

AGEING – DISCRIMINATION AND WORKERS COMPENSATION

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ABSTRACT

Workers compensation provisions in all States of Australia, save for Queensland, create disincentives for older workers to remain in the workforce because they require payments to cease at around 65 years. Age discrimination legislation in Australia now prevents an employer from requiring a worker to retire at a prescribed age. The workers compensation provisions are out of step with changes in the demography of the workforce and contrary to the spirit of age discrimination laws. There is a need for research into the consequences of the existing workers compensation provisions and the cost to workers compensation systems in the event that reforms are implemented to remove age requirements. This paper explores the interaction of workers compensation provisions and age discrimination legislation, noting the imperatives for workers to remain in the workforce and the need to change in the workers compensation arena.

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- Q My workers compensation was cut off when I turned 65. Is this unlawful discrimination?
- A Not if it was done pursuant to the provisions of the *Workers Compensation and Injury Management Act*. Something done in relation to age discrimination pursuant to the provisions of another Act is exempt.¹

INTRODUCTION

This paper considers the issues relating to age discrimination and workers compensation payments.² Most States and Territories have legislation which either ceases or reduces payments of compensation to injured workers when they reach 65 years of age. Only Queensland has no apparent age limit on the payment of compensation. The importance of the age limit on payment of compensation becomes apparent having regard to the fact, that other than as prescribed by statutes, it is unlawful to discriminate on the grounds of age in a host of employment related areas. This means that the rationale for the limitation of workers compensation payments at age 65 being the link to retirement age is no longer valid. Further, there is now pressure both internally and external to Australia which agitates for workers to remain in the workforce for as long as possible. It follows that there is a mismatch in legislative intent and themes which results in a lack of protection for older workers who remain in the workforce beyond 65 years.

This paper is in two parts. The first part will review the issues in relation to the ageing workforce and then it will consider the data on work injuries and disease to examine the rate of claims having regard to the worker's age. The second part of this paper will review the workers compensation provisions in Australia and consider whether those provisions discriminate against workers on the grounds of age. This section will include reference to the anti-discrimination laws operating in Australia. It will also consider any decided cases which relate to the issues of age discrimination and workers compensation.

PART ONE: SOME HUMAN RESOURCE ISSUES ARISING FROM AN AGEING WORKFORCE

The ageing population is a worldwide phenomenon. The Australian Bureau of Statistics in its review *Australian Social Trends 1999. Population projections: Our Ageing Population* projects that for 1997 to 2051, demographic changes will require considerable policy adjustment and planning.³ This data shows that the number of people over 65 years will more than double in the next half century - by 2031 it is estimated that more than 25% of the Australian population will be aged over 65 years.

¹ *Frequently Asked Questions* Western Australian Equal Opportunity Commission <<http://www.equalopportunity.wa.gov.au/faq.html#age>>.

² This paper was first presented at the 'Ageing Well' Research Network Symposium, City West Function Centre, West Perth, 29-30 SEPTEMBER 2005.

³ *Australian Social Trends 1999: Population projections: our ageing population* (2000) Australian Bureau of Statistics <<http://www.abs.gov.au/Ausstats/abs@.nsf/Lookup/B7760619C3973594CA25699F0005D60F>>.

At the same time there will be a reduction in the relative number of individuals under the age of 65. The fastest rate of growth for this period will be in the number of people aged over 85 years. McDonald observes that:

the potential retirement of so many from Australia's workforce threatens a labour shortage which has been a focus of Government policy over recent years. Policies aimed at retaining mature-age workers (those between 45 and 64) include gradually increasing the age at which women can access the age pension, increasing the minimum age for accessing superannuation benefits, and the introduction of incentives for workers who stay in employment beyond the age pension age through the Pension Bonus Scheme. Some people retire or leave the labour force well before their 60s and this is reflected by lower labour-force participation rates for men and women from their 40s and 50s onwards.⁴

On this basis the question of age and age discrimination is a significant issue. There is compelling evidence that ageing is generally viewed in a negative manner.⁵ Australian and also British research has shown that ageist views exist not only within the general community, but surprisingly also among health care professionals.⁶ The *Age Discrimination Act 2004* (Cth) (ADA) and similar State legislation which will be discussed below, attempts in some way to mediate against these attitudes, however legislation is usually reactive in that it is complaints based and addresses discrimination after the event. It is likely that, given the changing age profile of our population, there is a need to go further than simply legislative measures with strong community and workplace education programs.

This changing demography with increasing numbers of older workers in the workforce brings challenges to employers and industry. Changes can be anticipated in workforce planning, recruitment, selection, training, remuneration, performance measurement, career development, disengagement, occupational health and safety, and equal opportunity.⁷ For example in a report published in June 2005 into Australia's ageing policies, *Ageing and Employment Policies*, the Organisation for Economic Cooperation and Development (OECD) urged that older Australians must be encouraged to work longer. The OECD projects that without older workers remaining in the workforce it will remain stagnant for the next 50 years. The report noted that numbers of people aged between 50 and 65 participating in the labour market was lower in Australia than other OECD countries such as Japan, New

⁴ E. Macdonald, 'Living longer, working longer', *Canberra Times*, 22 January 2005.

⁵ R. Ranjin, 'Discrimination against older workers; psychology and economics' (2005) *Of Working Age Seminar on Age Discrimination in the Workplace* HREOC <http://www.hreoc.gov.au/sex_discrimination/workingage/speeches/ranzjin.html>; Richard Pickersgill, Chris Briggs, Jim Kitay, Shannon O'Keeffe and Alban Gillezeau, 'Productivity of Mature and Older Workers: Employer's Attitudes and Experiences', *ACIRRT Monograph No. 13*, (1996) Sydney. See also L. M. Woolf, 'Ageism' in P. Roberts (ed) *Ageing* (2000).

⁶ National Ageing Research Institute, *The wellness project: promoting older peoples' sexual health* (2002) Victorian Department of Human Services <http://www.mednwh.unimelb.edu.au/downloads/publications_2002/wellness_project.pdf>. See also K. Benjamin and S. Wilson, 'Facts and Misconceptions about Age, Health Status and Employability', *Health and Safety Laboratory Derbyshire Report Number HSL/2005/20* (2005).

⁷ M. Patrickson and L. Hartmann, 'Australia's Ageing Population: Implications for Human Resource Management' (1995) 16 (5) *International Journal of Manpower*, 34-46.

Zealand, Sweden and the United States. The OECD noted that Australia's superannuation guarantee system was one area where Australia was ahead of other nations in trying to provide sufficient incomes to retired people. However, if large numbers of people retired early and took their superannuation as a lump sum rather than as a pension, this could put the scheme in jeopardy. The report recommended that the Australian government should move to facilitate later retirement and remove incentives to early retirement,⁸ remove disability benefits as a pathway to retirement, enhance age discrimination legislation, and strengthen workers' employability by providing greater training and job search assistance to older workers.⁹ The comments made by the OECD have been noted and to some extent echoed by the Australian Treasurer and Prime Minister who have also urged Australians to work longer.¹⁰

The older worker in Australia has been disadvantaged in the labour market, finding it more difficult to gain employment, and access to training and promotion, than comparatively younger people.¹¹ This is due largely to the dramatic restructuring of the labour force in terms of age, gender, hours of work and degree of casualization which occurred during the 1980s. Laczko and Phillipson report that the majority of workforce redundancies were older workers.¹² As to the question of productivity of older workers the World Health Organisation found that older workers have a similar productivity rate to young individuals 'in tasks requiring sustained attention and in tasks in which the older workers are highly experienced'. The weight of evidence indicates that although there are changes in physical, physiological, and psychomotor performance in older workers these are generally not sufficient to preclude performing physical type tasks efficiently, and can be compensated through appropriate job redesign practices.¹³ Recently the Australian National Occupational Health and Safety Commission found that as people grow older and their health status changes, they tend to change to a better suited job or leave the workforce and that as there is an increasing need to retain older workers in the workforce, strategies to minimise age-related problems ideally should begin with young workers and continue throughout their working lives.¹⁴

INJURY FREQUENCY BY REFERENCE TO AGE

⁸ Lift the age for assessment for superannuation to 65 in line with age pensions.

⁹ S. Wright, 'Fed. Age Discrimination and Super Policies need Major Work: OECD', *AAP General News Wire*, June 21 2005, 1 See also V. Marsh 'Australia Urged to Improve Lot of Older Workers', *Financial Times*, (UK), June 23 2005, 3.

¹⁰ T. Colebatch, 'Why Australia Must Do More to Keep Older People Working', *The Age*, 21 June 2005; and 'Work Longer Call', *The Cairns Post*, 13 April 2005.

¹¹ Patrickson and Hartmann, above n 7, 34, and similar findings in J. Heywood, Lok-Sang Ho and Xiangdong Wei, 'The Determinants of Hiring Older Workers: Evidence from Hong Kong', (1999) 52(3) *Industrial & Labor Relations Review*, 444.

¹² E. Laczko and C. Phillipson, *Changing Work and Retirement* (1991) cited in Patrickson and Hartmann, above n 7, 34. Similar findings appear in C. Kossen (2005) 'Barriers to employment for marginalized mature workers' *Of Working Age Seminar on Age Discrimination in the Workplace* HREOC, <http://www.hreoc.gov.au/sex_discrimination/workingage/speeches/kossen.html>.

¹³ World Health Organisation, *Aging and Working Capacity* (1993) WHO Technical Report Series Geneva cited in Patrickson and Hartmann, above n 7, 34.

¹⁴ *Surveillance Alert OHS and the Ageing Workforce* May 2005 NOHSC.

European statistics indicate mixed outcomes linking safety with age. These are consistent with the Australian experience. The World Health Organisation data collected in the early 1990s indicated that in Europe the accident rates for younger staff are comparatively high, largely associated with their relative inexperience. High accident rates for older workers are often the consequence of higher risk assignments.¹⁵ When risk was taken into account in the analysis, the higher accident rates of older workers disappeared. However, older workers often took longer to recover from similar accidents than their younger colleagues. Ageing was also associated with increased vulnerability to problems associated with poor sight and poor hearing and the risk of falling. There is some evidence that higher wage earners are more likely to exit the labour force through retirement whilst lower wage earners are more likely to leave through disability. Higher wage earners are probably able to avoid health deterioration by preventative measures such as better health care and more leisure, whilst lower wage earners may exhaust their 'health capital' by remaining in the workforce. Therefore a person's occupation may have considerable effect on whether they remain in the workforce.¹⁶

In Western Australia in 2002/03, 25-34 year olds accounted for 25.3% of all lost-time claims, with the 34-44 age group accounting for 25% of claims and the 45-54 age group accounting for 20.7% of those claims. The average duration for lost time claims was highest in the age group 45-54 with about 93 days lost per claim. Overall the duration of lost time claims increased with increasing age up until age 54 after which the average duration decreases. In 2002/03 for male workers, the highest incidence (of injury) rate was recorded in the age groups 20-24 and 25-35. For female workers the highest incidence rate was recorded in the age groups 60-64 and 55-59. Data is collected for those workers over 65 years showing them as having the lowest incidence rates of all age groups and a duration rate of only 51.5 days lost, which compare favourably with the 25-35 age group which has a duration rate of 58.1 days lost per claim.¹⁷ Some commentators suggest that there may be an apparent economic advantage for older workers in prolonging the rehabilitation process until an early retirement option becomes accessible.¹⁸ The Australian statistics for the period 2001/02 are similar showing in the most recent national dataset that workers in the 25-34 group account for 27.7% of lost time claims, the 35-44 group 29.4% of claims, the 45-54 group at 29.3% and the over 55 years group being 14.2% of all lost time claims.¹⁹

The impact of injury may be different for women compared with men as strong gender differences exist in pre-injury financial circumstances such as wages and superannuation entitlements. Women and men are not equal in Australian society. Women hold fewer positions of power than men and are lower paid than men and

¹⁵ Ibid.

¹⁶ M.D. Haywood, W. R. Grady, M. A. Hardy and D. Sommers, 'Occupational Influences on Retirement, Disability and Death', (1989) 26(3) *Demography*, 393.

¹⁷ *WorkCover Statistical Report 1999/00 – 2002/03*, 40-42. Between 2001 and 2004 the over 65 years age group suffered 109 reported cases – a very small number of claims. Email from WorkCover, 9 September 2005.

¹⁸ Patrickson and Hartmann, above n 7, 34.

¹⁹ National Occupational Health and Safety Commission, *Compendium of Workers Compensation Statistics Australian 2001-2* December 2003, 34.

have fewer financial resources.²⁰ Women are also less unionised than men are and therefore are less likely to have access to an important source of support and advocacy.²¹ There is evidence that the trend in Australia towards individual employment contracts away from industry-based awards and collective agreements particularly disadvantages specific groups of women.²² Women in poorer paid positions generally have less bargaining power than men who are similarly placed. Women workers in low paid, poorly organised industries are often confined to those minimum rights and even then some women workers may be in so poor a bargaining position as to be afraid to assert those rights.²³

Australia has a highly sex-segregated labour force compared with most OECD countries. This is usually referred to as the 'dual labour market'. Women tend to be concentrated in a narrow range of occupations and industries. This phenomenon has not changed despite the very significant increase in participation of women in the labour force.²⁴ The segregation of women workers leads to exposure to particular occupational health and safety problems. The number of women workers suffering from Repetitive Strain and Overuse Injuries for example, is closely related to the occupations and industries employing large numbers of women workers.²⁵

As noted, once injured, women tend to stay away from work longer than men. Because women engage in more part-time and casual employment than men, the provisions of most compensation Acts which allow for reduction of payments affect women more severely than men.²⁶ As a consequence of all of these issues the majority of women will approach their retirement in comparatively less attractive financial

²⁰ H. Astor and C. Chinkin, *Dispute Resolution in Australia* (1992) 109. Astor and Chinkin properly caution against seeing women as victims in all cases.

²¹ J. Lee, 'Women and Enterprise Bargaining: The corset of the 1990's' (1994) 53(2) *Australian Journal of Public Administration* 189.

²² See for example M. Lee and P. Sheldon, *Workplace Relations* (1997) 32 and above n 15.

²³ J. Conaghan, 'The Invisibility of Women in Labour Law: Gender Neutrality in Model Building' (1986) 14 *International Journal of the Sociology of Law*, 386.

²⁴ NADRAC Discussion Paper, 48-9.

²⁵ National Occupational Health and Safety Commission, *A National Approach to Occupational Health and Safety for Women Workers Australian* (1990) 7.

²⁶ E. Macdonald, 'Living longer, working longer', *Canberra Times*, 22 January 2005: 'In 2003/04 the participation rate for women aged between 45 and 64 was 60 per cent, well above the 36 per cent of 1983-84. In comparison, participation by men decreased slightly over the last two decades in almost all age groups, though the rate for men aged 45-64 remained stable at 77 per cent in 1983-84 and 2003-04. In 2003-04 there were 3.2 million mature-age workers, making up a third of all employed people. About 44 per cent of these were women, the same proportion as that for all employed people. Just over a quarter (26 per cent) of mature-age workers were employed part-time, compared with 23 per cent of employed 25-44-year-olds. Men are generally less likely to work part-time than women, and this is true of mature-age workers. In 2003-04, 11 per cent of mature-age males were employed part-time, compared with 45 per cent of their female counterparts. Both male and female mature-age workers are more likely to work part-time as they approach retirement age, and this appears to be largely by choice. Mature-age part-time workers are less likely to want more hours of work (21 per cent) than part-time workers aged 25-44 (27 per cent). In 2003-04, the proportion of people working part-time who wanted more hours was 24 per cent for 45-54-year-olds, 18 per cent for 55-59-year-olds, and 13 per cent for 60-64-year-olds. See also M. Thornton, 'Job Segregation, Industrialisation and the Non-Discrimination Principle' (1983) *The Journal of Industrial Relation* 38; and R. Owens, 'Women, "Atypical": Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399.

circumstances to men and gain more financially by remaining at work. This may contribute eventually to higher participation rates for older women in the workforce.²⁷

RATES OF AGE DISCRIMINATION

Given the rate at which older workers are injured and the push for older workers to remain in the workforce, the question of the rate of age discrimination requires consideration. Grossman, writing of the United States experience citing the US Equal Employment Opportunity Commission, *Age Discrimination in Employment Act Charges for 2003* (EEOC), posits that if age discrimination had been decreasing throughout the years, even allowing for more people being aware of their right to complain and more older workers proving their mettle to those who question their ability, it would be reasonable to expect the number of complaints to be trending down. Instead, there are more cases. The EEOC logged 19,921 age discrimination complaints in 2002, an increase of 14.5% from the previous year and accounting for 23.6% of all discrimination claims filed with the agency.²⁸ The Western Australian experience is similar. In Western Australia in 2001/02, age discrimination enquiries made up 5.6% of all enquiries. In the following year it was the same proportion but in 2003/04, 6.4% of the enquiries related to age discrimination.²⁹ Of those matters which became complaints in 2001/02, age discrimination matters made up 5.6% of complaints, in 2002/03 it had reduced to 4.4% of complaints but in 2003/03 it had risen to 8.84% of all complaints. The bulk of discrimination enquiries arise out of employment issues, so for the year 2001/02 48.2% of claims related to employment, in 2002/03 it was 53.3% and in 2003/04 it had risen to 54.7%. For the same periods the conversion to complaints was 2001/02 – 42.6%, 2002/03 – 41.6% and 2003/04 – 61.8%. The lodgment of complaints for 2003/04 (a total of 39) was split evenly between men (20) and women (19). Overall women made more complaints of discrimination (63.7% of all complaints in 2003/04) so that the 20 claims lodged by men in relation to age discrimination represented the third most common ground of complaint for men. This data shows, consistent with the United States experience that there is a rise in enquiries and complaints in relation to age discrimination matters. This may be due to increased awareness or it may be due to increased incidence of discriminatory behaviours or increased numbers of older workers in the workforce.

PART TWO: WORKERS COMPENSATION PROVISIONS AND AGE DISCRIMINATION

²⁷ See for example the comments made by S. Hughes 'How women can save for retirement', *The Australian*, 6 March 2004, 41: 'BT Financial Services has conducted a study into Australian women and superannuation. While \$A300,000 is estimated to be the superannuation needed to fund a comfortable retirement, the results show that the average woman will only have around \$A77,000. This is because women tend to be in the workforce for a shorter time than men, and to hold lower-paying positions while they are working. Louise McBride, a specialist in tax-based financing, says that with divorce rates having reached 46%, it can no longer be assumed that women do not need to work and accumulate superannuation. Kath Bowler, CPA Australia's financial planning technical adviser, says younger women are better placed but should still make plans early.'

²⁸ R. J. Grossman, 'The under-reported impact of age discrimination and its threat to business vitality' (2000) 48(1) *Business Horizons* 71.

²⁹ *Report on Conciliation Services: Western Australian Equal Opportunity Commission Annual Report 2004* 16.

In its 2000 report *Age Matters*, HREOC observed that it had received several complaints from workers over the age of 65 who were refused employment by employers citing age limits under workers compensation legislation. It also noted that the Australian Electoral Commission (AEC) found it difficult to employ people over 65 due to the Commonwealth workers compensation laws. As a result, the AEC explored new ways of overcoming the compensation problem as it did not want to waste the skill of experienced polling officials just because they had reached a certain age.³⁰

This part of the paper will review the workers compensation provisions relevant to age in Australia. HREOC did not undertake an extensive review of all provisions, probably because of the similarities across States and Territories. Section 56 of the *Workers Compensation and Injury Management Act 1981* (WA) is typical of most workers compensation provisions in Australian jurisdictions which limit the payment of compensation using age criteria that were noted by HREOC.³¹ Section 56 in general terms directs that the worker's weekly payments will cease at age 65. Section 56 is read with section 198 which provides for certain payments after the worker is aged 64. It is necessary to also consider Schedule 5 of the *Worker's Compensation and Rehabilitation Act 1981* which provides by Clause 1 and Clause 2 that a worker will in some circumstances be entitled to receive payment after attaining the age of 65 where it can be shown to the satisfaction of the employer or in the case of dispute, to the dispute resolution body that he or she would have continued to work after attaining the age of 65, and that payments continue but not beyond the time when he or she attains the age of 70 years. In any event, the payment for the worker in those circumstances is a supplementary amount only, which is a fraction of the payment which the worker would receive prior to reaching 65.³²

The provisions to cease payments at age 65 were introduced at the commencement of the operation of the *Worker's Compensation and Injury Management Act 1981*(WA) in May 1982. The repealed *Worker's Compensation Act 1912 - 81* did not contain a similar provision. When introducing the Bill into the Legislative Assembly in October 1981 the (Coalition) Minister for Labour and Industry, Mr. O'Connor, said:

Members would agree that compensation is intended to assist financially a worker who, through a work caused disability is unable to earn. It is not, and cannot be considered, as a pension in the same nature as Social Services. Worker's Compensation is intended as assistance to enable rehabilitation and re-entry into the workforce to proceed without financial hardship. By its nature, then, Worker's Compensation should cease when the injured worker's earnings would

³⁰ HREOC, *Age Matters; a report on age discrimination*, (2000) 21-22.

³¹ In most States there are a number of means by which compensation payments are limited. For example, in Western Australia payments also cease if they reach a prescribed monetary amount regardless of the worker's age. Queensland also has a similar approach.

³² Workers below the age of 65 at the time of injury are entitled to their average weekly payments for the first 13 weeks and thereafter at the rate of about 85% of the average weekly earnings.

cease through retirement or some other cause. The Bill provides for entitlement to compensation to cease at age 65 years.³³

In reply to the Minister's comments, Howard Olney, QC, who led the debate for the Labor Party in the Legislative Council later that month, said:

The introduction of the 65 year cut-off is something we view with concern. There is a degree of inconsistency in the Government's approach to this aspect. Mr. Dunn recommended a gradual fading down of the prescribed amount after the 65th year to the age of 70. Indeed, the Minister, on page 23 of his speech notes, has said that worker's compensation should cease when injured worker's earnings would cease either through retirement or some other cause. The Government has then selected an arbitrary figure of 65 years, presuming that everyone ceases work at 65. It does not take into account the worker who would work beyond 65 years, nor does it take into account the worker who would have retired below the age of 65.

If we still had the formula for weekly payments which applied under the 1973 amendment to the Act, which was introduced by the Labor Government there would be no need for this retirement age to be introduced, because under that Act weekly payments were fixed at the amount the worker would have earned in his ordinary employment had he not been injured. That had been interpreted whereby if it could be shown at a particular time he would not have been working, he did not receive compensation. By the same token, if it were shown that a man over 65 years, who had been injured would have been working had he not been injured, he was entitled to compensation at a rate equivalent to the wage he would have been earning in the work he would have done.³⁴

Western Australia is not alone in ceasing workers compensation payments on account of age. In Victoria under the *Accident Compensation Act 1985*, Section 93E provides that a worker's payments will cease when the worker has attained retirement age. Retirement age is defined in Section 5 as being the normal retiring age for workers in the occupation for which the worker was employed at the time of the injury or the age of 65 years, whichever is earlier. A worker is not entitled to weekly payments after retirement age. It follows that for most workers, compensation payments in Victoria will cease on attaining 65 years.³⁵ In New South Wales section 52 of the *Workers Compensation Act 1987* provides that a worker's entitlement to weekly compensation continues only until one year after the age at which the worker would become eligible to receive an age pension under the *Social Security Act 1947* (Cth).³⁶

³³ *Debates*, Western Australian Parliament Legislative Assembly, 1 October 1981, 4201 (emphasis added).

³⁴ *Debates*, Western Australian Parliament Legislative Council, 27 October 1981.

³⁵ If a worker is injured within 52 weeks of attaining retirement age, the worker is entitled to weekly payments for not more than 104 weeks (whether consecutive or not) or incapacity for work.

³⁶ The NSW provisions were noted by HREOC in its report *Age Matters: A Report on Age Discrimination* (2000). Other payments such as hospital, medical and rehabilitation costs continue irrespective of age.

In South Australia under section 35 of the *Worker's Rehabilitation and Compensation Act 1986*, payments cease at normal retirement age. Normal retirement age is defined as the date on which the worker attains the normal retiring age for workers engaged in the kind of employment for which the worker's disability arose, or 65 years of age, whichever is the lesser.³⁷ Section 35(5A) states that workers who are within 6 months of retirement age and are still in employment are entitled to weekly payments for a period of up to six months.³⁸ No weekly payments are payable after the worker reaches 70 years of age.³⁹

In Tasmania the *Worker's Compensation Act 1988* provides under section 87(1) for payments of compensation to be ceased when the worker attains the age of 65 years. However there is also provision under section 87(2) for compensation payments to continue beyond the age of 65 years where the worker is able to establish that the terms and conditions of the worker's employment are such as would permit him or her to continue in that employment beyond the age of 65 years. Nevertheless it is a benefit which is only conferred upon a worker who attains the age of 65 years after making an application to the Compensation Tribunal.⁴⁰ In the Northern Territory, section 65 of the *Work Health Act 1986* (NT) provides that payments shall cease when the worker attains the age of 65 years or if the normal retiring age for workers in the industry or occupation in which he or she was employed is greater than 65 years, the normal retirement age for that industry or occupation. It is noteworthy that payments under the *Work Health Act 1986* (NT) are set at only 75% of loss of the worker's earnings, whereas in most States and Territories the rate of weekly payments is usually set at average weekly payments, at least for certain periods. The ACT provisions refer to payments ceasing when the worker reaches 'pension' age or if the injury is within two years of pension age, the payments continue for two years from the date of injury.⁴¹

Only Queensland does not cease payments by reference to age.⁴² Payments continue until either the worker has been in receipt of payments for 5 years, the incapacity from

³⁷ Similar to the New South Wales provisions. Until 1995, the South Australian provisions allowed in some cases for compensation payments to carry on until the worker was aged 70 or the age at which the worker was entitled to an age pension under the *Social Security Act 1947* (Cth). This latter provision contained an inherently discriminatory provision because in some cases payments would cease because the worker had attained the age where he or she was eligible to receive an aged pension under the *Social Security Act 1947* (Cth). Under that Act women were entitled to the payment of aged pension on attaining 60 years. Men, however, would only be entitled to an aged pension at 65 years. Note however that recent amendments to the *Social Security Act 1991* provide that the age distinction between men and women will be 'rectified' so as to provide that women will need to attain the age of 65 years in order to obtain an aged pension. In *Workcover Corporation of South Australia v Piller* [1995] SAWCAT 137 it was held that section 35(5) was invalid as being contrary to the *Sex Discrimination Act* (Cth) on the grounds of differential treatment of woman and men.

³⁸ This does not apply to working directors or to contractors covered by the Act.

³⁹ Other payments such as hospital, medical and rehabilitation costs continue irrespective of age.
⁴⁰ In that sense the provision is discriminatory because it establishes an additional burden upon a worker who has attained 65 years in requiring an application for continuation of payment.

⁴¹ In New Zealand payments cease when the applicant reaches New Zealand Superannuation Qualifying Age (NZSQA), which is currently 65, but was, prior to 1994, 60.

⁴² In the HREOC *Age Matters: A Report on Age Discrimination*, it was suggested that the ACT does not have age criteria but this does not appear to be correct.

injury ceases, the worker reaches the statutory maximum payment⁴³ or the claim is settled by a lump sum payment. Interestingly, the statistical and annual reports of the Queensland workers compensation authority do not provide data on the claim and incident rates by age.⁴⁴ In the HREOC report *Age Matters; A Report on Age Discrimination*, the Commission noted that if older workers were denied compensation payments it would be an unjust anomaly implying that an injury was less devastating for the older worker than the younger. It might also suggest that the older worker should not be in the workforce at all. HREOC also observed that to allow compensation to continue until the worker's death could impose prohibitive costs on compensation schemes. The Commission noted that the issue of resources needs to be addressed in conjunction with any elimination of the age limit.⁴⁵

AGE DISCRIMINATION LAWS IN AUSTRALIA

Age discrimination in employment is unlawful in various States⁴⁶ but was not covered by federal anti-discrimination legislation until 22 June 2004. The *Age Discrimination Act 2004* (Cth) (ADA)⁴⁷ defines age to include an age group. Discrimination on the grounds of age under the ADA need not be linked to a specific age, but can be related to the age group of a person or a characteristic of, or imputed to, that age group.⁴⁸ The objects of the ADA are to raise community awareness that people of all ages have the same fundamental rights and equality before the law, and eliminate discrimination on the basis of age as far as is possible in the areas of public life specified in the Act.⁴⁹ Both direct and indirect discrimination on the grounds of age are covered by the ADA. Direct discrimination occurs when a person receives less favourable treatment or is subjected to some detriment because he or she happens to possess a particular attribute. In this context an example of direct discrimination would be a requirement

⁴³ This provision is similar to the Western Australian provisions which cease payments at the prescribed amount. In Queensland the prescribed amount at the time of writing is \$174,625.

⁴⁴ See <http://www.qcomp.com.au/utilities/publications/htm/index.htm> (accessed 9 September 2005).

⁴⁵ HREOC, above n 30, 22.

⁴⁶ Section 12 of the ADA does not displace or limit the operation of State and Territory laws which can operate concurrently with the ADA. The ADA provides that where complainants have a choice as to jurisdiction they are required to elect whether to make their complaint under federal or State/Territory legislation.

⁴⁷ There were also consequential amendments to the *Workplace Relations Act 1996* (Cth) and the *Human Rights and Equal Opportunity Commission Act*.

⁴⁸ See section 5 of the ADA. The definition of age does not cover the age which might be imputed to a person, however the definition of direct age discrimination includes less favourable treatment because of 'a characteristic that is generally imputed to persons of the age of the aggrieved person'. This is in contrast to the United States *Age Discrimination in Employment Act*. In *Cline v General Dynamics* the Supreme Court majority found that the ADEA's text, structure, purpose, history, and relationship to other federal statutes clearly demonstrate that Congress did not intend the ADEA to prevent an employer from favouring an older employee over a younger one. The particular ADEA provision under which the Cline plaintiffs brought suit, section 623(a)(1), states as follows: "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age." The Supreme Court held that age under this provision of the AEA referred to 'old age' based partly on the fact that the ADEA only operates to protect employees over 40 years in any event. Martin K LaPointe and John G Fogarty Jr., 'A "means to an end": the Cline Court's pragmatic refusal to allow reverse discrimination under the ADEA' (2000) 55(2) *Labor Law Journal* 85.

⁴⁹ Section 3.

that a worker cease employment when he or she has attained the age of 65 years.⁵⁰ Indirect discrimination occurs when it is established that a member of a group is required to comply with a condition in order to obtain some right or benefit and being unable to comply, is able to establish that the condition was unreasonable and that a substantially greater proportion of those falling outside the group are able to comply.⁵¹

Section 16 provides that if an act is done for two or more reasons, then, for the purposes of the ADA, the act is taken to be done for the reason of the age of a person only if one of the reasons is the age of the person; and that reason is the *dominant reason* for the doing of the act. The dominant reason test is a different test to that applied under other federal anti-discrimination laws. Under the other federal anti-discrimination laws if an act is done for two or more reasons and a discriminatory ground is one of those reasons, then the act is done for the discriminatory reason, whether or not it was the dominant or substantial reason for doing the act.⁵² Some commentators regard the test as ‘unique and onerous.’⁵³ Interestingly the ADA provides that a reference to discrimination against a person on the ground of the person’s age will not include a reference to discrimination against a person on the ground of a disability of the person under the *Disability Discrimination Act 1992* (Cth) which suggests that a person should bring any complaint about age as an act distinct from (although possibly related to) others which are attributed to disability discrimination.

The employment-related areas⁵⁴ affected by the ADA include requests for information on which unlawful discrimination might be based, such as asking job applicants of a particular age group questions that others of different age groups are not asked. It is also an offence to publish or display advertisements that indicate an intention to discriminate on the grounds of age. The key provisions make it unlawful to discriminate in recruitment and offers of employment, as well as the actual terms and conditions of employment, access to promotion and training and dismissal or any other detriment.⁵⁵ This does not cover voluntary work or domestic duties performed in private households. It is also unlawful to discriminate in relation to decisions about who can become a partner in a firm, and the terms and conditions upon which a partnership is offered. This also covers denying or limiting access to benefits, expelling a partner or subjecting a partner to any other detriment based on age.⁵⁶ It is unlawful to discriminate on the grounds of age when conferring or withdrawing authorisation or qualifications, and in the terms or conditions on which those

⁵⁰ See *Griffin v Australia Postal Corporation IRC* (980015) 15th September 1998 which discusses the application of age discrimination laws to retirement provisions.

⁵¹ See generally *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 and also the West Australian response in the case of *Kemp v Minister for Education and Others* (1991) EOC 92-340 and sections 14 and 15 of the ADA.

⁵² The ‘dominant reason’ test was removed from the *Racial Discrimination Act* (Cth) in 1990 due to concerns about its affect. Concerns were expressed about the test in RDA in *Ardehirian v Robe River Iron Associates* (1990) EOC 92-299.

⁵³ J. Riley, B. Smith and T. Sarina, ‘Industrial Legislation in 2004’ (2004) 47(2) *Journal of Industrial Relations* 171 at 178.

⁵⁴ The ADA also covers other non-employment related areas such as goods and services and rights in relation to land.

⁵⁵ Section 18 ADA.

⁵⁶ Section 19 ADA.

authorisations or qualifications are granted.⁵⁷ It is unlawful to discriminate on the grounds of age by refusing membership to the organisation covered by the *Workplace Relations Act 1996* (Cth) in admitting a member or in the access to benefits provided by the organisation.⁵⁸ The ADA allows positive discrimination on the basis of age if the thing done provides a bona fide benefit to a person of a particular age. For example, in the case of a benefit given as a senior, the thing done is intended to meet a need that arises out of the particular age of the persons (another instance might be welfare services provided to young homeless people). Alternatively, the thing done may be intended to reduce a disadvantage experienced by persons of a particular age, for example, retrenchment support for older people.

The ADA contains employment-related exemptions which include inherent requirements of the job,⁵⁹ payment of junior pay rates under awards and agreements, discrimination in superannuation arising from the requirements of federal superannuation legislation, and discrimination regarding statistical and actuarial data about age that is used for superannuation purposes, charities, religious and voluntary bodies. Discrimination is possible where charitable benefits are offered to people of a certain age, to protect religious sensitivities, and regarding admission as a member of a voluntary body, and finally in compliance with other federal laws. Such laws will be reviewed two years after this legislation commences.

Importantly section 39 of the ADA does not make unlawful anything done in compliance with a State or Territory Act. In addition it is not unlawful to comply with Commonwealth Acts which contain provisions apparently contrary to the ADA. The Commonwealth workers compensation legislation is specifically referred to in Schedule 1 of the ADA as being exempt from the operations of the ADA.

In Western Australia, section 66V of the *Equal Opportunity Act 1984* (WA), which is typical of provisions relating to age discrimination in other States, prevents discrimination on the grounds of age in relation to the following employment situations:

1. deciding who should get a job; terms or conditions on which the employment is offered;
2. promotion, training, transfer of other benefits;
3. retrenchment or dismissal;

⁵⁷ Section 22 ADA.

⁵⁸ Section 23 ADA.

⁵⁹ See section 18(4) ADA. Taking into account the person's past training, qualifications and experience, relevant to the particular employment and whether the person is already employed by the employer and the person's performance as an employee; and all other relevant factors that it is reasonable to take into account. In relation to similar provisions in *Disability Discrimination Act 1992* (Cth) and the *Industrial Relations Act 1988* (Cth) the High Court has held that the 'inherent requirements' of a particular employment means 'something essential' to, or an 'essential element' of, a particular position. See for example *Qantas Airways Limited v Christie* (1998) 193 CLR 280 (age requirement for airline pilot – held to be an inherent requirement due to international conventions). The question of whether something is an inherent requirement of a particular position is required to be answered with reference to the function which the employee performs as part of the employer's undertaking and by reference to that organisation. *X v Commonwealth* (1999) 200 CLR 177 (the ability to be able to 'bleed safely' as a member of the armed services was an inherent requirement).

4. subjecting an employee to any other detriment (e.g., humiliation or insults because of a person's age).

The *Equal Opportunity Act 1984* (WA) in a manner similar to the ADA and other State and Territory legislation does not make unlawful things done in compliance with State Acts. Therefore any provisions relating to cessation or reduction of workers compensation payments by reference to age in workers compensation legislation around Australia are not unlawful.

It follows that workers compensation laws which contain an age limit are discriminatory (but not unlawful) in a direct sense in three respects. First, payments for compensation are to cease having regard to the attainment of a certain age namely around 65, unlike other age groups. Second, payment to a worker who has attained the age of 65 years is generally less in most States and Territories than the payment to a worker who has not attained 65 years. Third, a worker who has reached an age limit in their particular jurisdiction usually has to apply to a tribunal to seek continuation of payments after 65 and satisfy additional criteria not applied to other younger workers.

CASES INVOLVING WORKERS COMPENSATION AND AGE DISCRIMINATION

There are very few cases which provide a direct overlap of workers compensation and age discrimination legislation. The reason for this may be that no protest as to age discrimination is made if the case involved the operation of provisions with age limits or criteria because workers compensation laws are exempt from the operation of age discrimination laws. In *Burnside Hospital v WorkCover*⁶⁰ the worker was aged 63 and was injured in the course of his employment. Under the *Workers Rehabilitation and Compensation Act 1986* (SA) the employer was pursuant to section 58B to provide suitable employment to the worker if it was reasonably practicable. One of the submissions to the review panel was that because of the worker's age and near retirement it was not reasonably practicable to provide him with suitable work. About this submission the panel said:

The members of the Panel have struggled, individually and collectively, to reach a fair conclusion in this matter. We acknowledge that the employer acted in a commendably supportive way towards the worker, and to other workers, for many years, but we do not think this is relevant to the circumstances before us. We recognise that, when it dismissed the worker, it thought it was doing so in the fairest way possible, made extra payments to him, and thought it had satisfied himself that he would be able to retire, only two years early, without appreciable income loss. We do not think that this is a relevant consideration to the enquiry before us either, and, in any event, elements of the submissions we heard in this regard seemed to smack of impermissible age and/or disability considerations: see, for example, the *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992* of the Commonwealth.⁶¹

⁶⁰ [2004] SAWLRP 8.

⁶¹ At para 27.

The panel was convened to consider whether the employer was in breach of section 58B and if so whether an additional premium should be levied under section 67 of the Act. The panel concluded that such a premium should be levied. In *Fleming v Comcare*⁶² the Administrative Appeals tribunal considered whether it was appropriate to order Comcare to fund a course in psychology as rehabilitation for the applicant who was aged 56 years. In the course of the hearing, evidence of the ability of the worker to obtain work having regard to his age was given. Mr Handley, the Senior Member of the tribunal, noted:

With respect to job opportunities, Professor Anderson reported that ‘overall’, prospects were ‘good’ for psychology students with post-graduate qualifications. Professor Anderson thought that this may not be the case with Mr Fleming as it may take him longer to complete the course. She said in her experience ‘special needs’ students such as Mr Fleming, require more time to complete the course because such students find the ‘demands of a full-time load very stressful’. She acknowledged that employers are not permitted to discriminate regarding age, yet she felt that realistically, an employer may not be willing to train an employee of his age as they may feel they are unlikely to get sufficient benefits from doing so. She stated that ‘some psychologists’ work into their late 60’s and 70’s but they are usually ‘eminent psychologists’ with ‘high profile careers’, and for the most part, they work part time.⁶³

Importantly, Senior Member Handley then went to on conclude;

I would be pessimistic that Mr Fleming would obtain employment in the event of graduation. He would then be in his early 60’s, without practice skills or experience and would have been a compensation recipient for more than 30 years. I would hope that a potential employer would not discriminate against Mr Fleming, however in my experience, having heard many compensation claims over the years issued by injured workers, confirms that there is a reluctance – bordering perhaps on discrimination – against employing persons who have been in receipt of compensation payments. The applicant’s age will also, in all probability, present difficulties in him obtaining employment no less than for the reasons expressed by Professor Anderson that employers could have no confidence – because of the person’s age – that the person would be retained.⁶⁴

CONCLUSIONS AND PREDICTIONS

The Australian workforce is ageing and there are strong internal and external pressures on workers to remain in the workforce for as long as possible. The

⁶² [2004] AATA 1016.

⁶³ At para 76 (Emphasis added).

⁶⁴ At para 127 (Emphasis added).

Australian government is developing policies to encourage workers to remain in the workforce. This includes, among other things, the enactment of the ADA in 2004. Despite the States and Territories legislating to make age discrimination unlawful being enacted for over a decade the rate age discrimination enquiries and complaints are rising.

In most States and Territories, and federally, workers who continue past the age of 65 are treated differently to younger workers. Compensation payments are either ceased or reduced. The workers compensation legislation in Australia is almost uniformly discriminatory against older workers. It is anomalous that on the one hand the direction of policy is towards encouraging older workers to remain in the workforce, but at the same time it fails to provide adequate compensation protection for these workers. The rationale for the imposition of age limits on workers compensation, which was based on workers retiring at age 65, has fallen away since the introduction of age discrimination laws which make it unlawful to set mandatory retirement dates. There is a strong case to be made for the removal of age limits within workers compensation legislation. The Human Rights and Equal Opportunity Commission has warned that resource questions arise if workers compensation age limits are to be removed. In States such as Western Australia and Queensland the argument for removal of age limits is strongest because in these States payments are limited by a maximum weekly payment or a prescribed amount. If the age limit was lifted in Western Australia, workers' payments would eventually cease once they reached the prescribed amount. In Queensland this is already the case as it is the only State which does not set an age limit on weekly payments. In other States and Territories pension based schemes do not set maximum limits on weekly payments, or the limits are substantially higher than in Western Australia and Queensland. In these jurisdictions research is needed to consider the effect of the removal of age limits. Data obtained from the Queensland experience might be a useful guide to the effect of lifting the limits. Again some caution needs to be placed on setting time limits on for how long compensation can be paid, as this might arguably impact more heavily on younger workers. Clearly this is an area for more research.

Governments need to be wary of dragging their feet on this important issue. Given that older workers will be more experienced and familiar with workplace relations, it is likely that if workers compensation laws are not changed to accommodate older workers, other avenues will be explored. This might include a range of industrial options. For example, awards might be varied to include sickness and accident pay for older workers at rates equivalent to the provisions of the respective State workers compensation legislation in the event that the injury or disease was work caused or related. Likewise, certified agreements could contain similar clauses. Alternatively, claims might be made for sickness and accident policies to be taken out for older workers by employers. All these options point to some direct costs to employers which would not be recoverable from insurers as they would be outside the normal workers compensation framework. In addition, the employer might become involved in claims management issues. This might be acceptable to some larger employers but would be an enormous burden on smaller employers. Without changes to the workers compensation legislation, pressures are likely to be placed on employers to meet the shortfall in entitlements. Paradoxically the workers and unions most likely to achieve these industrial outcomes are the stronger construction and building workers who are statistically less likely to work beyond age 65 due to the heavier physical burden of

the work. So-called white-collar unions such as tertiary educators and teachers might also be in the vanguard to bring change as these workers are most likely to work beyond age 65 and currently have strong and articulate union bases. Other occupations such as nursing would be in similar positions, in particular as that profession has already been experiencing problems with an ageing nursing workforce. It follows that as workers become aware of the issues, so too will employers experience pressure for change. Employers, particularly smaller employers, may become a strong lobby force for change in order to protect themselves for increased direct costs. Alternatively those same employers may disguise age discriminatory practices in order to avoid ageing workforce issues.

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