

## CHALLENGING AGE DISCRIMINATION IN AUSTRALIAN WORKPLACES: FROM ANTI-DISCRIMINATION LEGISLATION TO INDUSTRIAL REGULATION

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### I INTRODUCTION

Proscribing age discrimination is not new. Some state and territory legislation dates back almost two decades,<sup>1</sup> and in 2004 the Australian Government enacted specific legislation outlawing age discrimination. The federal *Age Discrimination Act 2004* (Cth) ('*ADA*') has now been operative for seven years. This article argues that anti-discrimination legislation has not been effective in curbing age discrimination against mature age workers in the workplace, and that these workers may be better served by challenging age discrimination in the industrial context under the *Fair Work Act 2009* (Cth) ('*FWA*') instead. This article focuses on the experiences of mature age workers rather than younger workers, as many of the demographic arguments that are creating renewed interest in this topic apply to the former category. These include concerns regarding broader economic and fiscal factors such as an ageing population; skills shortages; government policies to delay access to superannuation and pensions; and the need to maintain a broad tax base of working persons to meet future health and aged care costs.<sup>2</sup> Many of these factors point to the need to extend the participation of mature age workers in paid employment and to minimise workplace discrimination against mature age workers.

This article contends that the operation of the federal *ADA* is impeded not only by the limitations particular to that legislation, some of which have now been dealt with, but more significantly by the same interpretative difficulties and regulatory flaws that plague Australian anti-discrimination laws more generally. These include complex legislative definitions of discrimination, restrictive court interpretations, difficulties with proving a discrimination complaint, the absence of positive equality obligations, and the lack of agency enforcement and

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1 See generally Sol Encel, 'Age Discrimination in Law and in Practice' (2004) 3 *Elder Law Review* 13 <<http://www.austlii.edu.au/au/journals/ElderLawRw/2004/7.html>> in which he documents the introduction of age prohibitions into anti-discrimination legislation in South Australia (1990), Queensland (1992), Western Australia (1993), New South Wales (1994), Northern Territory (1994), Australian Capital Territory (1996), Victoria (1996) and Tasmania (1999).

2 See Department of Treasury (Cth), *Australia to 2050: Future Challenges* (2010).

reporting requirements.<sup>3</sup> The mode of regulation, dependent as it is on individual complaints being made in order for practices or conduct to be challenged, has not brought about the type of social change necessary for discrimination to be adequately addressed. Although one of the clear flaws with the original drafting of the *ADA* has been dealt with, as discussed below, the underlying regulatory weaknesses remain.

Recent changes to industrial regulation potentially offer new options to challenge workplace practices that discriminate on the basis of age. The ‘general protections’ provisions in Part 3-1 of the *FWA* protect employees and prospective employees from any ‘adverse action’ taken against them because they are exercising a workplace right, or because they fall within one of the protected categories, including a broad range of non-discrimination grounds. The ‘general protections’ regime adopts a different approach to that generally used in anti-discrimination legislation on a number of core concerns, such as the way in which the impugned conduct is defined and the onus of proof. The provisions raise their own interpretative difficulties, and this may ultimately have an impact on their effectiveness, depending on how they are resolved. The *FWA* provisions are supported by the enforcement powers of the Fair Work Ombudsman (‘FWO’), which is a significant regulatory development for enforcing workplace anti-discrimination obligations. The *FWA* regime also has the potential to move beyond the reactive complaints based model of anti-discrimination laws, with the FWO vested with the authority to proactively engage with workplace discrimination concerns. This article assesses whether these new measures will be more effective in challenging workplace age discrimination because they address some of the regulatory weaknesses of anti-discrimination legislation.

In 2010 the Australian Government announced, as part of its new Human Rights Framework, that it will be conducting ‘a review of all federal anti-discrimination laws with a view to streamlining this legislation into a single, comprehensive Act. This will enable us to remove unnecessary regulatory overlap and focus on making the system more user friendly’.<sup>4</sup> This means that the *ADA* will become part of a consolidated federal Act. The process of moving towards a single federal anti-discrimination Act could have involved a thorough overhaul of the federal legislation to address some of the broader interpretative, enforcement and structural difficulties evident in Australian anti-discrimination laws. However, the prevailing approach to the consolidation project is one of limited reform, without regard to the broad ranging recommendations made by the 2008 Senate inquiry into the *Sex Discrimination Act 1984* (Cth).<sup>5</sup> It runs the

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3 See Belinda Smith, ‘It’s About Time – For a New Regulatory Approach to Equality’ (2008) 36 *Federal Law Review* 117; Simon Rice, ‘And Which “Equality Act” Would That Be?’ in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010).

4 Robert McClelland, ‘Address to the National Press Club of Australia – Launch of Australia’s Human Rights Framework’ (Speech delivered at the Launch of Australia’s Human Rights Framework, National Press Club of Australia, 21 April 2010).

5 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008).

risk of reducing the final legislative framework to ‘the lowest common denominator.’<sup>6</sup> The consequence of this approach is that the innovations seen in the industrial context are unlikely to feature in the revamped federal anti-discrimination legislation. Nevertheless, the Australian Government has signalled that addressing age discrimination is on the political agenda, evident in its announcement that it will legislate at last to establish a dedicated Age Discrimination Commissioner in the Australian Human Rights Commission (‘AHRC’).<sup>7</sup>

This article is organised as follows. Part II examines the social perceptions of age, which highlight the need for anti-discrimination legislation to work in tandem with other strategies, such as education and awareness raising, to have a long term effect on the way age is perceived. This Part also seeks to gauge the extent of the problem faced by mature age workers and their experience of workplace discrimination. Part III analyses the operation of the *ADA* and the regulatory weaknesses of the current legislative approach. Part IV outlines the alternative approach of using the new provisions of the *FWA* to challenge workplace age discrimination, and the possible advantages of this regulatory model. Part V assesses the potential for the FWO to play a significant role in enforcement and in facilitating proactive measures. The article concludes in Part VI that there is a prospect that this new regime offers better opportunities for challenging workplace age discrimination at both an individual and a systemic level. Whether this can be achieved in practice is still to be seen.

There is no clear delineation in terms of a specific age group when discussing older workers who experience workplace discrimination based on age. In this article the term ‘mature age workers’ is used to signify those workers who fall into the category, but without limiting this to a specified age range. Only the United States’ age discrimination legislation specifies a defined age for seeking redress over workplace discrimination. Age discrimination legislation in Australia takes the more standard approach of using the broad attribute of ‘age,’ and this in turn is defined in some Australian legislation to include ‘age group.’<sup>8</sup> However, it is worth noting that the Australian Bureau of Statistics uses the age group of 45 years or over for its classification of ‘older jobseekers,’<sup>9</sup> and

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6 Rice, above n 3, 211; Belinda Smith, ‘Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law’ (2010) 23 *Australian Journal of Labour Law* 199, 200. See also Discrimination Law Experts’ Roundtable, *Report on Recommendations for a Consolidated Federal Anti-discrimination Law in Australia* (16 February 2011) Australian National University College of Law <<http://law.anu.edu.au/lrsj/DiscriminationExpertsRoundtableReport.pdf>>.

7 Robert McClelland, ‘Tackling Age Discrimination’ (Media Release, 30 September 2010). See Sex and Age Discrimination Legislation Amendment Bill 2010 (Cth); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex and Age Discrimination Legislation Amendment Bill 2010 [Provisions]* (2011).

8 See Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases, and Materials* (Federation Press, 2008) 307.

9 Australian Bureau of Statistics, *1301.0 – Year Book Australia 2005* (2005) <<http://www.abs.gov.au/Ausstats/abs@.nsf/0/D4CD96E96875500DCA256F7200833041?Open>>.

statistics on complaints lodged under the *ADA* show that the peak age grouping for complainants is 45 years or over.<sup>10</sup>

## II AGE BASED DISCRIMINATION

### A Perceptions of Age

Age discrimination has not captured the public consciousness in the same way as areas such as race and sex discrimination.<sup>11</sup> Some commentators have pointed to the ‘perception that age discrimination is an economic labour market issue rather than an equality issue,’ undermining any sense of a rights based approach.<sup>12</sup> Fredman points out that there is ‘little consensus on the meaning of equality in the context of age and how it can be achieved,’<sup>13</sup> and advocates for an equality perspective in this context of ‘facilitat[ing] equal participation of all in society, based on equal concern and respect for the dignity of each individual.’<sup>14</sup> Age also differs from other grounds of discrimination as a particular individual’s age changes naturally over time. As the then Human Rights Commissioner pointed out: ‘[A]ge discrimination is ... a peculiar form of discrimination in that, unless it is addressed at systemic and practical levels, in time the discriminators will soon become the discriminated against.’<sup>15</sup>

There is a certain ambivalence about the concept of age discrimination, which individuals would be reluctant to articulate in other areas of anti-discrimination regulation. One explanation for this ambivalence is that chronological age is a recognised and accepted basis for allocating and defining certain rights and responsibilities, such as voting, consent to medical treatment, marriage, and concessional entitlements. There may be debates about what the right age is for particular purposes, but chronological age does play a role in the way we define life phases of education, work and retirement, despite the fact that the reality is more fluid. Assumptions about needs and capacity are made on the basis of age, and as with other areas of anti-discrimination regulation, there is a need to demarcate the valid from invalid distinctions based on age.<sup>16</sup> This has had consequences for the scope and operation of age discrimination legislation in Australia. It is the most conditional of all the proscribed grounds of discrimination, with the broadest array of exemptions.<sup>17</sup>

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10 See Australian Human Rights Commission, *Annual Report 2009–2010* (2010), 86 <[www.humanrights.gov.au/about/publications/annual\\_reports/2008\\_09-10/](http://www.humanrights.gov.au/about/publications/annual_reports/2008_09-10/)>.

11 See Encel, above n 1, pt B.

12 Colm O’Cinneide, ‘Comparative European Perspectives on Age Discrimination Legislation’ in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue* (Hart Publishing, 2003) 195, 199–200.

13 Sandra Fredman and Sarah Spencer, ‘Introduction’ in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue* (Hart Publishing, 2003) 1, 2.

14 Sandra Fredman, ‘The Age of Equality’ in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue* (Hart Publishing, 2003) 21, 21.

15 Sev Ozdowski, ‘Addressing Age Discrimination’ (2002) 81 *Reform* 11, 14.

16 Fredman, above n 14, 36.

17 *Age Discrimination Act 2004* (Cth) ss 33–43.

In addition, the lack of a single human rights instrument dealing with age discrimination creates an impression that the connection between human rights and age discrimination is less secure than other areas subject to anti-discrimination regulation. Age discrimination legislation in Australia gives effect to a range of obligations under international instruments and other relevant sources.<sup>18</sup> Recently, there has been discussion of whether there is a need for a focussed international instrument covering age discrimination, such as a declaration or convention on the rights of older persons, as a way of providing stronger legal protection.<sup>19</sup> As we have experienced in the disability area, the adoption of a tailored international convention, even after relevant anti-discrimination legislation has existed for some time, can fuel further action and innovation, add additional accountability, and serve to raise the profile of and general awareness on the issue.<sup>20</sup> Continuing concerns regarding an ageing population globally, and greater acceptance of age as a human rights issue, should serve to fuel ongoing interest in a possible international instrument in this area.

Age discrimination has been described as ‘irrational from a business perspective,’<sup>21</sup> and it has been argued that as the ageing of the workforce becomes an increasingly pressing concern ‘[d]iscrimination on the grounds of age is likely to come into sharper focus.’<sup>22</sup> Even the AHRC in its literature uses this dual sales pitch on age discrimination, presenting the tackling of age discrimination and harassment in the workplace as the legal obligation of all employers, but also as ‘good for business.’<sup>23</sup> Underpinning this is a sentiment that the human rights case for age discrimination is not on its own an adequate motivational factor for employers. Instead, the arguments regarding longer life span, shortage of skilled labour, and the value and experience of older workers, are used to fill the gap.

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- 18 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, ATS 23 (entered into force 13 November 1980); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, ATS 4 (entered into force 16 January 1991); *ILO Convention (No 111) Concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, ATS 12 (entered into force 15 June 1974). See also Implementation of the International Plan of Action and Related Activities, GA Res 46/91, UN GAOR, 74<sup>th</sup> plen mtg, UN Doc A/RES/46/91 (16 December 1991); United Nations Second World Assembly on Ageing, *Madrid Political Declaration and International Plan of Action on Ageing* (2002).
- 19 Elizabeth Broderick, ‘Is it Time for a Convention on the Rights of Older People?’ (Speech delivered at the International Federation of Ageing, Melbourne, 6 May 2010) <[http://www.hreoc.gov.au/about/media/speeches/age/2010/20100506\\_rights\\_older.html](http://www.hreoc.gov.au/about/media/speeches/age/2010/20100506_rights_older.html)>.
- 20 Graeme Innes, ‘The Best DisCo in Town: Towards Implementation of the Convention on the Rights of Persons with Disabilities’ (Speech delivered at Sydney, 19 August 2009) <[http://www.hreoc.gov.au/disability\\_rights/speeches/2009/disco.htm](http://www.hreoc.gov.au/disability_rights/speeches/2009/disco.htm)>.
- 21 Lynne Bennington, ‘Prime Age Recruitment: The Challenge for Age Discrimination Legislation’ (2004) 3 *Elder Law Review* 27, 27.
- 22 Encel, above n 1, 14.
- 23 Australian Human Rights Commission, *Mature Workers: Help for Employers* <[http://www.hreoc.gov.au/matureworkers/4\\_help\\_for\\_employers.html](http://www.hreoc.gov.au/matureworkers/4_help_for_employers.html)>.

In early age discrimination cases the human rights and business cases were seen as oppositional. For example, in a 1995 age discrimination case, Qantas called an economist as an expert witness to argue that ‘a preference for younger trainees is properly and reasonably explained as a rational economic strategy’ and that ‘when there are hiring and training investments involved in the employment decision, firms have legitimate economic reasons for preferring to hire applicants who have a longer expected tenure or working life.’<sup>24</sup> Ultimately, the then Equal Opportunity Tribunal of New South Wales found direct discrimination on the basis of age to be substantiated, thereby rejecting the economic rationalism argument in favour of the equal employment opportunity argument.<sup>25</sup> But fifteen years later the landscape is quite different and the equality and economic arguments are much more aligned. There is clearly a need to broaden the overlap between the human rights and the business case perspectives. The crux of the problem is that while the economic arguments based on an ageing population, skill shortages and longer life span are not really disputed, the discriminatory nature of perceptions regarding mature age workers appears to be largely impenetrable.

Anti-discrimination laws deal not only with the relevant ground or attribute, such as sex or age, but also with characteristics appertaining to or generally imputed to a person because of that attribute. This is the heart of what drives age discrimination – not the fact that a person is a particular chronological age per se, but the assumptions and perceptions that prevail in relation to age generally, and particularly those that relate to mature age workers.<sup>26</sup> Common among these is the notion that mature age workers are inflexible, technological luddites, and physically incapable of doing the job, and that an employer will not get a good return on its training investment.<sup>27</sup> In some instances, these assumptions can give rise to discrimination based on age and on disability, but space does not permit a full consideration of this point of intersection in this article.<sup>28</sup>

There is also the common perception that mature age workers have had a ‘fair innings’ and should make way for younger (and by implication more talented) workers. The ‘fair innings’ argument is an unsound generalisation. It does not match the experience of many older women who, because of family or carers responsibilities may have had periods out of paid employment and are yet to experience a long, uninterrupted period of workforce engagement at the crease. Another widespread argument is that institutions need constant renewal and that older workers should make way for younger workers who are the ‘new blood’ of the organisation; what Friedman calls the vampire theory.<sup>29</sup> The reality is that

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24 *Blatchford v Qantas Airways Ltd* (1997) EOC 92-888, 105.

25 Encel, above n 1, pt E.

26 Rees, Lindsay and Rice, above n 8, 308–10.

27 John Spoehr, Kate Barnett and Eric Parnis, ‘Experience Works: The Mature Age Employment Challenge’ (Discussion Paper presented for National Seniors Australia, Australian Institute of Social Research, June 2009) 31.

28 See Rees, Lindsay and Rice, above n 8, 309–10.

29 Lawrence Friedman, ‘Age Discrimination Law: Some Remarks on the American Experience’ in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue* (Hart Publishing, 2003) 175, 191.

‘new blood’ may itself prove to be transitory and require regular infusions, whereas older workers in fact tend to stay longer in the job.<sup>30</sup> There is also the belief that mature age workers are not well suited to the dynamic nature of the modern workplace in which technological innovation and creativity predominate.<sup>31</sup> Finally there is the ‘image’ aspect; that mature age workers, irrespective of their talents, experience and loyalty, are perceived as not a good fit for the ‘image’ an organisation seeks to project. Little will change in Australian workplaces without a direct challenge to these assumptions and perceptions. The publicity surrounding successfully litigated age discrimination complaints has a part to play in challenging these assumptions, but must work in conjunction with other proactive strategies.

## B Mapping the Experience of Discrimination

A difficulty with the area of anti-discrimination regulation generally is getting an accurate picture of the extent of the discrimination experienced. Annual statistics from anti-discrimination agencies reveal the number of individual complaints lodged each year with such agencies, and these figures can be broken down to indicate which complaints are based on specific grounds. A modest number of age discrimination complaints are dealt with by human rights agencies each year. Annual Reports of the New South Wales Anti-Discrimination Board since age discrimination coverage was introduced in 1994 show that complaints of age discrimination have been relatively steady.<sup>32</sup> Apart from an early spike in complaints in the first two years after the provisions were introduced, the share of age discrimination complaints has been roughly in the range of four to eight per cent of all complaints lodged. Since 2004, when the federal legislation commenced, there has been a modest increase in the number of complaints lodged each year under the *ADA*, but as a percentage of total complaints this figure has remained on average six to seven per cent of all complaints lodged under federal human rights legislation.<sup>33</sup> However, statistics on complaints lodged represent only those people that have the fortitude and resources to pursue an individual complaint. As many commentators have suggested, complainants under anti-discrimination laws have little prior experience with the legal system, limited resources, and are hampered by their inability to afford legal representation.<sup>34</sup> Hence the data do not provide a

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30 Margaret Patrickson and Rob Ranzijn, ‘Workforce Ageing: The Challenge for 21<sup>st</sup> Century Management’ (2005) 10 *International Journal of Organisational Behaviour* 729, 735.

31 *Ibid* 732–3.

32 See the Anti-Discrimination Board of New South Wales Annual Reports for the period 1995–2010 <[http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_annual\\_report\\_index](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_index)>.

33 See Australian Human Rights Commission, *Annual Report, 2005-2006; 2006-2007; 2007-2008; 2008-2009; 2009-2010* <[http://www.hreoc.gov.au/about/publications/annual\\_reports/index.html](http://www.hreoc.gov.au/about/publications/annual_reports/index.html)>.

34 Beth Gaze and Rosemary Hunter, ‘Access to Justice for Discrimination Complainants: Courts and Legal Representation’ (2009) 32 *University of New South Wales Law Journal* 699, 699. See also Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’ (2009) 31 *Sydney Law Review* 579.

complete picture of the extent of discrimination on the basis of age, and it is difficult to gauge the degree of under-reporting.

Other estimates of the extent of age discrimination come from the material contained in numerous government reports and other publications dealing with the topic. This terrain has been well traversed, with numerous reports on this subject over the last two decades. Many state anti-discrimination bodies have conducted reviews in this area, and generally found strong evidence of age discrimination and little change in community attitudes.<sup>35</sup> The Human Rights and Equal Opportunity Commission undertook its own study in this area and its Report in 2000 noted the prevalence of discriminatory treatment of mature age workers, despite the existence of legislative coverage in state jurisdictions and limited federal coverage in this area for some time.<sup>36</sup> A number of federal government committee reports<sup>37</sup> over the years have highlighted the negative consequences of age discrimination against mature age workers, as have state government bodies.<sup>38</sup> Business and trade unions have also joined forces on this issue,<sup>39</sup> and an economic analysis of the area has been undertaken by the Productivity Commission.<sup>40</sup> The discussion paper prepared for National Seniors Australia by the Australian Institute for Social Research in 2009 found in relation to mature age workers that ‘few are able to work as long as they expect or need to work.’<sup>41</sup> The AHRC has recently released a report on age discrimination with a view to exposing the hidden barriers for mature age workers.<sup>42</sup>

In 2004 Encel summarised what he saw as the salient points regarding age discrimination, and pointed to a high degree of consensus from the official reports and academic studies in the area, both national and international.<sup>43</sup> Many of these factors are still relevant:

- Employers continue to discriminate against older workers, in spite of the fact that they generally recognise the value of experience, reliability and stability;
- Employers consider that older workers are more difficult to train or retrain, and that it is not worth their while to invest in training;

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35 New South Wales Anti-Discrimination Board, *Discrimination and Age: A Report of the Anti-Discrimination Board in Accordance with Section 119(a) of the Anti-Discrimination Act 1977* (1980); New South Wales Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999); Equal Opportunity Commission of Victoria, *Age Limits: Report by the Equal Opportunity Commissions of Victoria, South Australia and Western Australia* (2001).

36 Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination* (2000) 11.

37 See, eg, House of Representative Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007).

38 Solomon Encel, *Over the Hill or Flying High? An Analysis of Age Discrimination Complaints in NSW* (Social Policy Research Centre, 1998); NSW Committee on Ageing, *Too Young to Go: Mature Age Unemployment and Early Retirement in NSW* (2001). See also Tania Drabsch, ‘Ageing in Australia’ (Research Paper No 12/04, Parliamentary Library, Parliament of NSW, 2004).

39 Business Council of Australia, *Age Can Work: A Business Guide for Supporting Older Workers* (2003).

40 Productivity Commission, *Economic Implications of an Ageing Australia* (2005).

41 Spoehr, Barnett and Parnis, above n 27, 5.

42 Australian Human Rights Commission, *Age Discrimination – Exposing the Hidden Barriers for Mature Age Workers* (2010).

43 Encel, above n 1, pt D.

- Legislation to ban age discrimination has had little effect on improving job opportunities for older workers;
- There is a disproportionately high concentration of older workers among the long-term unemployed;
- Downsizing affects older workers disproportionately;
- Recruitment agencies are reluctant to accept older workers as clients, and correspondingly reluctant to recommend them to employers; and
- There are relatively few success stories that give favourable accounts of positive policies by employers.<sup>44</sup>

Another indicator of the extent of age discrimination is the evidence derived from empirical research on the experiences of mature age workers in terms of lack of employment opportunities, unemployment and underemployment. A number of studies show that mature age workers usually experience longer periods of unemployment, and that once mature age workers lose their jobs it is often very difficult for them to secure new employment.<sup>45</sup> The Australian Bureau of Statistics data on discouraged job seekers shows that in September 2009, 55 per cent of those discouraged from seeking work were aged 55 and over, and the main reason given for not actively looking for work was that they were either told or perceived that they were considered ‘too old’ by employers.<sup>46</sup> Even where mature age workers remain in employment they point to a lack of equal access to training and promotion, and feel vulnerable to retrenchment.<sup>47</sup> Finally, it is important when considering participation figures of mature age workers to look closely at what might otherwise appear to be a ‘choice’ to retire or to enter into alternative forms of participation such as self-employment or consulting, where that ‘choice’ is predicated on a lack of other genuine options.

### III THE OPERATION OF THE *ADA*

#### A The Standard Regulatory Approach

Age discrimination legislation utilises the traditional model of regulation found in other discrimination statutes such as the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). Generally, this entails proscribing direct and indirect discrimination based on the ground of age, or because of characteristics appertaining to or imputed on the basis of age.<sup>48</sup> The proscription applies to a range of areas of public life, including work, education, provision of goods and services, and access to premises and accommodation.<sup>49</sup> Certain conduct may be excused under the legislative scheme because it comes

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44 Ibid.

45 Spoehr, Barnett and Parnis, above n 27, 10–11.

46 Australian Bureau of Statistics, *6220.0 – Persons Not in the Labour Force* (2011). <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6220.0>>.

47 Australian Human Rights Commission, above n 42, 25–7.

48 *Age Discrimination Act 2004* (Cth) ss 14–15.

49 *Age Discrimination Act 2004* (Cth) ss 18–32.

within the terms of an exemption.<sup>50</sup> The regulatory model also relies on individuals who have experienced age discrimination to pursue complaints against named respondents, and uses conciliation as a first resort method of dispute resolution. In the event complaints are not resolved through conciliation, individuals can choose to pursue a remedy from a court or tribunal upon proof of their claim. Most jurisdictions have separate provisions dealing with compulsory retirement, although the provisions are not uniform, and industrial laws have generally dealt with discriminatory dismissals.

Apart from the long standing age discrimination legislation in the United States, which operates exclusively in relation to the employment of older workers, most national and international jurisdictions use an unrestricted concept of age that applies in all areas.<sup>51</sup> The inquiry conducted by the New South Wales Law Reform Commission into the operation of the *Anti-Discrimination Act 1977* (NSW) came to the view that it might be appropriate to limit the coverage of age discrimination to the area of employment,<sup>52</sup> but this recommendation has not been implemented. Much of the complexity of age discrimination legislation, and the need for various exemptions, comes from the coverage of the provision of goods and services, where age is regarded as a relevant criterion for determining the terms and conditions for accessing various services and benefits.

It took until 2004 for specific age discrimination legislation to be introduced at the federal level in Australia. The area was not entirely without federal coverage until that point, as employment related age discrimination could be the subject of a complaint under the then *Human Rights and Equal Opportunity Act 1986* (Cth). A number of age discrimination complaints have been dealt with through this process, particularly in relation to the armed forces.<sup>53</sup> However, under this arrangement once a complaint has been investigated and conciliated the only sanction available is a report to the Commonwealth Attorney-General, without the capacity for an aggrieved person to pursue a complaint to an enforceable outcome through the courts.

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50 *Age Discrimination Act 2004* (Cth) ss 33–47.

51 See *The Age Discrimination in Employment Act of 1967*, 29 USC §§ 621–34 (West 2006); Friedman, above n 29.

52 New South Wales Law Reform Commission, above n 35.

53 Human Rights and Equal Opportunity Commission, 'Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Compulsory Age Retirement' (Report No 1, 1996); 'Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Redundancy Arrangements and Age Discrimination' (Report No 2, 1997); 'Report of Inquiry into complaints of Discrimination in Employment and Occupation: Age Discrimination in Trade Union Membership' (Report No 4, 1997); 'Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Age Discrimination in the Australian Defence Force' (Report No 8, 2000); 'Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Discrimination on the Ground of Age' (Report No 11, 2000); 'Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Report of an Inquiry into a Complaint by Mr Andrew Hamilton of Age Discrimination in the Australian Defence Force' (Report No 14, 2002); 'Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Report of an Inquiry into a Complaint by Mr Kenneth Douglas of Age Discrimination in the Australian Defence Force' (Report No 26, 2004).

## B Features of the *ADA*

From the outset, the *ADA* was intended as a form of ‘soft touch’ regulation designed to raise awareness, rather than imposing strict sanctions for non-compliance. The legislation has been described by the AHRC as ‘intended to act as a catalyst for attitudinal change.’<sup>54</sup> This approach is premised on the notion that most discrimination is of an unconscious and unintentional nature and that once the offending conduct is highlighted, changes to hearts and minds will naturally follow; an ideal that has been subject to much criticism.<sup>55</sup>

In keeping with this ideal, until 2009 the *ADA* established a higher threshold for proving age discrimination complaints than exists under any other federal anti-discrimination legislation. For a complaint of age discrimination to be made out, a complainant had to show that not only was age, or a characteristic imputed or appertaining to age, a reason for the alleged discriminatory conduct, but that it was the dominant reason.<sup>56</sup> A similar requirement was removed in respect of race from the *Racial Discrimination Act 1975* (Cth) in 1990. The Human Rights and Equal Opportunity Commission identified this as a shortcoming with the Age Discrimination Bill 2003 (Cth) when it was first proposed, and recommended that the standard approach to proving discrimination be adopted.<sup>57</sup> The Senate Legal and Constitutional Legislation Committee that examined the Bill was of the view that ‘a more stringent test than other anti-discrimination law signals to the community the lesser importance of age discrimination,’<sup>58</sup> and recommended changes to this approach. However, the government justified proceeding with the more stringent requirement on the basis that it was a way to avoid ‘unnecessary costs and inflexibility on employers acting in good faith.’<sup>59</sup> The consequence of this was that the evidential burden on complainants was more onerous, and this can be seen as operating as both a disincentive to lodging complaints and a contributing factor to the lack of successfully litigated complaints under this legislation. The dominant purpose test requirement was removed only in 2009, to bring the *ADA* into line with other federal anti-discrimination legislation.<sup>60</sup>

An additional factor in conveying a reduced status for age discrimination in the federal context has been the lack of a dedicated Commissioner for the area. The role of Commissioner responsible for age discrimination has been allocated as an additional responsibility to other office holders of the AHRC, and has most recently been the responsibility of the Sex Discrimination Commissioner.

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54 Australian Human Rights Commission, *Federal Discrimination Law* (31 March 2010) [2.1.1] <<http://www.hreoc.gov.au/legal/FDL/index.html>>.

55 See Margaret Thornton, *The Liberal Promise: Anti-discrimination Legislation in Australia* (Oxford University Press, 1990).

56 *Age Discrimination Act 2004* (Cth) s 16.

57 Human Rights and Equal Opportunity Commission, Submission No 9 to the Commonwealth of Australia, *Senate Legal and Constitutional Legislation Committee on the Age Discrimination Bill 2003*, 3 September 2003, 3.

58 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Age Discrimination Bill 2003* (2003) 7.

59 Explanatory Memorandum, Age Discrimination Bill 2003 (Cth) 43.

60 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

Legislation has been introduced into the federal Parliament to establish a dedicated Age Discrimination Commissioner in the AHRC, a reform recently endorsed by the Senate Legal and Constitutional Legislation Committee in its deliberation on the Bill.<sup>61</sup>

A further limiting feature of the *ADA* is the breadth and range of defences and exemptions, which have been described as ‘problematic’.<sup>62</sup> Division 4 of the Act provides general exemptions for positive discrimination, charities, religious bodies, voluntary bodies, superannuation, insurance and credit based on actuarial data, superannuation legislation, taxation laws, pensions, allowances and related benefits, Commonwealth employment programs, health, and migration and citizenship.<sup>63</sup> There is a specific exemption for direct compliance with other laws,<sup>64</sup> and a long list of Acts are included in Schedule 1, including industrial laws and Australian Defence Force legislation and subsidiary instruments. The effect these exemptions have on lowering the level of protection for age discrimination compared with other federal anti-discrimination legislation was raised in the recent Senate Committee deliberations on the Bill to establish the office of the Age Discrimination Commissioner.<sup>65</sup>

Particularly relevant to the employment context is the inherent requirements defence, which enables an employer to refuse to hire or to legitimately terminate, the employment of a person who is not able to perform the inherent requirements of the position in question. This defence is framed in the *ADA* without reference to the obligation to make reasonable accommodations that is present in other anti-discrimination legislation. The High Court had the opportunity to consider the scope of this defence in the high profile age discrimination case of *Qantas Airways Ltd v Christie*,<sup>66</sup> although the relevant legislation considered in that case was industrial law rather than anti-discrimination legislation. The Court adopted a broad interpretation of inherent requirements in that case that extended well beyond the physical capacity to undertake the job in question. This interpretation has significantly limited the operation of the defence, and influenced the scope of the defence beyond age discrimination in other areas such as disability discrimination.<sup>67</sup>

### C Pursing Age Discrimination Complaints

The area of age discrimination is not immune from the problems that have plagued Australian anti-discrimination law more generally that make it difficult

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61 See Senate Legal and Constitutional Affairs Legislation Committee, above n 7.

62 Joanna Hemingway, *Roadmap to ADA: Age Discrimination Act 2004* (2007) Human Rights and Equal Opportunity Commission, 25 <[http://www.hreoc.gov.au/age/roadmap\\_ADA.pdf](http://www.hreoc.gov.au/age/roadmap_ADA.pdf)>.

63 *Age Discrimination Act 2004* (Cth) ss 33–43.

64 *Age Discrimination Act 2004* (Cth) s 39.

65 Senate Legal and Constitutional Affairs Legislation Committee, above n 7, [3.60]–[3.61].

66 (1988) 193 CLR 280. See generally Therese MacDermott, ‘Age Discrimination and Employment Law: The Sky’s the Limit’ (1998) 11 *Australian Journal of Labour Law* 144.

67 Margaret Thornton, ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15(1) *Australian Journal of Human Rights* 1.

for complainants to successfully pursue age discrimination complaints. In the case of direct discrimination there is the ongoing quest to find a suitable comparator, real or hypothetical, in order to establish less favourable treatment, rather than being able to rely simply on the conduct being unfavourable. In addition, the onus of proof remains with the complainant to establish all aspects of a direct discrimination complaint, including proving that the reason the action was taken was on the basis of a proscribed ground. This obstacle is out of kilter with international developments in anti-discrimination laws, which generally shift the onus to the respondent once the complainant has made out a prima facie case.<sup>68</sup> Recently, a United Nations treaty committee called upon Australia to rectify this problem in Australian anti-discrimination law in the context of race.<sup>69</sup> Indirect discrimination also carries with it its own hurdles, particularly in terms of substantiating the disparate impact aspect and satisfying the notion of unreasonableness.<sup>70</sup> Finally, the individual orientation of discrimination laws, including age discrimination laws, is an ongoing shortcoming in terms of tackling the systemic nature of discrimination.<sup>71</sup> As a consequence few age discrimination complaints are pursued to the point of litigation in the federal courts, and have been generally unsuccessful.<sup>72</sup>

#### D Conciliation

The area is also affected by the private and confidential nature of conciliation. A significant proportion of all discrimination complaints are resolved each year through conciliation conducted by human rights agencies. This is explicable from a number of different perspectives. First, conciliation may be able to deal with the issue effectively and appropriately, for example where it resolves a misunderstanding or clarifies an entitlement. In this situation conciliation can offer speedy and cost effective resolution of the complaint. It can also offer a degree of comfort to complainants who prefer the confidentiality that conciliation provides, although this comes at a price in terms of public awareness and group empowerment.<sup>73</sup> But not all discrimination arises out of a simple misunderstanding or misinterpretation, and other explanations for resolution through conciliation are more nuanced. In some circumstances complainants have no option but to agree to settle for whatever they can obtain through conciliation, since they do not have the resources or capacity to pursue their

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68 Rees, Lindsay and Rice, above n 8, 146–58; Allen, above n 34.

69 Committee on the Elimination of All Forms of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 77<sup>th</sup> sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010).

70 Allen, above n 34, 582–3.

71 Senate Standing Committee on Legal and Constitutional Affairs, above n 5, ch 6.

72 Elizabeth Broderick, 'Mature Age Worker – You'll Be One Sooner Than You Think!' (Speech delivered at the Australian Institute of Family Studies, Melbourne, 6 August 2009) <[http://www.hreoc.gov.au/about/media/speeches/age/2009/20090806\\_mature\\_age.html](http://www.hreoc.gov.au/about/media/speeches/age/2009/20090806_mature_age.html)>.

73 Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *The Modern Law Review* 733, 760.

complaints through the tribunal or court system.<sup>74</sup> Although conciliators can attempt to create a level playing field during the conciliation process, the pressure to settle and the lack of capacity to take the matter further are difficult factors to counter.<sup>75</sup> This is particularly important in the federal jurisdiction where the expense of Federal Court proceedings, and the risk of a costs order against complainants if they are unsuccessful, operate as serious disincentives to litigation under anti-discrimination legislation.<sup>76</sup> This suggests that the discrimination disputes that are dealt with by tribunals and courts tend to be either disputes of an intractable nature that are not amenable to amicable settlement or complaints raising difficult interpretative issues that need a determinative resolution beyond the confines of conciliation. However, both types of disputes require access to substantial private or public resources for litigation to be pursued.

The AHRC has observed that ‘complaints made under the *ADA* have a high rate of resolution through conciliation.’<sup>77</sup> It is important to consider the reasons that lie behind this observation. A simplistic argument is that the type of issues that people complain about in the case of age are straight forward, and can therefore be resolved readily through conciliation. Alternatively, it may be the resources point coming into play; that complainants in these circumstances cannot afford to pursue matters any further. In the case of age discrimination litigation in the United States, Friedman has commented that such litigation is seen as the domain of white middle class men, with the resources to pursue a litigation strategy.<sup>78</sup> It may also be that the difficulties of proof, exacerbated by the former dominant purpose requirement, present such a hurdle for complainants wishing to take complaints that they are more willing to settle for what they can get in conciliation. Others may wish to avoid the publicity or the potential career damage of pursuing the matter further.

## E Decided Cases

Although there are few reported cases under the *ADA*,<sup>79</sup> and none that have been successfully litigated in the federal courts to date, there are a number of decisions by state anti-discrimination tribunals and industrial tribunals where

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74 Dominique Allen, ‘Behind the Conciliation Doors Settling Discrimination Complaints in Victoria’ (2009) 18 *Griffith Law Review* 778; Gaze and Hunter, above n 34.

75 Mary-Jane Ierodiaconou, ‘Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?’ (Working Paper No 32, Centre for Employment and Labour Relations Law, January 2005), 28.

76 Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Federation Press, 2010) 234–43.

77 Human Rights and Equal Opportunity Commission, Submission to Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, Inquiry into Older People and the Law, 15 December 2006, [6.18]

78 Fredman, above n 14, 52; Friedman, above n 29, 182.

79 See, eg, *Thompson v Big Bert Pty Ltd* (2007) 168 IR 309; *O’Brien v Crouch* [2007] FMCA 1976 (14 November 2007); *Boyn v Schering Pty Ltd* (2008) 103 ALD 108; *Keech v State of Western Australia Metropolitan Health Service* [2010] FCA 1332 (2 December 2010).

workplace age discrimination complaints have been substantiated. The legislative requirement for pursuing workplace age discrimination complaints under the various state anti-discrimination laws, under the *ADA*, and under industrial laws differ in a number of respects. This article does not purport to examine all the technicalities of pursuing a complaint under each of these regimes. Where a workplace complaint has been pursued under the *ADA*, the case can shed light on the operation of that Act. But the discussion of some of the decided cases below is also used for a wider purpose: as a way of highlighting the perceptions regarding age that underpin the complaints made, as well as some of the difficulties encountered by individuals in pursuing their complaints.

In *Thompson v Big Bert Pty Ltd*<sup>80</sup> a 37 year old woman who worked as a bar attendant alleged that her employer had discriminated against her on the basis of both her age and her sex in allocating shifts. Her evidence included that the owner of the hotel had been heard to say that he wanted to replace older staff with 'young glamours.' Her complaint was that she had been both directly and indirectly discriminated against on the basis of her age in breach of the *ADA*. In terms of direct discrimination she alleged that it was a characteristic appertaining generally to, or generally imputed to, persons in their late 30s that 'they are less attractive and less glamorous than persons in a younger age group'. As far as her claim of indirect discrimination was concerned, she alleged that it was a requirement that 'in order to continue in her usual shifts she look attractive and/or glamorous and young'. She also claimed that the shift arrangements were altered in a way that made her childcare arrangements difficult and that this was part of a concerted effort to force her to leave that employment. The Court found that the applicant had failed 'by a considerable margin' to establish that her age was the reason for the change in shift, and it pointed to a number of other factors relating to the organisation of the business and personal conflict between the applicant and her manager. No direct consideration was given in the decision to the question of whether it was appropriate to characterise the age based imputation in the way the applicant presented it, or how an appropriate comparison would be made under the *ADA*.

The problem of proof has also manifested itself in some of the cases under state anti-discrimination legislation. In *Mooney v Commissioner of Police (No 2)* the New South Wales Administrative Decisions Tribunal found that comments relating to the applicant's age were merely made in passing and that 'no inference can be drawn that a decision was made or not made, on the basis of Mr Mooney's age.'<sup>81</sup> It also found that comments made by other staff members alluding to when Mr Mooney was going to retire 'were not comments which could give rise to an inference that Mr Mooney's age was a factor in any treatment of him by the respondent.'<sup>82</sup> As a consequence, the applicant failed to

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80 (2007) 168 IR 309.

81 [2003] NSWADT 107, [50].

82 Ibid [51].

establish the causal link between his alleged treatment and his age, and the complaint was dismissed.

An example of a case where the evidential burden was satisfied is the Queensland case of *Skinner and Smith v Lightning Bolt Co Pty Ltd*<sup>83</sup> where the termination of two older and experienced storemen on the basis of a purported downturn in trade was found to breach the relevant state age discrimination provisions. Evidence was presented that the positions were filled two weeks later by younger men. The Tribunal rejected the employer's argument that it wanted to employ workers who were ambitious to advance beyond store work, and who would form part of a trained pool of workers who could be promoted to other areas of the business as the need arose. Instead, the Tribunal found that a substantial reason for the dismissal of the two men was their age, although it reached this decision without any reference to the age of the complainants.<sup>84</sup> Again, the question of what comparison is necessary to establish the discrimination was not directly addressed in this case. This case does however challenge the common perception that a worker, simply because of her or his age, is no longer suitable for a particular position that an employer presents as having been 'modernised' and therefore requiring a different skills set.

Similar strategies involving moving a mature age worker out of a long standing position following the 'professionalisation' of the role have been successfully challenged under unfair dismissal laws. For example, in the Western Australian case of *Richards v Webforge Australia Pty Ltd*,<sup>85</sup> the applicant was identified by management as no longer suitable for the role of stock controller, which it now regarded as requiring a professional qualification, although he had been performing that role for many of his 24 years of service. The Commission concluded that it was not a genuine redundancy situation, and that the applicant was never given the chance to prove his capacity to perform the new role. The Commission found that, although the role had been enlarged, at its core it was basically the same role. This led the Commission to conclude that the applicant's age was the underlying motivation for 'modernising' the position, and as the decision was tainted with what it referred to as 'ageism,' the termination was in the circumstances 'harsh' within the terms of the unfair dismissal scheme.

Another common assumption that has been challenged through the case law is that an age limit can be justified on the basis of the extensive physical training required before an employee is ready to undertake a particular role. A common argument is that employers are justified in these circumstances in limiting applicants to a younger cohort to enable them to recoup the investment made in training and on the basis that younger people learn more easily and are in a better physical condition for training.<sup>86</sup> The Federal Court has rejected such arguments in the context of defence force personnel, and quashed the notion that age can be

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83 [2001] QADT 12. See also *Lightning Bolt Co Pty Ltd v Skinner* [2002] QCA 518.

84 See Rees, Lindsay and Rice, above n 8, 326.

85 [2004] WAIRC 13207; *Webforge Australia Pty Ltd v Richards* [2005] WAIRC 01264.

86 Spoehr, Barnett and Parnis, above n 27.

used as a proxy for assessing fitness, ability to be trained and capacity for learning.<sup>87</sup>

Finally, there is the important ‘image’ aspect; the assumption that a mature age worker is not a good fit for the image that the employer wishes to project of its business. This approach was successfully challenged in the Virgin Blue litigation,<sup>88</sup> in which female applicants for cabin crew positions alleged both direct and indirect discrimination based on age, where no applicants over 35 years of age were recruited. The respondent disputed the claim of age discrimination and maintained that the recruitment was undertaken on its behalf by recruitment agents on the basis of behavioral competencies that assessed team work, communication skills, and the ability to have ‘fun’ and make it ‘fun’ for the customer. This emphasis on ‘fun’ resulted in the recruiters, who themselves were mostly young, excluding all the older applicants for the positions. Although the complainants secured a favourable outcome in this case, the decision at first instance and on appeal fails to deal with the difficult interpretative questions of how to make the appropriate comparison for the purpose of direct discrimination and how to define the membership of the group subject to the alleged discriminatory conduct.<sup>89</sup> But the case is an important example of the gendered nature of some forms of age discrimination, although there are only a few examples of women bringing age discrimination cases in the reported decisions. Some women may have had their complaints resolved through conciliation, but it is also possible that women may not feel that it is worth challenging the systemic discrimination they experience, or that they lack the resources to do so, or both.

The cases set out above are a small sample of the type of workplace age discrimination cases that have been litigated, and the underlying perceptions about mature age workers that they entail. Many more complaints will have been resolved by conciliation, or abandoned in the event they are not settled through conciliation. A number of these cases highlight the difficulties complainants face in proving the discrimination. Even with the dominant purpose test now gone under the *ADA*, complainants are still likely to struggle to establish the link between the adverse treatment and their age, as they do with other grounds of discrimination, given the absence of a ‘shifting onus’ that applies in overseas jurisdictions.<sup>90</sup> The operation of the *ADA* is also reliant on individuals, such as those referred to in the cases above, to have the capacity and perseverance to pursue discrimination complaints. This dependence on individual complainants has been consistently identified as a deficiency in the regulatory model that should be rectified.<sup>91</sup> The burden on individual complainants could be

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87 *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* [1998] FCA 1295 (16 October 1998); *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* (1999) 167 ALR 268.

88 *Hopper v Virgin Blue Airline Pty Ltd* [2005] ADTQ 28; *Virgin Blue Airline Pty Ltd v Hopper* [2007] QSC 75. See generally Juliet Bourke, ‘Are We Having Fun Yet: Age Discrimination in Recruitment’ (Australian Equal Opportunity Alert, Issue 153, 17 October 2005).

89 Rees, Lindsay and Rice, above n 8, 326.

90 *Ibid.*

91 See Senate Standing Committee on Legal and Constitutional Affairs, above n 5.

ameliorated by enabling an agency to assist individuals with their complaints or initiate its own complaints. The absence of agency enforcement undermines the effectiveness of Australian anti-discrimination laws.<sup>92</sup> Many of these deficiencies are not particular to the *ADA*, and affect other anti-discrimination regimes. However, a number of these deficiencies have been addressed under the *FWA*. The reverse onus and the enforcement role of the FWO are two such examples. Part IV of this article explores the alternative approach of using the *FWA* provisions and the potential advantages this presents to challenging workplace age discrimination.

## IV THE *FWA* ALTERNATIVE

### A Utilising the *FWA*

The ‘general protections’ provisions of the *FWA* offer both new hope and new challenges in dealing with workplace discrimination complaints. The statutory scheme now extends beyond discriminatory dismissals, which constituted unlawful terminations under previous legislative schemes,<sup>93</sup> to cover other types of discriminatory conduct, such as discrimination in the terms and conditions of continuing employment, or the opportunities for promotion or selection for retrenchment. Coverage now also extends to prospective employees, another important development in dealing with workplace discrimination. This allows the decision not to engage a worker to be challenged under industrial legislation, where previously this could only be dealt with under anti-discrimination laws.

The principal provision relevant to workplace discrimination complaints prohibits an employer from taking adverse action against an employee or prospective employee because of that person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.<sup>94</sup> The concept of ‘adverse action’ is defined to include dismissing an employee, injuring him or her in their employment, altering their position to their prejudice, or discriminating between that employee and other employees. In the case of a prospective employee it covers a refusal to employ the person or discriminating against that person in the terms or conditions on which the employment is offered.<sup>95</sup>

The ‘general protections’ regime brings with it a number of important changes that impact on the manner in which workplace discrimination complaints are pursued and can be used to the advantage of individuals pursuing age

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92 Belinda Smith, ‘Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work–Family Conflict’ (2006) 28 *Sydney Law Review* 689; Smith, above n 3.

93 See, eg, the former *Workplace Relations Act 1996* (Cth) s 170CK.

94 *Fair Work Act 2009* (Cth) s 351.

95 *Fair Work Act 2009* (Cth) s 342.

discrimination complaints. Amongst these is the pivotal question of who bears the onus of proof in relation to establishing a discrimination complaint. Another important feature is the ability to bring a complaint in the industrial arena, and the costs implications of using that jurisdiction. The availability of injunctive relief in a broad range of areas is also a feature of the scheme. This can facilitate the preservation of the employment relationship while a complaint is being determined.

## B Coverage of Discriminatory Conduct

While it is possible to point to a number of innovations under the *FWA* scheme that hold the promise of more effective remedies for workplace discrimination complaints generally, there are a number of interpretative issues that will need to be resolved for the scheme to fulfil its potential. First is the question of the discriminatory conduct that is covered by these provisions. Secondly, there is the question of the interaction between the *FWA* coverage of discrimination and the existing anti-discrimination regimes. The latter question arises as a consequence of the provisions in the *FWA* scheme that seek to exempt conduct that is not ‘unlawful’ under anti-discrimination legislation in force in the place where the impugned action took place. Uncertainty over these two questions may impede the ability of the *FWA* to deal with a broad range of discriminatory conduct.<sup>96</sup>

On the first question of coverage, the terminology of the *FWA* is not straight forward. Section 351 of the Act does not use the words ‘discriminating’ or ‘discrimination’. What it proscribes is the taking of ‘adverse action’ against a person who is an employee, or prospective employee, of the employer because of a proscribed attribute such as age. Section 342 sets out the meaning of what is ‘adverse action’. This extends to an employer dismissing the employee, injuring the employee in his or her employment, altering the position of the employee to the employee’s prejudice or discriminating between the employee and other employees of the employer. In the case of a prospective employee, the adverse action may take the form of a refusal to employ or discrimination in the terms and conditions of any offer of employment. The concept of adverse action is potentially much wider than the understanding of the term ‘discriminate’ from anti-discrimination legislation. The provisions avoid the limitations that arise from the use of a formal distinction between the concepts of direct and indirect discrimination in delineating the proscribed conduct.<sup>97</sup> Arguably a breach could

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96 See Simon Rice and Cameron Roles, ‘It’s a Discrimination Law Julia, But Not As We Know It: Part 3-1 of the Fair Work Act’ (2010) 21 *Economic and Labour Relations Review* 13; Carol Andrades, ‘Intersections between “General Protections” under the *Fair Work Act 2009* (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries’ (Working Paper No 47, Centre for Employment and Labour Relations Law, University of Melbourne, December 2009); Gillian Walker, ‘The Fair Work Act’s anti-discrimination provisions: extending protection or misguided duplication?’ (2009) 32(4) *Bulletin (Law Society of SA)* 21.

97 Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3; Smith, above n 6.

be established by simply proving the casual link between the proscribed ground or attribute and the impugned conduct alleged to constitute the adverse action, without any need to refer to comparative treatment that is a defining feature of many anti-discrimination regimes.<sup>98</sup> A breach of section 351 could be established if any ‘adverse action’ is taken, such as altering an employee’s position to his or her prejudice because of age. The High Court has interpreted the concept of ‘altering an employee’s position to his or her prejudice’ broadly in the freedom of association context, to cover ‘any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.’<sup>99</sup> It extends to such action as an email that causes employees to be concerned about their job security, even where this was not acted on.<sup>100</sup>

The Australian Government was alerted to the interpretative problems that the breadth of the provisions might present when the AHRC addressed this issue in its submission on the Fair Work Bill 2008 (Cth).<sup>101</sup> Although the AHRC recommended that the terminology be clarified, the Australian Government appears to have ignored this advice, and therefore the choice of language appears to be deliberate. Another factor to take into account is the approach taken by the FWO to its legislative mandate to deal with workplace discrimination. It has identified the provisions as broad in coverage, addressing direct, indirect and systemic discrimination.<sup>102</sup> The FWO is currently exercising its regulatory functions in accordance with a broad interpretation of the coverage of the provisions.

The second interpretative difficulty is the exclusion of actions that are ‘not unlawful under any anti-discrimination law in force in the place where the action is taken.’<sup>103</sup> This exclusion is open to both a broad and a narrow interpretation, with each interpretation having the potential to impact significantly on the scope of the provisions. A narrow interpretation would exclude only conduct that was the subject of a specific exemption under other state, territory or federal discrimination laws. Smith presumes this was intended ‘to ensure these new protections did not make unlawful special or positive measures taken to address inequality that were permitted under existing legislation.’<sup>104</sup> Stewart also sees the exclusion as ‘limited to measures such as affirmative action programs or temporary exemptions.’<sup>105</sup> These views accord with the original wording of the exclusion in section 351 of the Fair Work Bill 2008 (Cth), which only excluded action that was ‘authorised by, or under, a State or Territory anti-discrimination law.’ Rice and Roles argue that the phrase ‘not unlawful’ captures a broader

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98 Rice and Roles, above n 96.

99 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1, 18. See also *BHP Iron Ore Pty Ltd v Australian Workers’ Union* (2000) 97 IR 266, 275.

100 *Community and Public Sector Union v Telstra Corporation Ltd* [2001] 107 FCR 93.

101 Australian Human Rights Commission, Submission No 137 to Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Fair Work Bill 2008*, 26 August 2009.

102 Fair Work Ombudsman, *Guidance Note No 6 – Discrimination Policy* (2009).

103 *Fair Work Act 2009* (Cth) s 351(2)(a).

104 Smith, above n 6, 11.

105 Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 2<sup>nd</sup> ed, 2009) [14.16].

range of conduct and has the potential to limit complainants to the rights they already had under existing anti-discrimination laws.<sup>106</sup> The Supplementary Explanatory Memorandum contains a purported explanation for the change in wording to the current exclusion which suggests that it is limited to conduct where there is a relevant statutory exemption:

Paragraph 351(2)(a) of the Bill (together with paragraph 342(3)(a)), currently provide that action is not discriminatory if it is authorised by or under a Commonwealth, State or Territory anti-discrimination law. This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word 'authorised' may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorise the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.<sup>107</sup>

It is unlikely that either of these two interpretative issues can be resolved in a conclusive manner until there is some deliberation by superior courts on these issues. The general approach of the higher courts to interpreting anti-discrimination legislation has been criticised as undermining the remedial purpose of that legislation.<sup>108</sup> There is scope for a generous interpretation if the courts give the provisions the beneficial interpretation that such remedial legislation warrants. But this has not always transpired in superior courts' interpretations of anti-discrimination legislation. As has been observed by Kirby J, following a number of spirited dissents on the interpretation of anti-discrimination legislation:

The field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief originally granted to them.<sup>109</sup>

### C Proving a Causal Link under the *FWA*

The adverse action proscribed by the *FWA* must have occurred because of one of the prohibited grounds. As with most current anti-discrimination legislation, this link is satisfied where it is *a* reason for the action taken, and it need not be the predominant or substantial reason for the conduct in question.<sup>110</sup> However, in contrast to anti-discrimination legislation, this process is assisted by the reverse onus that applies to applications lodged under the 'general protections' provisions.<sup>111</sup> This has the effect that a rebuttable presumption

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106 Rice and Roles, above n 96.

107 Supplementary Explanatory Memorandum, Fair Work Bill 2008, [220].

108 Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' [2002] 26 *Melbourne University Law Review* 325; Belinda Smith, 'From *Wardley* to *Purvis* - How Far has Australian Anti-discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3; Thornton, above n 67; Rice above n 3.

109 *X v Commonwealth of Australia* (1999) 200 CLR 177, 211.

110 *Fair Work Act 2009* (Cth) s 360.

111 *Fair Work Act 2009* (Cth) s 361.

applies: where there is an allegation that a person has taken action for a particular reason, this is assumed to be the case unless that person proves otherwise. The only circumstance where this will not apply is in the case of an application for an injunction. This reverse onus provision offers a clear advantage over pursuing an age discrimination complaint under anti-discrimination legislation.

The Federal Court of Australia has had a number of opportunities to consider the manner in which the reverse onus operates under the *FWA*, although not as yet with respect to an application alleging discrimination. *Barclay v Board of Bendigo Regional Institute of Technical and Further Education*<sup>112</sup> dealt with the question of whether certain adverse action, admitted by the employer, was taken against an employee for one or more of the reasons proscribed in Divisions 3 and 4 of Part 3-1 of the *FWA*. The central issue was whether a causal nexus existed between the employee's union membership and industrial activities and the employer's admitted actions. In the proceedings at first instance the Federal Court found that the employer 'provided convincing and credible explanations of why it was that she took the steps that she did,' unconnected with the employee's union membership or activities.<sup>113</sup> However this was reversed by a majority on appeal.<sup>114</sup> The appeal decision emphasises the need to ascertain the 'real reason' for the conduct,<sup>115</sup> noting that 'adverse action will not be excused simply because its perpetrator held a benevolent intent' nor will the objective connection between the employer's action and the attribute in question be ignored.<sup>116</sup> The appeal court concluded that the employer failed to show that the real reason for the actions lay outside the ambit of the provisions.

The case of *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)*<sup>117</sup> shows circumstances in which the employer rebutted the presumption. In these proceedings Ms Jones sought relief for adverse action taken or proposed to be taken against her by her employer, which she alleged was because of her role and participation in negotiations for an enterprise agreement. The applicant was successful in obtaining an interlocutory injunction to prevent any action being taken against her until a full hearing of the matter,<sup>118</sup> but did not succeed on the substantive claim. The Court regarded Ms Jones as bearing the onus of proving that she had a workplace right, but once she established this fact the onus of proof shifted to the employer to demonstrate that the adverse action was not for a proscribed reason. The Court found that the actions in question were in no way related to any workplace rights of Ms Jones and concluded that her role in the enterprise bargaining negotiations were 'completely irrelevant' to the employer's

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112 [2010] FCA 284 (25 March 2010).

113 *Ibid.*, [54].

114 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011).

115 See *Bowling v General Motors-Holdens Pty Ltd* (1976) 12 ALR 605 (Mason J).

116 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011) [28].

117 [2010] FCA 399 (29 April 2010).

118 *Jones v Queensland Tertiary Admissions Centre Ltd* [2009] FCA 1382 (25 November 2009).

reasons for acting as it did. A number of other recent applications, where the operation of the reverse onus has been an issue, have also been unsuccessful.<sup>119</sup>

As is apparent from these cases, the reverse onus is not a panacea for proving discrimination. Nevertheless a reverse onus provision offers a clear advantage over pursuing a complaint under anti-discrimination legislation because it requires the employer to articulate the reason for the impugned conduct. The actual motivation for acting in a particular way is something known, by and large, only to that employer. Under anti-discrimination law it is usually up to the complainant, in establishing direct discrimination, to prove the causal link by adducing evidence to substantiate an alleged reason or to establish the facts from which an inference can be drawn.<sup>120</sup> The reverse onus mandates greater input by the employer in this process, and will assist individuals in making out a workplace age discrimination complaint.

### D Procedural Aspects

In addition to examining the substantive provisions, it is necessary to make a realistic assessment of some of the procedural aspects of the *FWA* scheme. While the shifting burden of proof is likely to be significant for those who claim to have experienced discrimination, other developments such as the ability to obtain injunctive relief, may not be a practical option for many complainants bringing workplace discrimination complaints. First, in the few cases to date where interim injunctions have been sought, discrimination has not featured as the basis for the alleged breaches. Most of the cases have involved freedom of association breaches. Secondly, in *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)*, mentioned above, where interim relief was obtained, the proceedings were brought by the Chief Executive Officer of the respondent organisation, presumably with more resources to pursue such a remedy compared to others who might pursue a workplace discrimination complaint. Thirdly, there is the issue of support for and advice on bringing an application for interim relief. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Phillips Engineering Aus Pty Ltd*,<sup>121</sup> the application for interim relief was brought by the union on behalf of the employee affected by the alleged adverse action, and the union succeeded in obtaining an interlocutory order to reinstate the employee, pending a full hearing of the matter. Without the financial resources to fund the application, or the involvement of a union to bring the proceedings on behalf of an employee, it is doubtful that many individual complainants would be in a position to pursue such an option. Finally, many discrimination complaints are lodged after the employment relationship has come to an end. In these circumstances it would usually be too late to contemplate interlocutory relief of this kind.

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119 See *Hammond v Boutique Kitchens & Joinery Pty Ltd* [2010] FMCA 622 (16 August 2010); *Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd* [2010] FCA 770 (23 July 2010).

120 See Allen, above n 34.

121 [2010] FCA 611 (15 June 2010).

Another important consideration is the process for resolving these complaints. While the *FWA* allows complaints to be lodged initially with Fair Work Australia, in the event that some form of dispute resolution does not resolve the issues or is not agreed to by the parties, the jurisdiction to determine complaints lies with the Federal Court or the Federal Magistrates Court, as it does with complaints under federal anti-discrimination legislation. The dispute resolution mechanisms available to Fair Work Australia, in the absence of the parties' agreement, can only be utilised where it is alleged there has been a dismissal in contravention of the general protections provisions of the Act. In the case of a dismissal claim, where the matter is not resolved by conciliation or some other method of dispute resolution, Fair Work Australia issues a certificate to that effect, and a person wishing to pursue the complaint must commence court proceedings within 14 days. If a person has not been dismissed, but alleges that there has been some other contravention of the general protections provisions of the Act, the utilisation of the institutional dispute resolution mechanisms is dependent on the agreement of both parties. If no such agreement is forthcoming, then the applicant can make an application directly to the Federal Court or Federal Magistrates Court to deal with the matter.

One way to look at this aspect of the scheme is to say that a person seeking to pursue an age discrimination complaint under the *FWA* provisions has had the opportunity to at least commence their action in the industrial sphere, even if the matter does not remain there for long. There is the possibility that many complaints may settle through conciliation, and even where this is not mandatory, both complainant and employer may be willing to participate in the process. Fair Work Australia, and its predecessor institutions, have had a long history of dealing with disputes by conciliation, and can bring these skills to bear on workplace discrimination complaints that come for dispute resolution as a precursor to Federal Court proceedings being instituted. Another perceived advantage of the industrial arena is that Fair Work Australia may offer speedier dispute resolution at this initial stage than anti-discrimination agencies, due at least in part to its more extensive resources and the staff it can dedicate to this process. The potential consequences of an established breach of the adverse action provisions, discussed below, may also encourage employers to be more conciliatory in their approach to reaching a suitable resolution. Finally, there is the question of costs. In pursuing a 'general protections' application each party is liable for their own costs, with limited powers to order the payment of another party's costs for unreasonable behaviour.<sup>122</sup> This is clearly an improvement on the position of complainants pursuing a claim under federal anti-discrimination laws in the federal courts, where the general rule that 'costs follow the event' applies and operates as a disincentive to pursuing such a claim.<sup>123</sup>

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122 *Fair Work Act 2009* (Cth) s 570.

123 See Gaze and Hunter, above n 76; Discrimination Law Experts' Roundtable, above n 6.

### E Consequences of a Breach of the Adverse Action Provisions

One factor to consider with age discrimination complaints is whether the consequence for an employer if a breach is established will have an effect on the manner in which complaints are handled. Awards of compensatory damages have generally been low in federal discrimination cases that have been litigated. This affects not only the response of the employer, but also whether it is worthwhile for individuals to subject themselves to the stress and risks of making a complaint and to pursuing that complaint through legal proceedings.<sup>124</sup> The fact that the *FWA* regime imposes potential fines of up to \$6600 for an individual and up to \$33 000 for corporations for each breach established, may bring more pressure to bear on employers to take complaints seriously and to attempt to reach an appropriate settlement of a complaint where possible. That there is also the prospect of compensatory damages that are not capped in the same way as they are in the federal unfair dismissal context is unlikely to be as significant, as this simply replicates the consequences for an established breach of federal anti-discrimination legislation. It is also likely that complainants bringing a discrimination complaint under these provisions will face the same pressure to settle as in discrimination proceedings generally, as few can afford to undertake costly and time consuming litigation.<sup>125</sup> However, one factor that may make a significant difference to the balance of power and resources in this situation is the possibility that the FWO may take up the complaint on behalf of an individual, as discussed below.

## V THE ENFORCEMENT ROLE OF THE FWO

An important feature of the *FWA* is its continuation of the enhanced role for state actors in the enforcement of Australian workplace laws.<sup>126</sup> Under the *FWA*, the legislative mandate of the FWO extends to monitoring compliance, and inquiring into, investigating and taking enforcement action in relation to workplace discrimination complaints.<sup>127</sup> This is an innovative arrangement, as in the past the Workplace Ombudsman was not able to investigate discrimination complaints, and could only refer such complaints on to federal or state anti-discrimination bodies. The FWO has now set up a specialist anti-discrimination unit within its complex investigations and innovation branch to deal with such complaints. In its first year of operation the FWO received 804 discrimination complaints, of which age discrimination complaints represented seven per

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124 See Beth Gaze, 'The *Sex Discrimination Act* after 25 Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914, 919–20.

125 See Gaze and Hunter, above n 34.

126 Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306.

127 *Fair Work Act 2009* (Cth) s 682.

cent.<sup>128</sup> In this timeframe, the FWO case-managed 300 workplace discrimination complaints and recommended three matters for litigation. The agency has launched a number of prosecutions against employers alleging unlawful discrimination.<sup>129</sup>

The capacity to bring proceedings alleging a contravention of the provisions is not limited to the person affected by the alleged contravention, but specifically includes Fair Work Inspectors. Reliance on individuals to identify and to muster the resources to challenge the discriminatory nature of their treatment weakens the enforcement structures of anti-discrimination regimes. It is also the least effective mechanism for addressing structural and systemic forms of discrimination. Regulatory regimes in other areas, such as competition policy or financial regulation, include a strong role for a regulator to enforce compliance and prosecute breaches. Occupational health and safety and workplace laws also make use of regulatory structures that involve active participation by government entities in investigating, reviewing and enforcing compliance. To date, the FWO has been particularly active in investigating and prosecuting underpayment of wages.

Under the *FWA* individuals concerned about the treatment they have received on the basis of their age can bring the conduct to the attention of the FWO. It then falls to that agency to investigate the complaint, and where it identifies a possible contravention of the Act to take appropriate enforcement action. This could lead to different resolution options, spanning a spectrum from cautions, to a negotiated outcome with undertakings provided by an employer, or to the FWO commencing proceedings in the Federal Court to prosecute the matter. There is clearly a role here for egregious breaches of the adverse action provisions to be dealt with by the FWO. These enforcement powers could be exercised in relation to concerns raised in relation to treatment based on age. It is a lack of this very capacity to act with respect to alleged breaches on behalf of complainants, and to do so even in the absence of a formal complaint, which has been identified as a major weakness of the Australian anti-discrimination system and as limiting the capacity of human rights agencies in their endeavours to prevent and eliminate discrimination.<sup>130</sup> It is this type of inquiry and enforcement powers that the AHRC has been advocating should supplement its existing functions.<sup>131</sup> An additional factor is resources. The FWO is currently a well-resourced agency with the capacity to pursue such issues, in contrast to the situation of many human rights agencies which have historically been underfunded.<sup>132</sup>

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128 Fair Work Ombudsman, *Annual Report 2009–2010* (2010).

129 Fair Work Ombudsman, 'Sydney Company Faces Court Over Pregnancy Discrimination' (Media Release, 7 July 2010); Fair Work Ombudsman, 'Phone Retailer Faces Court for Alleged Discrimination against Geelong Employee' (Media Release, 1 March 2011).

130 Senate Standing Committee on Legal and Constitutional Affairs, above n 5, ch 10.

131 See Australian Human Rights Commission, *Gender Equity Blueprint* (2010); Elizabeth Broderick, Sex Discrimination Commissioner, 'CEDAW Opening Statement' (Speech delivered at the CEDAW Committee, New York, 19 July 2010).

132 See Australian Human Rights Commission, Submission to National Human Rights Consultation, June 2009, 7, 33, 77, 100, 108.

## A The Potential for Proactive Measures

The corollary of the enforcement role of the FWO is the agency's capacity to facilitate proactive measures to address discrimination. In a conference address in 2009, the FWO's Chief Counsel indicated that 'to complement our reactive work we are currently evaluating what can be done to incorporate discrimination investigations into targeted audit programs and our new educational services.'<sup>133</sup> This creates an opportunity for preventive action rather than simply a reactive response to reported non-compliance. To date, the FWO has been actively engaged in monitoring compliance in the context of underpayment of wages. It also has a program of targeted national and state campaigns. Pregnancy discrimination has been included in its campaigns,<sup>134</sup> as a consequence of compliance concerns regarding both discrimination obligations and maternity leave entitlements. The FWO has commenced a campaign to inform mature age workers about age discrimination and what assistance is available in this regard.<sup>135</sup> It is important that these campaigns operate in a genuinely proactive manner.

The regulatory challenge in the context of workplace age discrimination is to provide more than an avenue to complain about conduct at the point when an individual's employment is terminated or threatened in some way. Instead, it must create a regulatory environment that alerts employers to the type of workplace policies and practices that commonly result in age discrimination, and provides guidance on how to avoid such practices and develop policies and practices in compliance with anti-discrimination obligations. Involvement by the FWO in such activities would support and complement the existing education and awareness raising initiatives of the AHRC in this area.<sup>136</sup> Recruitment and selection practices are a good starting point for working on compliance strategies. They provide a context in which to challenge common stereotypes and assumptions about mature age workers. And they have the potential to have flow-on effects to other aspects of the treatment of mature age workers, such as access to training, promotion, performance review, restructuring and retrenchment. Recruitment process operates as a major barrier for mature age workers seeking employment, and recruitment agencies often perform a gate-keeping function that can exclude mature age workers. The need for targeted and sustained work on exposing age discrimination in recruitment, and the development of more transparent selection processes is an area that would benefit from the

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133 Natalie James, Chief Counsel of the FWO, 'Practical Impacts of the Fair Work Ombudsman's Combined Agency Powers and New Discrimination Jurisdiction' (Paper presented at the 8<sup>th</sup> Annual Workforce Conference: 'Fairer for Who? How the New Industrial Relations Laws are Impacting on Australian Workplaces', Melbourne, 21 September 2009).

134 Fair Work Ombudsman, 'Helping Women Avoid Pregnancy Discrimination' (Media Release, 7 July 2010).

135 Fair Work Ombudsman 'Information to Assist Mature-age Workers Avoid Age Discrimination' (Media Release, 18 November 2010).

136 See Australian Human Rights Commission, above n 23; Australian Human Rights Commission, above n 42.

involvement of a well resourced agency such as the FWO. Guidance and education on these issues can be supplemented with other measures, such as investigating and auditing of such practices. These measures enable the FWO to identify areas of non-compliance and to follow up with a range of 'soft' and 'hard' regulatory responses, ranging from advice and targeted education programs to prosecutions depending on the circumstances.

## VI CONCLUSION

This article has examined mechanisms for challenging workplace age discrimination against mature age workers. While this has been within the purview of anti-discrimination legislation for some time, new provisions introduced by the *FWA* provide an alternative means of challenging workplace age discrimination in the federal industrial jurisdiction. This paper has argued that this new regime offers better opportunities for mature age workers to challenge such conduct because the industrial legislation is not burdened by complex definitions of discrimination, has a reserve onus provision, allows for interlocutory relief to preserve the employment relationship, and is a jurisdiction where parties bear their own costs. Complainants can also avail themselves of the dispute resolution processes of Fair Work Australia, and in some circumstances can take their complaints directly to the federal courts, without the delays of pursuing other forms of dispute resolution.

In addition to providing a potentially better mechanism for individual complaints, the *FWA* regime also has advantages at the systemic level. It harnesses the enforcement powers of a well resourced agency, the FWO, to monitor and enforce compliance with workplace anti-discrimination obligations, as well as vesting that agency with the ability to pursue complaints on behalf of individuals. In this way the *FWA* regime differs from the reactive complaints-based model of anti-discrimination regulation. The agency has already commenced a campaign on age discrimination involving mature age workers, and hopefully this will be followed by targeted auditing and investigation of such practices. In addition, the *FWA* regime imposes significant fines for breaches of its provisions which hopefully will encourage employers to reflect on the way their existing practices and procedures impact on mature age workers, and to take remedial action.

The current project to consolidate federal anti-discrimination laws, together with the moves to establish the office of a dedicated Age Discrimination Commissioner, leaves scope for further refinements in the operation of federal anti-discrimination laws, including the *ADA*. However it is unlikely that these developments will address the underlying regulatory weaknesses. The potential of the *FWA* regime to offer better options is also yet to be fully realised. The operation of the substantive provisions may be hampered by restrictive judicial interpretations that may emerge from litigated matters over time. The enforcement role of the FWO is also dependent on how that agency views its priorities. It has put considerable time and resources into monitoring and

enforcing compliance on payment of wages. It is hoped that the same zeal can be applied to workplace discrimination issues, including age discrimination. There are pressing economic and fiscal reasons for addressing workplace age discrimination and enhancing participation of mature age workers. Neither industrial regulation nor anti-discrimination legislation can achieve this goal on its own, but must work in tandem with other strategies to counter prevailing perceptions of mature age workers.