government. WEL recommends scaled financial penalties under the Act to deal with this problem. Another suggestion is linkage of Affirmative Action (Equal Opportunity) Act and Sex Discrimination Act investigations. This could mean that as a simple administrative matter firms found wanting by investigations under one act are referred to the agency responsible for the other act for priority monitoring under its regime. Parker (forthcoming) has suggested that in Sex Discrimination cases before the courts, the courts should rely on evidence of poor EEO compliance in deciding levels of penalty. The courts could and should do this relying on precedents from other business regulatory arenas (such as Trade Practices Act compliance). If the courts do not choose to take up this suggestion in sex discrimination cases over time, the parliament can decide to instruct them to do so.

Section II: An Enforcement Pyramid in Practice

Levels of the pyramid

The regulatory system that the Affirmative Action Agency has been using over the past decade can best be described as an enforcement pyramid, which has been finely tuned at the lower levels to compensate for the scarcity of enforcement options at the upper levels. At the base of the pyramid (capacitation), the Agency has fostered cooperative relations with the business community through newsletters and seminars aiming to educate and build a regulatory community, joint awards for excellence, help lines, and responsiveness to the needs of business. Once employers failed to comply with the basic requirement of lodging a report, the Agency moved to the second bottom level of the pyramid (dialogue), and in the early days, set in place several tiers of prompting, first gentle reminder letters with offers of assistance, leading to letters that reminded employers of their legal obligations, and eventually letters signalling the intention to name the employer in parliament. The six or seven stages of letter writing, often accompanied by telephone calls and meetings between the Director of the Agency and CEOs, have been important measures in giving employers an opportunity to cooperate with government in implementing EEO policies. These actions were also crucial in gaining compliance rates in the high nineties for report lodgement in the first five years of implementation. Where dialogue broke down between the Agency and the employer, third parties such as EEO consultants or EEO experts from other businesses were introduced in the hope that their persuasiveness would elicit compliant behaviour.

At times, however, this strategy was reserved for use after the Agency had progressed to the level of deterrence. Once named in parliament, third parties were used to encourage non-compliers back into the regulatory community. The success of the strategy was undoubtedly dependent on the degree to which employers felt personal shame or feared "brand damage" as a result of exposure. Initially, naming was a source of pride among those who believed that "The only ones who don't get help these

days are the poor white Anglo-Saxon males" (Braithwaite, 1992). Subsequently, however, the Karpin Report (1995) has linked sound management practice to having effective EEO programs, thereby suggesting that naming says something about business acumen as well as employment policies toward women.

The regulatory system outlined above can best be described as a pyramid without a top, with the highest level of sanctioning having deterrence value only for some of the non-compliers some of the time. The addition of the suspension of government contracts has been an essential element in completing the enforcement pyramid. While the denial of contracts is an option that has not been used to date, this, in itself, is not a problem. A problem exists, however, if employers believe that the government has no intention of using such a sanction because they don't take the legislation seriously.

The fact that the current system fits the model of an enforcement pyramid is not an argument for claiming it to be the best system. Yet in Section I, the enforcement pyramid emerged as the preferred model. This conclusion rests on the following assertions:

- (1) Effective EEO programs are related to well established management practices but involve awareness and insight beyond that offered by internal human resource management programs.
- (2) The implementation of the Affirmative Action legislation is cost effective when it is carried out in the manner expected by legislators and regulators.
- (3) EEO programs require commitment and responsibility on the part of business: They must be owned by business.
- (4) EEO programs must be owned at all levels if they are to achieve their goal of removing discriminatory barriers in the workplace.
- (5) Social incentives are effective in promoting EEO programs.

(6) Operating effective EEO programs requires that others in government and in the business community take such programs seriously.

Data and methods

The validity of these propositions will be examined in turn using a data set of 148 employers chosen from the reporting units that had lodged a report with the Affirmative Action Agency in 1989-90. The sample was stratified on size and the percentage of women in the workforce. Equal representation was given to business units with a workforce in the following bands: (a) 100-499, (b) 500-999 and (c) 1000 or more, and to firms with a female workforce of (a) less than 30%, (b) 30-49%, and (c) 50% or more. Business units were selected from Sydney, Melbourne and Brisbane and their surrounding districts. Equal representation was given to each geographic region when selecting randomly by size and percent of women in the workforce (see Braithwaite, 1992 for further details).

The data for these companies come from three sources:

(a) Contact persons, named on the Affirmative Action Report lodged with the Agency, were interviewed between December 1991 and June 1992 in terms of their attitudes to the Affirmative Action legislation, their efforts to implement the legislation, and their business unit's approach to implementation. Of those approached, 89% agreed to participate.

(b) The data lodged with the Affirmative Action Agency by the sampled companies were collected for 1990-91, 1991-92, and 1992-3. These data provide the basis for calculating a compliance score representing the number of steps implemented by each reporting unit each year. The reports were also assessed on a four point scale representing the progress that had been made toward establishing an effective EEO program in keeping with the

spirit of the legislation. The coding was completed by two independent judges in each year. One of the judges performed the task for all three years. Where disagreements between the judges were encountered, consultation and discussion were used to resolve differences. In the rare cases where agreement could not be reached, scores were averaged across judges. The coding categories appear in Appendix 1. It is of note that compliance, measured as the number of steps undertaken each year and referred to elsewhere as procedural compliance, is consistently and positively correlated with the adoption of EEO initiatives and measures in the workplace, referred to elsewhere as substantive compliance (Braithwaite, 1992). The self-reporting system, while undoubtedly open to some exaggeration and wishful thinking, is not abused to the extent feared by some critics of the legislation.

(c) The overall five point ratings given to reporting units by the Affirmative Action Agency for 1996-97. Data were available for 133 companies. Data were also coded on whether or not the company had been subsumed under a parent report or had closed down completely. In the latter case, rating data for 1994-5 and 1995-96 were collected where available.

Compliance across time for this sample

Before using these data to test some of the assumptions underlying the superiority of an enforcement pyramid model, background information needs to be provided on the degree to which the random sample of companies have complied with the legislation over time.

Table 1: Substantive compliance ratings of randomly selected reporting units over time

Compliance	Research ratings used prior to AAA ratings			AAA
	1990-91	1991-2	1992-3	1996-7
Level 1	17%	12%	9%	1%
Level 2	43%	62%	47%	18%
Level 3	30%	23%	37%	57%
Level 4	10%	3%	7%	22%
Level 5	na	na	na	2%

As can be seen from Table 1, the most notable change for this sample of companies from 1990 to 1993 was at the lowest level. The percentage of companies who completed the form without showing any commitment or understanding of EEO issues dropped steadily. The changes in the upper levels from 1990 to 1993 are less systematic. The impact of the 1992 Effectiveness Review on standards of reporting is difficult to assess, except to note that some effect cannot be ruled out. Notwithstanding this event, the overall pattern confirms the findings that emerge from the Affirmative Action Agency's Annual Reports over this period: Change occurs slowly and in small ways.

Table 2: Correlations among randomly selected companies on substantive compliance over time.

	Pre-AAA 90-91	Pre-AAA 91-92	Pre-AAA 92-93
Pre-AAA 91-92	.52		
Pre-AAA 92-93	.51	.67	
AAA 96-97	.30	.35	.35

No. steps completed in same year	.65	not available	.62
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When we ask if good performers remained at the top overtime while poor performers remained at the bottom, the answer is yes in the short term. The correlations in Table 2 for the years 1991 to 1993 are high. Those doing well in 1990-91 tended to be the same business units doing well in 1991-2 and 1992-3. Similarly, those not complying with the spirit of the legislation in 1991 continued to adopt their postures of resistance to having an EEO program through 1993. Table 2 also shows the strong relationship between undertaking the steps outlined by the legislation and achieving a rating that reflected substantive compliance. By substantive compliance, we mean having an EEO program with some credibility as a mechanism for bringing about gender equity in the workplace (see Appendix 1).

By 1996-7, however, the pattern of consistently high performers and low performers was much weaker. The correlations between the three earlier periods and 1996-7 were between .30 and .35. These findings suggest that companies change their compliance records relative to other companies over longer periods of time. Because the numbers of the coding system used by the Affirmative Action Agency are not directly comparable to those used during the earlier period, it is impossible to claim an improvement in standards over this longer period of time. There has been a dramatic drop, however, in the companies that have made no attempt to deal with EEO issues in the management of their organization.

An analysis of the classification criteria suggests that relative positioning of companies in the pre-AA classification system should be comparable to their positioning

within the current AAA system. The question that can be asked from these data, therefore, is what explains superior performance on EEO implementation over time, and what role can the Affirmative Action Agency play in ensuring these forces are at work. Answers to these questions will be provided within the framework set by the six assertions listed above.

(1) Effective EEO programs are related to well established management practices but involve awareness and insight beyond that offered by internal human resource management programs.

Earlier work on the 1989-90 AWIRS has shown that strong human resource management programs increase the likelihood of a company having introduced EEO initiatives of the kind represented by Peetz in his equity index. Furthermore, compliance with the affirmative action legislation improved the likelihood of a company having gender equity initiatives above and beyond those achievable through human resource management programs.

The following section examines the role played by human resource management and compliance with the steps of the affirmative action legislation in the early 90s in supporting the later development of substantive EEO programs. Specifically, would quality programs have arisen out of human resource management programs without having to attend to the issues raised under the affirmative action legislation?

To answer this question, measures taken of a company's commitment to human resource management in 1991-92 (data source a) and the number of steps ticked in the Affirmative Action Agency Report for 1990-91 prior to interview (data source b) were used to predict substantive compliance in 1992-93 (rated by research team - data source b)

and 1996-97(data source c). All these measures, with the exception of the Affirmative Action Agency's rating for 1997, have been described in detail in Braithwaite (1992). The human resource management measures were based on items from AWIRS 1989-90(Braithwaite, 1993).

A variable that has been consistently important in understanding compliance of both a procedural and substantive kind has been the size of the company. Larger companies have higher compliance rates. Consequently, the following regression analyses always include company size as a control variable. The findings of the regression analyses are reported as standardized beta coefficients. Scoring is such that a positive coefficient means that as the score on the predictor increases the compliance score increases. A negative coefficient means that increases in the predictor bring about a reduction in compliance.

Table 3: Predicting substantive compliance in 1993 and 1997 from investment in human resource management programs and the affirmative action steps completed in 1991 and 1992

Predictors	Substantive compliance 1993 standardized β coefficients			Substantive compliance 1997 standardized β coefficients		
	Size of reporting unit	.33**	.28**	.27**	.24*	.21*
HRM: communications		-.11	-.13		.03	.02
HRM: employee relations		.12	.05		.17	.13
HRM: productivity		.12	.04		-.08	-.12
AAA: steps completed			.44**			.24*
R ²	.11**	.11*	.28**	.05*	.05*	.10*

Change in R ²		.01	.17**		.01	.05*

* significant <.05

** significant <.01

The findings in Table 3 clearly show the importance of the legislation and the completion of the steps delineated in the legislation for the setting up of substantive and sustainable EEO programs. The human resource management programs, identified as critically important in the early years of implementation of the act (Braithwaite, 1993), have not had an enduring effect.

These findings should not be interpreted as dismissing the role that human resource management has played in promoting gender equity. Further analyses reveal that human resource management programs were important in kick-starting EEO programs and promoting a favourable organizational climate for their development. Where human resource management programs were strong, resistance from senior management was less likely to occur and there was a greater understanding of what EEO programs and the legislation had to offer. yet human resource management programs are not enough to set in place a strong gender equity program.

(2) The implementation of the Affirmative Action legislation is cost effective when it is carried out in the manner expected by legislators and regulators.

Many of the concerns about the affirmative action legislation have revolved around implementing the steps and the reporting requirements (Effectiveness review, 1992; submissions for this review). Those opposed to the legislation claim that the demands of the legislation are a waste of time (Braithwaite, 1992), while those committed

to it claim that the self-reporting procedures are abused through company's fabricating their results (Braithwaite, 1993). Earlier in this chapter it was suggested that implementing the legislation is most costly for those companies who have implemented the legislation minimally without trying to use the legislation genuinely to improve gender equity in their workforce. One crude test of this proposition is through an analysis of companies that collapsed over the course of this study (1991 to 1997). Is there any evidence that companies that failed over this six year period were companies that made minimal investment in implementing the legislation? By minimal investment we mean that they fulfilled their reporting requirement to the Affirmative Action Agency as a paper and pencil exercise, ticking their boxes on their annual report, but did not set up an EEO program to address equity issues in any serious way.

Again regression analysis was used to answer this question. As was the case previously, size of company needed to be controlled. Another control variable introduced was whether or not the reporting unit had become a subsidiary of a larger reporting unit over the six year period. The regression analysis can then ask the following question: What explains substantive compliance after we have controlled for company size and the degree to which companies fulfilled their basic reporting requirements to the Agency? - Specifically, are the companies at risk of collapse the ones that fail to follow through on their reporting requirements and set in place some kind of gender equity program?

Table 4: Future collapse as a characteristic of companies that don't carry procedural compliance through to substantive compliance.

Predictors	Substantive compliance 1993 standardized β coefficients
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companies that
collapsed
study 1991-1997

companies may have to commit to taking time out to seriously evaluate their own practices and develop innovative solutions that produce a win-win outcome for both productivity and gender equity. The following regression analyses test two related propositions. First, that support for the legislation and for the ideal of gender equity within the company is important for substantive compliance, that is a strong gender equity program. Second, companies which have less commitment to the legislation and to gender equity will be satisfying requirements for procedural compliance, but not necessarily substantive compliance.

The variables used to assess the company's commitment to the legislation and to gender equity are composites of a number of variables that have been shown to cluster together around six themes (see Braithwaite, 1992 for details):

- (a) Ideological commitment on the part of the EEO contact person which manifests itself in the belief that there is a serious problem of sex discrimination in the workforce, that the legislation is appropriate, fair and effective in dealing with the problem, and will produce good outcomes for business. High scorers on this dimension also believed that the legislation offered benefits to society as a whole, they believed that innovative schemes for tackling discrimination were both desirable and practicable in their companies, and they were confident that they would achieve the goals they had set for their EEO program.
- (b) Dissenting management represented the EEO contact person's perception of how senior management and the CEO regarded the legislation and the issue of gender equity. This dimension was important in so far as the EEO contact person's interest and capacity to bring about organizational change may have been determined by how they saw those senior to themselves.
- (c) Enmeshment in EEO networks within and outside the company was a third factor to emerge in the earlier study (Braithwaite, 1992). It brought together variables concerning

the amount of time the contact person spent on EEO matters, the degree to which women in the company were active and supportive of the EEO program, and the formal and informal links that the contact person had outside with other EEO officers.

(d) Paying lip service to the legislation without committing to fundamental change was manifested in three ways. EEO contact persons reported that EEO had been integrated into daily practices, that the steps of the legislation were both desirable and practicable, but they were not prepared to go further in their commitments.

(e) Union involvement in EEO issues was assessed through the extent to which the EEO contact person saw the union as being supportive of EEO activities and the degree to which the union was involved actively in shaping EEO practices.

(f) The final dimension was called the social bargain because it represented the situation where the EEO contact person and management regarded compliance with the legislation as a responsibility to be law abiding in so far as government was responsive to the needs of the business community. Implementation of the legislation was contingent upon a business view that the government's authority was legitimate.

Six variables representing the above dimensions were used as predictors of procedural compliance (steps completed according to the annual report) and substantive compliance in 1993. Size of company was used as a control variable.

Table 5: Predicting procedural and substantive compliance in 1993 from company responses to the affirmative action legislation

Predictors	Procedural compliance 1993 standardized β coefficients	Substantive compliance ³ 1997 standardized β coefficients
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Size of reporting unit	.02	.24*
Ideological commitment	.26*	.31*
Dissenting management	-.06	-.04
EEO enmeshment	-.02	-.04
Lip service	.26*	.08
Union involvement	.09	-.13
Social bargain	.04	-.05
R ²	.17**	.18**

These findings show that compliance in a substantive sense rests heavily on the shoulders of the EEO contact person and the level of knowledge, commitment and initiative that they bring to the job. In addition, size of the organization matters, with larger workplaces having superior EEO programs. Not surprisingly, having a committed EEO contact person ensures procedural compliance with the legislation as well. What is more important, however, is that paying lip service to the legislation, that is, accepting the legislation as not too intrusive and do-able, predicts compliance with the steps that are mandated, but does not predict the operation of strong EEO programs. These findings describe the situation in 1993. How do these companies perform in 1997?

A second finding of interest in Table 6 is the result that union involvement in 1993 was counterproductive to having strong EEO programs in 1997. This finding needs to be interpreted with due acknowledgement of the state of knowledge of EEO issues in the union movement in the early 90s. Few women were members of unions at that time, interest in the affirmative action legislation among union representatives was rare, and understanding of sex discrimination was at best rudimentary, at worst misguided.

The results in Tables 5 and 6 show that in order for a workplace to deal with issues of discrimination, it must invest in knowledge and understanding of what is involved and what needs to be done. Much of that expertise comes from EEO contacts in other organizations, and that understanding must be shared in the organization at a grass roots level. EEO programs are stronger when they have a broad base of support in the organization and outside.

(7) Social incentives are effective in promoting EEO programs.

The effectiveness of rewards and sanctions among the sample of 170 companies cannot be gauged because there are insufficient cases where they have been used to draw any reasonable conclusions. Of some relevance, however, are the rewards and sanctions that the business community thought would work in improving the quality of EEO programs. The rewards and sanctions fell into three categories: (a) punishment (e.g. penalties, fines, negative publicity, more prescriptive laws), (b) dialogue (e.g. receiving feedback, having more direct contact with the Agency, discussing report with employees) and (c) rewards (e.g. good publicity, becoming a model for industry group, receiving modest financial support for EEO program).

These data provide an opportunity to examine how newsanctions and rewards might be perceived by business. Are there some approaches that resonate with high compliers or are opposed by high compliers? If high compliers see certain rewards and sanctions as unfair or unreasonable, there is little likelihood of gaining support for these measures among the broader regulatory community.

A regression analysis used scores from the EEO contact person on punishment, dialogue and rewards to find out which would be most highly supported, if any, by high compliers. Size of company was entered as a control variable.

Table 7: Predicting substantive compliance in 1993 and 1997 from preferred sanctioning packages

Predictors	Procedural compliance 1993 standardized β coefficients	Substantive compliance 1993 standardized β coefficients	Substantive compliance 1997 standardized β coefficients
Size of reporting unit	.12	.30**	.22*
Punishment	-.12	-.10	.03
Dialogue	.28*	.16	.08
Rewards	.24*	.18*	.13
R ²	.16**	.15**	.07

The findings in Table 8 show that rewards, primarily of a kind that recognize achievement publicly, are welcome and meaningful to those who are taking their responsibilities on gender equity issues seriously. The importance of dialogue among

those who are high on procedural compliance though not necessarily on substantive compliance, provides support for the argument that in 1993 there was considerable ignorance in the business community as to how to implement an EEO program that works. The lack of relationship between the rewards and sanctions considered appropriate in 1992 and EEO performance in 1997 is probably not surprising. The appropriateness of rewards and sanctions are constrained by time.

The failure of any relationship between performance and punishment is also not surprising. When people see ambiguity and have doubts about what they should do to have a strong EEO program, the threat of punishment is seen to be premature. These data, however, should not be used to infer that punishment is unacceptable in this domain in 1997. As understanding and knowledge become widespread, EEO contact persons might be expected to have a more favourable attitude to the use of punishment, after companies have been given a fair go and the support they need to get their houses in order.

Conclusion

The findings presented in section demonstrate that if a company has a strong, sustainable EEO program, it has relied on knowledgeable, committed and effective EEO contact persons with a capacity to build support within the company and with formal and informal links outside. By outside links we mean links to individuals and groups who have EEO knowledge and experience from both government and the private sector. These qualities cannot be satisfactorily provided from a human resource management base alone. The affirmative action legislation has provided the base for much of the sustained EEO activity that we have seen. By the same token, the task is far from complete. Change has taken place very slowly. Many companies still have not built strong EEO programs and have been content to adopt a minimalist approach to matters of gender equity. This

stance is reminiscent of the complacency of Australian business described in the Karpin Report. To the extent that the Affirmative Action Act can be an educative force from outside, it plays a role in helping Australian business be more competitive.

Failure to move companies more rapidly from procedural compliance to substantive compliance appears to be in the interests of no-one. In this respect, adding layers to an enforcement pyramid to encourage companies to prioritize their EEO programs may be useful. Strengthening the upper levels of the pyramid through financial and social sanctions, however, must be accompanied by an equally strong persuasive and educative effort at the base of the pyramid. Round table discussions and company submissions show that a shared understanding of how we implement gender equity in the workplace is a goal that remains beyond our reach. It will only come within reach if it stays on our agenda, within companies, professional associations, policy makers and politicians, the courts, and the community at large. It is difficult to envisage how this can take place without leadership from government.

What then are some of the next steps that might be given priority?

- (1) Educating companies that grudging paper compliance with the Affirmative Action Act may reduce their competitiveness (induce costs without benefits), while genuine commitment to programmatic gender equity will increase competitiveness.
- (2) Educating EEO contact persons that their leadership and commitment is vital to success and convincing them of how critical it is that they do not become alienated from the reform process.
- (3) Convincing EEO contact persons that their long term effectiveness depends on their being enmeshed in networks of EEO advocates both within and outside the firm.
- (4) Educating management on the need to allow their EEO contact persons to network if they want their EEO program to be effective.

- (5) Nurturing professional bodies that promote gender equity programs and deal with compliance issues more generally, and encouraging them to initiate quality assurance programs through peer review.
- (6) The Affirmative Action Agency should continue with its graduated approach to enforcement that keeps punishment in the background. However, its regulatory pyramid needs more of a peak. The power to suspend firms from contracts with government should not only be retained, but should be used occasionally. A formal step of putting firms on notice through a watch list of companies being considered for suspension of government contracts should be introduced. Firms on the watch list should be subject to intensive and regular audits by the Affirmative Action Agency. In sex discrimination cases before the courts, the relevant agencies should be submitting evidence of Affirmative Action Act compliance in address on penalty. When the courts pick up a linkage of affirmative action and sex discrimination both will be delivered more loudly.
- (7) The Affirmative Action Agency should continue to use positive publicity and even expanding it to recognize outstanding accomplishments in the past year.
- (8) Firms should be exempted from reporting requirements if they submit to a biennial EEO audit by an auditing firm accredited by the Affirmative Action Agency and if that firm is able to certify that there had been continuous improvement in EEO performance during the preceding two years.

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