

Board diversity – impact of equal opportunity legislation

Executive summary

Measures designed to achieve board, executive and general employee gender diversity can, if appropriately structured and implemented, be compliant with equal opportunity legislation. However, Federal and state/ territory equal opportunity legislation differs and while any diversity measures may fall within a general exception under Federal or relevant state or territory legislation, a case by case analysis will be required, and specific application for an exemption may be required in some jurisdictions.

What is equal opportunity law?

State and federal legislation

Equal opportunity law is governed by state and federal legislation. This means that, when an organisation is considering its legal obligations, it will need to look both at the federal legislation and also the legislation in the state/s in which the organisation is recruiting or employing.

For the purposes of equal opportunity legislation, 'employment' also means 'engagement' and so includes other arrangements such as independent contractors, consultants and non-executive directors.

When does it apply?

In the context of recruitment, it is generally unlawful to discriminate against someone on the basis of an unlawful ground in:

- the arrangements made for the purpose of determining who should be offered employment (for example, the advertising or recruitment processes undertaken);
- determining who should be offered employment; or
- the terms and conditions on which employment is offered.

Direct and indirect discrimination

Unlawful discrimination can be direct or indirect.

Direct discrimination occurs where a person is treated less favourably based on a prohibited ground of discrimination.

Indirect discrimination occurs where a condition, policy or requirement is imposed with which a person with a specific attribute cannot comply, but with which a substantially higher proportion of people without the attribute can comply.

Unlawful grounds

Under state and federal legislation, it is unlawful for an employer to discriminate against employees based on certain 'prohibited grounds of discrimination'. These grounds vary from jurisdiction to jurisdiction, but generally include:

Freehills

- sex;
- marital status;
- pregnancy or potential pregnancy;
- race;
- religious belief or activity;
- political belief or activity;
- disability or impairment (physical or intellectual);
- employment activity;
- sexual orientation and lawful sexual activity;
- gender history, gender identity, transgender and transsexual status;
- carer status or family responsibilities;
- physical features;
- breastfeeding;
- age;
- association with persons with one of the above characteristics.

Recruiting for diversity

Can our organisation specifically recruit for board diversity?

In a general sense, recruitment activities that specifically target members of a group within the grounds of the relevant discrimination grounds (for example, quotas or specifically seeking women for Board roles) will need to consider whether an exception applies, or a relevant exemption is obtained under discrimination legislation from the relevant body responsible for administering the legislation. If no exemption applies, such activities may breach discrimination legislation.

Other ways to foster diversity

There are other ways in which your organisation could take steps to foster diversity (on boards and within the workforce generally) without being in breach of the relevant equal opportunity legislation, or needing to obtain an exemption.

These include focussing on diversity in the 'candidate pool' by:

- having selection criteria that do not indirectly disadvantage people from certain groups. For example, if selection criteria require candidates to have prior experience as a CEO, this will generally narrow the diversity of applicants while more general criteria focussing on experience may encourage more diversity;
- advertising roles in a way that reaches a broad group of people; and
- making public an organisation's commitment to diversity and equal opportunity.

Are there any exceptions and exemptions available?

There are a number of exceptions to the federal and state equal opportunity legislation, relevant to sex discrimination. Broadly, these exceptions can be grouped into:

- genuine occupational qualification or requirement;
- special measures;
- charities and voluntary bodies.

Freehills

Generally, the types of criteria that attach to 'genuine occupational qualification' (as it relates to sex discrimination) include:

- the duties of the position involve performing in a dramatic performance in a role that is required to be performed by a person of that sex for reasons of authenticity, aesthetics or tradition;
- the duties of the position include conducting clothing or body searches of persons of that sex or to enter a toilet facilities ordinarily used by persons of the same sex;

This exception is narrow and specific and is unlikely to be available in respect of board roles.

Special measures

A number of the equal opportunity laws (including the Federal Sex Discrimination Act) contain 'special measures' exceptions, which allow for some degree of positive discrimination to achieve substantive equality.

In order to meet this exception, the measure must meet the following criteria:

- the person propounding the special measure must be acting reasonably in assessing the need for the special measure; and
- the special measure must only be in place for so long as it is required to achieve its objective of 'substantive equality'.

Such special measures must be monitored to ensure that they continue only to promote their objective, and not go further than reasonably required to do so.

It is important to keep in mind that conduct that is acceptable by operation of an exemption in the Federal Sex Discrimination Act, for example, will not necessarily comply with relevant state legislation. Whilst some states have exceptions in place which reflect to some degree the provisions of the Federal Sex Discrimination Act, this is by no means uniform.

The Federal Sex Discrimination Act contains a 'special measures' exception and the following table summarises the position in states and territories in relation to special measures exceptions and whether organisations will need to apply for an exemption to target women for board and executive positions (this is not required under the Federal legislation).

State/territory	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Special measures exception (gender)?	Yes	No	Yes	Yes	Yes	Yes	No	Yes
Application for exemption required?	No	Yes	No	No	No	Yes*	Yes	No

* The Office of the Anti-Discrimination Commissioner recommends that an exemption is sought in these circumstances

How to apply for a temporary exemption

The specific process for obtaining a temporary exemption, and the maximum period for which an exemption can be granted, differs between jurisdictions.

Generally, an organisation will need to apply in writing to the relevant body in each state or territory. Information about the process for applying for an exemption in other states and territories can be accessed on the web sites of the relevant bodies.

Please refer below to the links to the relevant state and territory bodies if you would like further information.

What are the consequences of a breach of the laws?

How complaints are brought

The equal opportunity laws in each jurisdiction establish a body (such as the Australian Human Rights Commission) to receive complaints as well as a procedure for handling and resolving complaints of discrimination.

Complaints could be brought by an unsuccessful candidate who feels that an organisation has unlawfully discriminated against them in denying their application. In some cases, a special interest group may also bring a complaint on behalf of an individual or group or the relevant equal opportunity commissioner may initiate an enquiry into a particular practice by an organisation.

Complaints procedure

Whilst there are variations between the different states, and at federal level, the emphasis is largely placed on conciliation rather than formal court or tribunal proceedings. The relevant body appoints one of its conciliators to conduct a conciliation at the Commission's offices, ideally to assist the parties reach a negotiated outcome.

Nevertheless, if conciliation of a complaint is unsuccessful, the complainant may be able to commence proceedings in a federal or state court or tribunal.

Potential outcomes

If the court is satisfied that there has been an unlawful discrimination it can make a range of orders as it thinks fit. These orders vary across jurisdictions, but generally include the following:

- directing the employer to not repeat the conduct;
- requiring the employer to do any reasonable act to redress any loss or damage;
- requiring a claimant to be reinstated;
- requiring the employer to pay damages by way of compensation;
- declaring it would be inappropriate for any further action in the matter; and
- orders as to costs.

Also, discrimination issues often attract media interest, meaning there is the additional risk of damage to your organisation's reputation.

Privacy

Federal privacy laws and, specifically, the National Privacy Principles, will generally apply to the collection and maintenance of information provided by candidates to organisations. Organisations will need to comply with their obligations with respect to the collection, use, disclosure and storage of that information.

Useful links

Jurisdiction	Body	Link
---------------------	-------------	-------------

Jurisdiction	Body	Link
Federal	Australian Human Rights Commission (formerly Human Rights and Equal Opportunity Commission)	www.hreoc.gov.au
Australian Capital Territory	ACT Human Rights Commission	http://www.hrc.act.gov.au/
New South Wales	Anti-Discrimination Board	http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_index
Northern Territory	NT Anti-Discrimination Commission	http://www.nt.gov.au/justice/adc/index.htm
Queensland	Anti-Discrimination Commission Queensland	http://www.adcq.qld.gov.au/
South Australia	Equal Opportunity Commission	http://www.eoc.sa.gov.au/
Tasmania	Office of the Anti-Discrimination Commissioner	http://www.antidiscrimination.tas.gov.au/
Victoria	Victorian Equal Opportunity and Human Rights Commission	http://www.humanrightscommission.vic.gov.au/Home.asp
Western Australia	Equal Opportunity Commission	http://www.eoc.wa.gov.au/Index.aspx

Disclaimer: This explanation provides a summary only of the subject matter covered (current to September 2010). The summary is not intended to be nor should it be relied upon as a substitute for legal or other professional advice. Neither ASX nor its advisers assumes a duty of care in making this explanation available to organisations as a guide.