

# TOO MANY CANDLES ON THE BIRTHDAY CAKE: AGE DISCRIMINATION, WORK AND THE LAW

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The paper describes the rippling effect of ageism in the workplace: its incidence, identification, how it is reported and the problems associated with proving age discrimination. These issues are discussed through an analysis of relevant federal court, state and territory tribunal cases, including 22 age employment complaints handled by the Australian Capital Territory (ACT) Human Rights Office between 2001 to 2005. We conclude that the Age Discrimination Act (ADA) and also the equivalent State and Territory legislation are hampered by serious construction faults and application difficulties for those who are discriminated against.

## I INTRODUCTION

Ageism permeates our society. Negative imagery of growing older in our language, religion, literature, media, and the theories and practices of socio-political structures contribute to and are affected by ageism: ‘structural ageism’—the values and practices of everyday life reinforce the images and perpetuate discrimination.<sup>1</sup> Thus, if older workers are perceived as less productive and are forced to retire, the idea that older workers are not productive is reinforced and further perpetuates discrimination.<sup>2</sup>

Therefore, despite an increase in mature age workers in the workforce over the last two decades,<sup>3</sup> the biggest hurdle that these individuals face in the workplace continues to be

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<sup>1</sup> Colin Duncan, ‘Ageism, Early Exit, and the Rationality of Age-Based Discrimination’ in Ian Glover & Mohamed Branine (eds), *Ageism in Work and Employment* (2001) 27.

<sup>2</sup> This discrimination may be unconscious. For a discussion on unconscious discrimination, please see P Easteal, *Less Than Equal – Women and the Australian Legal System* (Butterworths, 2001) Chapter 8; and J Hunyor, ‘Skin-Deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 24 *Sydney Law Review*.

<sup>3</sup> Australian Bureau of Statistics, *Australian Social Trends 2004* (Australian Bureau of Statistics, 2004) 114-7.

discrimination<sup>4</sup> with some essentially coerced out of the workforce.<sup>5</sup> Accordingly in one survey of 1500 people aged between 45 and 74, 67% had concerns about the prospect of re-entering the workforce or advancing in their current jobs.<sup>6</sup> This correlates with another study's finding that less than one-third of organisations proactively seek to attract and retain mature age workers.<sup>7</sup> Indeed, ageism appears to be entrenched and apparent across a spectrum of workplaces.<sup>8</sup> Further, given stereotypes about older females,<sup>9</sup> women may experience particular disadvantages—'gendered ageism'.<sup>10</sup> One research project that looked at 90 women aged between 43 and 97 found that all had experienced age discrimination.<sup>11</sup> Participants such as a 47-year-old former school teacher expressed the view that they were looked over and considered superfluous. She was advised by an employment agency, 'You're so old, you're redundant'.<sup>12</sup>

Given the demographic bulk of baby-boomers, these discriminatory practices are no doubt increasingly common and a particularly relevant social and economic issue.<sup>13</sup> Yet paradoxically, the efficacy of the mechanisms, including legal remedies, for dealing with discrimination must be, at least to some extent, affected and limited by the underlying ageist values:

The perspective offered by social anthropology that most (or all) assumptions are learned, a product of enculturation, fits within a model of culture as a holistic system in which the various parts are interrelated. Values, beliefs, norms, mores, organisations and structures—all of the parts of the culture work together with multi-directional feedback. A sophisticated piece of machinery, nothing in the system exists in isolation.<sup>14</sup>

Discrimination and the law must be examined holistically with recognition that nothing in society takes place in a vacuum; age discrimination and its legal recourses interact within a context of ageism. Myths and stereotypes about older people in the

<sup>4</sup> L Bennington, 'Prime Age Recruitment: The Challenge for Age Discrimination' (2004) 3 *Elder Law Review* 27; R Patterson, 'The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern' (2004) 3 *Elder Law Review* 65.

<sup>5</sup> Australian Bureau of Statistics, *Mature Age Person Statistical Profile: Labour Force, Embargo 11.30am (Canberra Time) Thursday, 4 November 2004* (2004) [10] <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/9FD152E80ADA3FA2CA256F4100708F3D/\\$File/4905055001\\_nov%202004.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/9FD152E80ADA3FA2CA256F4100708F3D/$File/4905055001_nov%202004.pdf)> at 29 July 2007.

<sup>6</sup> From Diversity at Work, *Mature Age Workers* <<http://diversityatwork.com.au/node/728>> at 29 July 2007.

<sup>7</sup> B Jorgensen, 'The Ageing Population: Implications for the Australian Workforce' (2004) 20/20 *Australia Series, Hudson Global Resources and Human Capital Solutions*.

<sup>8</sup> In our case sample from the ACT Human Rights Office, complainants were drawn from all spheres and a broad range of employment contexts: 11 from large sized workplaces, five medium and six small; 12 from private; seven government, and two universities. Eight were professionals such as doctor, teacher, IT, middle management while others were blue-collar workers (cleaner, clerk, stripper, bus driver, maid, auto mechanic, carer, construction, maintenance).

<sup>9</sup> S Encel, 'Age Discrimination in Law and in Practice' (2004) 7 *Elder Law Review* 13, <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/ElderLRev/2004/7.html?query=age%20discrimaintion>> at 29 July 2007.

<sup>10</sup> Sara Arber and Jay Ginn, 'Only Connect: Gender Relations and Ageing' in Sara Arber and Jay Ginn (eds), *Connecting Gender and Ageing: A Sociological Approach* (1995) 7.

<sup>11</sup> S Encel and H Studencki, *Gendered Ageism: Job Search Experiences of Older Women* (Department for Women, New South Wales (NSW) Committee on Ageing, 1997) 3.

<sup>12</sup> Encel, above n 9.

<sup>13</sup> See The Australian Government Treasury, *Australia's Demographic Challenges* (2004) <<http://demographics.treasury.gov.au/content/discussion.asp>> at 29 July 2007.

<sup>14</sup> Easteal, above n 2, 3.

workplace<sup>15</sup> continue to permeate our society and present a barrier for older workers in obtaining and retaining employment.<sup>16</sup> Specifically, ‘imputed characteristics and characteristics that appertain generally to a group of people’<sup>17</sup> arise from stereotypes about older people being unadaptable to change,<sup>18</sup> set in their ways,<sup>19</sup> technologically illiterate,<sup>20</sup> sick and frail,<sup>21</sup> irreverent and less efficient<sup>22</sup> and possessing a lower work ethic.<sup>23</sup> The invalidity of the beliefs is of no consequence in promoting and perpetuating ageism.<sup>24</sup>

So, are the laws, which have been enacted to protect against age discrimination, effective?

All States and Territories have legislation in place, which, at least in theory, protects people from discrimination on the grounds of age.<sup>25</sup> In 2004, the Federal Government

<sup>15</sup> N Carr-Ruffino, *Managing Diversity – People Skills for a Multicultural Workplace* (Pearson Custom Publishing, 3<sup>rd</sup> ed, 2000) 365-75.

<sup>16</sup> B Hassell and P Perrew, ‘An Examination of Benefits about Older Workers: Do Stereotypes Exist?’ [1995] 16(5) *Journal of Organisational Behaviour* 457-68; Patterson, above n 4.

<sup>17</sup> Section 14b of the ADA recognises that (direct) discrimination may be taking place because of (ii) a characteristic that appertains generally to persons of the age of the aggrieved person; or (iii) a characteristic that is generally imputed to persons of the age of the aggrieved person. *Commonwealth v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 191, 207 (Wilcox J), in the context of the SDA, the *Sex Discrimination Act 1984* (Commonwealth (Cth)) stated that it is not necessary for the characteristic to be proven in each case; it is enough to show that the characteristic generally exists.

<sup>18</sup> B Rosen and T Jerdee, ‘The Influence of Age Stereotypes on Managerial Decisions’ (1976) 61 *Journal of Applied Psychology*, 428-32.

<sup>19</sup> For instance in one South Australia case, discussed in the 2005-2006 Annual Report, the complainant was told that ‘People over 40 are too set in their ways to adapt to a new environment.’

<sup>20</sup> Adelina Broadbridge, ‘Ageism in Retailing: Myth or Reality?’ in Ian Glover & Mohamed Branine (eds), *Ageism in Work and Employment* (2001) 155.

<sup>21</sup> Carr-Ruffino, above n 15, 369-70.

<sup>22</sup> C Victor, *Old Age in Modern Society: A Textbook of Social Gerontology* (Chapman and Hall, 1994).

<sup>23</sup> Carr-Ruffino above n 15, 367-70.

<sup>24</sup> Workers aged 45 and over took less sick days than their younger counterparts from a World Health Organization research as cited in Equal Opportunity Commission Victoria, *Things You May Not Know About Mature Age Workers in Working for Ages: Fact Sheet*, <<http://eoc.vic.gov.au/workingforages/materials/things%20to%20know%20about%2045+.pdf#search=%22World%20Health%20Organisation%20workers%20aged%2045%20and%20over%20took%20less%20sick%20days%20than%20their%20younger%20counterparts%22>> at 29 July 2007. This correlates with ABS data that younger workers have a higher rate of taking sick leave than older workers: Australian Bureau of Statistics, *Employment Arrangements: Sick Leave in 4102.0 Australian Social Trends 1996*, (1996)

<<http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/2db55ccbd87f6686ca2570ec0073e386!OpenDocument>> at 29 July 2007.

<sup>25</sup> *Equal Opportunity Act 1984* (South Australia (SA)) amended in 1990 to include age. *Anti-Discrimination Act 1991* (Queensland (Qld)) amended in 1992, *Equal Opportunity Act 1984* (Western Australia (WA)) amended in 1993, *Anti-Discrimination Act 1977* (NSW) amended in 1994, *Anti-Discrimination Act 1992* (Northern Territory (NT)) amended in 1994, *Discrimination Act 1991* (ACT) amended in 1996, *Equal Opportunity Act 1995* (Victoria (Vic)) amended in 1996 and *Anti-Discrimination Act 1998* (Tasmania (Tas)) amended in 1999. They prohibit compulsory retirement with the exception of certain professions such as police officers, fire officers, and magistrates and the Tas act s 35 and the NT act s 36, which provide compulsory retirement as an exemption. The *Workplace Relations Act 1996* (Cth) made age a ground for discrimination.

passed the *Age Discrimination Act*;<sup>26</sup> prior to its enactment, a complainant's only recourse at the Commonwealth level was to file a complaint under the *Human Rights and Equal Opportunity Act* (HREOCA). Anti-discrimination Acts though have been criticised in the academic literature for being ineffective or too weak to make any real difference, perhaps due to the paradox of enactment within many layers of conscious and unconscious 'mainstream' assumptions and prejudices:

The failure to actually redress substantive inequality issues reflects in part a resistance in so called liberal societies, such as Australia, to accept that systemic discrimination of women and other minorities exists. After all, liberalism is premised upon the belief that formal equality is guaranteed and ensured under the law.<sup>27</sup> Thus, formal equality laws are limited by their failure to reflect or deal with the myriad of inequalities that permeate the society.<sup>28</sup>

Let us now look briefly at various criticisms of discrimination law in general and how they apply specifically to age discrimination law. We will see how the legislation contains crucial concepts such as *inherent requirements* and *reasonable*, which are neutral in theory and in 'black letter' but are no doubt vulnerable to interpretation through the multiple, and often invisible, filters of ageism. Thus, our aim here is to explore the rippling effect of ageism on incidence, identification, reporting of age discrimination in the workplace and the legal response. We studied the last by identifying and looking at relevant Federal, State and Territory tribunal cases. In addition, we accessed and analysed 22 age employment complaints handled by the ACT Human Rights Office between 2001-2005 focusing on the Commissioner's legal reasoning/argument.<sup>29</sup> We also interviewed ACT Human Rights staff.<sup>30</sup>

## II AGEISM RIPPLE: LEGAL PROCESS – INDIVIDUAL COMPLAINTS-BASED

The specific details of the discrimination complaint process vary jurisdictionally. However, it always remains up to the individual to make the complaint—either at HREOC or to a state or territory counterpart. Disclosing and reporting discrimination requires both some feeling of empowerment and knowledge of the options. People who are discriminated against are often members of a minority group and may feel some degree of disempowerment to begin with, which is exacerbated by their workplace victimisation experience. They may lack knowledge about their legal options too. For instance, research by the NSW Law Reform Commission (LRC) found that complainants were unclear about their rights, what the processes were, and were frustrated by the lack of support and continued delays. This led to some seeking alternative avenues of redress, to accepting unsatisfactory offers of settlement or to

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<sup>26</sup> This followed the recommendation for federal legislation in Human Rights and Equal Opportunity Commission, *Age Matters* (Human Rights and Equal Opportunity Commission, 2000). Discussed by DWilliams, 'Significant Steps toward a Commonwealth Discrimination Act' (2002) *Reform* 81.

<sup>27</sup> M Thornton, *The Liberal Promise Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

<sup>28</sup> Easteal, above n 2, 158.

<sup>29</sup> The Commissioner until 1 November 2006 was operating under the *Discrimination Act 1991* (ACT) s 7(1).

<sup>30</sup> The authors would like to thank the Human Rights Office (HRO) for making archived files available and participating in discussions. The views presented though are those of the authors who accept responsibility for the work. The project was funded by a small grant from the Division of Business, Law and Information Sciences (BLIS) at the University of Canberra.

abandoning the complaint.<sup>31</sup> Another review by several State discrimination agencies also identified that older people were unclear about their rights and responsibilities under the law. They did not know whether they needed to disclose their age in job applications; employers on the other hand were unsure about how to comply with anti-discrimination legislation.<sup>32</sup>

Making a complaint can be hindered too by the individuals' inability to identify what has happened to them as discrimination. This denial is an accoutrement of the ageist or other discriminatory attitudes and actions that are a normalised part of the society. Thus, the behaviour is, in effect, masked. How? Jonathon Hunyor's analysis of racial discrimination provides some answers.<sup>33</sup> In terms of employment, far from protecting people from discrimination on the grounds of race he argues that the *Racial Discrimination Act* (RDA)<sup>34</sup> has made the problem 'invisible'. That is, the actual discrimination based on racial stereotypes has not disappeared, but its visibility has been subverted by language that cloaks the discrimination on racial grounds by focusing them on acceptable grounds of discrimination based on personal characteristics. For example, an employer may claim that a person was not chosen for a position, even though they were the most qualified, because of personal characteristics that were seen to be undesirable, such as being soft-spoken.<sup>35</sup> Perception of this trait may be the consequence of subconscious racial stereotyping of a person and constitute direct discrimination,<sup>36</sup> but is acceptable because the dismissal or lack of promotion was argued on merit and not explicitly about the individual's ethnicity. So too with age. Employers can send out messages about age preferences, which in essence amount to age discrimination using a language of 'merit'.<sup>37</sup> While such language or criteria can be used legitimately for employers to find a suitable employee, they can also hide ageist biases. Thus, one Victorian study found that even though it was illegal to advertise age preferences for jobs, some advertisements 'still provide(d) numerous clear messages

<sup>31</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92, (1999). Encel, above n 9.

<sup>32</sup> The Victorian, South Australian and Western Australian Equal Opportunity Commissions and the Australian Employers Convention, *Age Limits: Age-Related Discrimination in Employment Affecting Workers Over 45*, (The Victorian, South Australian and Western Australian Equal Opportunity Commissions, 2001) 14.

<sup>33</sup> Hunyor, above n 2.

<sup>34</sup> *Racial Discrimination Act* (RDA) 1975(Cth).

<sup>35</sup> *Department of Health v Arumugam* [1988] VR 319. The applicant who was of Southern Indian origin argued that he was discriminated against because he was the best qualified for a senior medial position that was given to some one else. The Victorian Court accepted the respondent's argument that the complainant was not chosen because he was not as articulate or aggressive as the chosen employee. The Court did not explore whether the decision by the employer in relation to his speech and personality were based on assumptions about 'racial' differences.

<sup>36</sup> It is defined in s 14 of the ADA:

A person (the discriminator) discriminates against another person (the aggrieved person) on the ground of age of the aggrieved person if:

(a) the discriminator treats or proposes to treat the aggrieved person less favourably than, in the circumstances that are the same or not materially different, the discriminator treats or would treat a person of a different age; and

(b) the discriminator does so because of:

(i) the age of the aggrieved person; or

(ii) a characteristic that appertains generally to person of the age of the aggrieved person; or

(iii) a characteristic that is generally imputed to persons of the age of the aggrieved person.

<sup>37</sup> For a discussion on this phenomenon see Hunyor, above n 2.

about the preferred age range through the use of “age specific descriptors” (e.g. young environment etc).<sup>38</sup>

‘Virgin Flair’ is a good example of such masking. Virgin Blue Airlines described it as ‘a desire to create a memorable, positive experience for customers: the ability to have fun, making it fun for the customer.’ The Queensland Tribunal found that, given statistical evidence that Virgin Blue employed very few flight attendants over the age of 35, the company had discriminated.<sup>39</sup> While the criteria of ‘Virgin Flair’ did not contravene anti-discrimination laws per se, the assessors’ application of their preference for younger people being more in line with the concept of ‘Virgin flair’ was.

### A Low Reporting

For a problem that is seemingly widespread, there appear to be relatively few successful complaints. For instance, during the 2005-2006 period, 106 complaints were made under the ADA; 74% were related to employment.<sup>40</sup> This number is low compared to complaints made under the RDA (259; 48% employment), *Sexual Discrimination Act (SDA) 1984 (Cth)* (347; 85% employment) or *Disability Discrimination Act (DDA)*<sup>41</sup> (561; 58% employment) the same financial year.<sup>42</sup>

State jurisdictions evidence the same relative infrequency of age discrimination matters as shown in table 1.

Table 1: Complaints received in employment area, NSW and Victoria, 2005-2006

Employment cases	NSW		VIC	
	(n)	%	(n)	%
Age	(38)	8.7	76	11
Sex	(214)	49.1	116	16.9
Race	(60)	13.8	123	17.9
Disability	(124)	28.4	373	54.2
	436	100	688	100

Data were obtained from the Annual Reports of the two jurisdictions.<sup>43</sup>

<sup>38</sup> L Bennington, ‘Age Discrimination: Converging Evidence From Four Australian Studies’ (2001) 13 *Employee Responsibilities and Rights Journal* 125.

<sup>39</sup> In *Hopper & Others v Virgin Blue Airlines Pty Ltd* [2005] QADT 28, 32 <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/qld/QADT/2005/28.html?query=Hopper>> at 29 July 2007. Member Savage SC accepted the evidence with caution. In our ACT case sample, such statistical evidence was used only by two respondent employers. In one, an age breakdown of existing staff showing that three quarters were aged over 51.

<sup>40</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2004-2005* (Human Rights and Equal Opportunity Commission, 2005) 55. See also Sara Charlesworth, ‘Managing Work and Family in the Shadow of Anti-discrimination Law, Work, Family and the Law’, in Jill Murray (ed), *Work, Family and the Law* (2005).

<sup>41</sup> *The Disability Discrimination Act 1991*(Cth).

<sup>42</sup> Human Rights and Equal Opportunity Commission, above n 40, 49, 51 and 53.

<sup>43</sup> The Annual Reports can be accessed from Anti-Discrimination Board, *Annual Report 2005-06* (2006) Lawlink NSW

<[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)> at 29 July 2007; and Equal Opportunity Commission Victoria, *Annual Report 2005/06* (2006) Victorian Equal Opportunity & Human Rights Commission

<<http://www.equalopportunitycommission.vic.gov.au/publications/annual%20reports/default.asp>> at 29 July 2007.

Similarly, in Queensland, age made up 6.2% of the total complaints in 2005-2006; 47 of these complaints related to work.<sup>44</sup> In Tasmania, age was the grounds for 5.1% of complaints<sup>45</sup> while in the Northern Territory, the 10 age employment discrimination cases constituted 11% of work-related complaints.<sup>46</sup> We found too that a comparatively small number of age discrimination in employment matters were dealt with by the ACT Human Rights Office under the ACT Discrimination Act in contrast to ‘motherhood’ and harassment complaints filed from 2001 through 2005.<sup>47</sup>

This relatively low reporting rate for age cases might be explained in part by intersectional discrimination—that is ‘the different types of discrimination or disadvantage that compound on each other and are inseparable’ arising from the ‘connection between aspects of identity’<sup>48</sup> For example when gendered ageism occurs, the older women victims who do report may be inclined to file under the better known act - the SDA.

### III AGEISM RIPPLE: EXEMPTIONS OR EXCEPTIONS

All anti-discrimination acts have been controversial to some extent and have necessitated compromises to be enacted. Exemptions or exceptions have been one such tool. Although all grounds in State discrimination legislation include some,<sup>49</sup> age has more than any other ground except for disability. For example, the ACT Discrimination Act has eight exceptions for sex,<sup>50</sup> two for race,<sup>51</sup> three religious or political convictions,<sup>52</sup> 11 relating to disability<sup>53</sup> and 10 relating to age.<sup>54</sup> However, it is not just the number that can weaken the implementation of the legislation. There is ample room for interpretation of reasonable and relevant through the filtering of stereotypes in s 57C, which in the context of health and safety states that:

<sup>44</sup> Anti-Discrimination Commission Queensland, *Annual Report 05-06* (2006) <<http://www.adcq.qld.gov.au/main/publications.html>> at 29 July 2007. 12.9% of all enquiries pertaining to employment discrimination were about age in South Australia but it is unclear if that proportion made it through the screening process to complaints handling. So too the 7.4% of enquiries in Western Australia with employment area and age ground as cited in the annual report by the Equal Opportunity Commission, *Annual Report 2005-2006* (2006) <<http://www.equalopportunity.wa.gov.au/ar0506-3.html>> at 29 July 2007.

<sup>45</sup> Office of the Anti-Discrimination Commissioner, *2005-2006 Annual Report* (2006) Tasmania <[http://www.antidiscrimination.tas.gov.au/publications/annual\\_reports](http://www.antidiscrimination.tas.gov.au/publications/annual_reports)> at 29 July 2007.

<sup>46</sup> Anti-Discrimination Commission, *Annual Report 2005-2006* (2006) Northern Territory of Australia Anti-Discrimination Commission <<http://www.nt.gov.au/justice/adcc/html/annreport/index.html>> at 29 July 2007.

<sup>47</sup> Twenty-two age cases were identified in contrast to 37 ‘motherhood’ and 46 harassment. See P Easta and S Priest, ‘Employment Discrimination Complaints at the ACT Human Rights Office: Players, Process, Legal Principles and Outcome’ [2006] *Contemporary Issues in Law* 4.

<sup>48</sup> Pru Goward, ‘Everyday Intersectionality’, *Beyond Tolerance; National Conference on Racism, 14 March 2002*, <[http://www.hreoc.gov.au/racial\\_discrimination/beyond\\_tolerance/speeches/goward.htm](http://www.hreoc.gov.au/racial_discrimination/beyond_tolerance/speeches/goward.htm)> at 4 August 2007

<sup>49</sup> The sex discrimination jurisdictional counterparts also have specific exclusions with, as one example, the *Equal Opportunity Act 1995* (Vic) s 21 allowing discrimination in job offers where there are no more than five full-time staff. See C Andrades, ‘High Roads, Low Roads and Detours: Strategic Considerations in Discrimination Law’ (1999) 73(4) *Law Institute Journal* 52-5.

<sup>50</sup> *Discrimination Act 1991* (ACT) Div 4.2 ss 34-41.

<sup>51</sup> *Discrimination Act 1991* (ACT) Div 4.3, s 42-3.

<sup>52</sup> *Discrimination Act 1991* (ACT) Div 4.4, ss 44-6.

<sup>53</sup> *Discrimination Act 1991* (ACT) Div 4.5, ss 47-57.

<sup>54</sup> *Discrimination Act 1991* (ACT) Div 4.6, ss 57A, 57B, 57C, 57E, 57G, 57H, 57J, 57K, 57L, 57M.

- (1) it is not unlawful to discriminate on the basis of age if the discrimination is practised to comply with reasonable health and safety requirements relevant to the employment or work.
- (2) In deciding what health and safety requirements are *reasonable* (for subsection (1)), all the *relevant* circumstances of the particular case must be taken into account, including the effects of the discrimination on the person discriminated against (emphasis added).

The NSW LRC in reviewing the *Anti-Discrimination Act 1977* (NSW) observed also that exemptions for age discrimination were more numerous than in any other area and usually based on prejudice and stereotypes with little evidence that age is ‘inappropriately used as a basis for discrimination in other areas.’<sup>55</sup>

So too with Commonwealth laws: permanent, temporary and short-term statutory exemptions to numerous varieties of organisations have diminished the scope and power of the SDA.<sup>56</sup> No other Federal anti-discrimination legislation though has as many exemptions as the ADA.<sup>57</sup> Such legislative provisions make it confusing for both employers and employees to effectively identify what actions are prohibited by the ADA. Too many exceptions can make recognition and reporting difficult and, according to the Council of the Ageing could actually work against reducing ageism:

The width of the exemptions given to the Commonwealth, which they describe as demonstrating the ‘Commonwealth’s own reticence in embracing its own age discrimination laws.’ The Council expressed concern that by taking this approach the Commonwealth ‘provides a negative role model to the community.’<sup>58</sup>

#### IV AGEIST RIPPLE: PROOF IS PROBLEMATIC

Difficulty in establishing that the action was discrimination may contribute to the low reporting already discussed and the relative low frequency of conciliations and hearings. Although the ADA has been in place for well over two years, no case has yet to be heard in the Federal Magistrates Court. In the same vein, in the ACT, we identified only two age discrimination cases which had been dismissed by the Commissioner that had progressed to the ACT Discrimination Tribunal: *Kannane & Ruston v Casino Canberra Ltd*<sup>59</sup> was dismissed, while in *Bloomfield v Westco Jeans Pty Ltd*<sup>60</sup> the 46 year old complainant received \$250.00 and a letter of apology.

At HREOC, 34% of finalised matters were conciliated, which is lower than under the SDA (44%) and the DDA (46%) but higher than the RDA 23%.<sup>61</sup> There are issues of

<sup>55</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92, (1999) 16.

<sup>56</sup> Discussed in Easteal, above n 2.

<sup>57</sup> COTA (Council on the Ageing) expressed its concern for the excessively wide range of exemptions especially relating to those where the Commonwealth Government is the employer. Discussed in Encel, above n 9.

<sup>58</sup> Parliament of Australia, *Bills Digest No. 29 2003-04* (2004) <<http://www.aph.gov.au/library/pubs/bd/2003-04/04bd029.htm>> at 29 July 2007.

<sup>59</sup> *Kannane & Ruston v Casino Canberra Ltd* [1999] ACTDT 10 (24 August 1999).

<sup>60</sup> *Bloomfield v Westco Jeans Pty Ltd* (2001) EOC 93-161.

<sup>61</sup> HREOC, *Annual Report 2005-2006* (2006) <[http://www.hreoc.gov.au/annrep05\\_06/index.html](http://www.hreoc.gov.au/annrep05_06/index.html)> at 29 July 2007.



proof that remain a barrier for people seeking relief under the RDA<sup>62</sup> and apparently in age cases. In South Australia as another example, the highest rates of conciliation were for complaints of pregnancy discrimination (71% conciliated). The lowest rates of conciliation were in complaints of race (43%) and age discrimination (44%).<sup>63</sup>

Proof is based upon the concept of comparability, which involves comparing ‘likes with unlikes.’<sup>64</sup> Also, showing a nexus between the grounds and the employer’s behaviour can be challenging for the complainant.<sup>65</sup> It is unlikely that an employer or prospective employer will openly tell the complainant that he or she is being treated in a certain way because of his or her age and/or openly articulate any ageist perceptions held:

Decisions made in the secrecy of boardrooms or in the minds of employers will rarely, if ever...find expression to the employee in directly discriminatory terms. Still less will they be exposed to the potentially corroborative eye of a witness, especially as the most likely witnesses, fellow employees, may well entertain the fear of losing their jobs at the hands of the same employer.<sup>66</sup>

Yet, evidence of some sort is necessary.<sup>67</sup> In one case, the Commissioner cited the racial discrimination case of Arumungam that stated discrimination could be inferred when the complainant’s superiority over the person appointed is so great and evident that no reasonable selection board, acting reasonably, could have made the selection. However, she concluded that even if she accepted that the complainant was better qualified, there was insufficient evidence to suggest that age and nationality were factors operating.

Perhaps reflecting the lack of evidence, in our ACT HRO age complainant sample, about one quarter withdrew (one on health grounds, one after advice from HRO, another three with no reason provided) and half were declined.<sup>68</sup> Dismissal appeared to be a by-product of the legislative requirement to show a link between cause and the attribute. As staff reported, it is harder to demonstrate that nexus in age cases:

With age discrimination unless a direct comment is made connecting the alleged unfavourable treatment to the complainant’s age, and there is some evidence that this comment was made, it is difficult to show a causal connection between age and the unfavourable treatment.

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<sup>62</sup> See B Gaze, ‘Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-04,’ [2005/06] *Australian Journal of Human Rights* 6; Hunyor, above n 2.

<sup>63</sup> Equal Opportunity Commission, *2006 Annual Report* (2006) <[http://www.eoc.sa.gov.au/site/eo\\_resources/publications/annual\\_reports.jsp](http://www.eoc.sa.gov.au/site/eo_resources/publications/annual_reports.jsp)> at 29 July 2007.

<sup>64</sup> Thornton, above n 27, states that ‘a woman needs to be like a real or hypothetical man in order to substantiate a complaint.’

<sup>65</sup> *Racial Discrimination Act 1975* (Cth) as critiqued by Hunyor, above n 2.

<sup>66</sup> *Bennet v Everitt* (1988) EOC 92-244, 77, 271 (Einfield J) as discussed by P Rajapakse, ‘An Analysis of Methods of Proof in Direct Discrimination Cases in Australia’ *University of Queensland Law Journal* (1998) 20(1) 90-103.

<sup>67</sup> As no complaints have proceeded to formal hearing under the ADA, we are not able to comment on whether the burden of proof would be greater than at conciliation. Both proceedings operate under a legislative requirement to show a link between the protected trait and the discriminatory behaviour.

<sup>68</sup> Of those age matters declined, one was not in the ACT jurisdiction, in two there was no issue of illegality and in eight cases - a lack of substance.

Accordingly it is not uncommon for a lack of evidence establishing a causal link between the discrimination and age to be mentioned in the Commissioner's letters notifying parties of dismissal:

Unable to find sufficient evidence to support allegations – have to show a causal link  
 As you have not been able to supply me with any significant information that demonstrates age was a factor in decisions.  
 There needs to be a causal link between a person's attribute and the alleged discrimination. Not satisfied that age in this case was the reason for the decision that had a detrimental effect on her.

If there is another possible explanation, then establishing the link becomes even more problematic. This was shown in one case file in which the ACT Commissioner was influenced by the consistency of the various witnesses; each believed that the complainant's lack of employment was due to her frequent absences, which caused concern to clients and their families.

Difficulty in proving discrimination was also evidenced by our finding that, conforming to the other jurisdictions discussed above, only 27% of the age cases were conciliated and agreement reached in just 9% or two cases. This was in contrast to almost half of the employment discrimination cases filed under other grounds, achieving a resolution.<sup>69</sup> Further, the compensation in the two age cases was \$500.00 and zero, which contrasted markedly with an average settlement of \$6,756 in the pregnancy and carer discrimination cohort.

And, it is no doubt significant that there was direct admission by the respondents in the two resolved cases. One respondent had advised the complainant that the business was looking for someone between 30 to 35 years of age to take over the management of the company in the future and that the applicant's age was therefore unacceptable. That respondent admitted that they had used age as a criterion and asked HRO for help in drafting an anti-discrimination policy. In his correspondence to the HRO however, the respondent also gave a demographic breakdown of staff as evidence of practicing non-discrimination.

In the other age matter that settled, the complainant stated he had been told that he was too old to be considered for a certain sort of position. The respondent said that his comments had been fairly innocuous, like 'None of us are getting any younger; the things we were doing at 20 are a lot harder now'. Thus, the causal link was clearly enunciated by the respondents.

#### A *Dominant Reason an Added Hurdle*

Section 16 of the ADA includes a dominant reason test for proving discrimination on the grounds of age. It provides that:

If an act is done for 2 or more reasons, then, for the purposes of this Act. The act is taken to be done for the reason of the age of the person if:

- one of the reasons is the age of the person; and
- that reason is the dominant reason for doing of the act.

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<sup>69</sup> Easteal and Priest, above n 43.

The Explanatory Memorandum to the Act states that the inclusion of the dominant reason test is to 'not establish barriers for positive developments'.<sup>70</sup> For example, a barrier that may arise if this test was not included would be to restrict 'employment opportunities for older Australians by imposing unnecessary costs and inflexibility on employers acting in good faith'.<sup>71</sup> It purports to base this reasoning on the idea that as the solution to age discrimination is education and attitudinal change, it is undesirable to make it onerous for employers to prevent age discrimination. Such reasoning appears to be counter-intuitive to the intent of the ADA.<sup>72</sup> The inclusion of the dominant reason test provides an unnecessary barrier for a complainant. The practical effect of the provision is to make it harder for an applicant to show prima facie that (s)he has been discriminated against on the basis of age.

The dominant reason test was criticised in the past for creating injustice and application problems with the RDA.<sup>73</sup> Consequently, it was removed in 1990 and is not a part of other Federal anti-discrimination laws. Under the SDA, RDA and the DDA, if there is more than one reason as to why an act was done, it is enough to show that the discriminatory reason was one of the reasons. It need not be the primary one.<sup>74</sup>

## V AGEIST RIPPLE: INHERENT REQUIREMENTS

Section 18(4)<sup>75</sup> of the ADA provides that employers may legally discriminate against a person on the ground of age if they can prove that the complainant cannot carry out the inherent requirements of the job due to their age:

distinction, exclusion or preference will only be justified by reference to the inherent requirements of a given position if it corresponds objectively and closely to those requirements, and if it takes account of individual capacities.<sup>76</sup>

Unfortunately, employers can both obscure acts of discrimination as we saw earlier and refute claims or complaints of discrimination by hiding behind inherent requirements and the language of merit. For instance, in *Gilshenan v P.D. Mulligan (Newcastle) Pty Ltd*,<sup>77</sup> a 64-year-old butcher was transferred from the butcher's shop to a sausage-making factory. He alleged that the transfer was intended to induce him to retire; the respondent however claimed that he was too slow at his job - that he was not fulfilling the inherent requirements of the position. Similarly in *Goodworth v Marsdens Motors Pty. Ltd*,<sup>78</sup> Ms Goodworth was forced to retire after six years of employment with the

<sup>70</sup> Explanatory Memorandum, the *Age Discrimination Act 2003* (Cth) pt 3, cl 16, para 24, 43.

<sup>71</sup> Ibid.

<sup>72</sup> P Thew, K Eastman and J Bourke, *Age Discrimination: Mitigating Risk in the Workplace* (CCH Australia Ltd, 2005) 48.

<sup>73</sup> *Ardeshirian v Robe River Iron Associates* (1990) EOC 92-299.

<sup>74</sup> Section 8 SDA, s 18 RDA and s 10 DDA.

<sup>75</sup> Paragraphs (1)(a), (1)(b) and (2)(c) do not make it unlawful for an employer to discriminate against another person, on the ground of the other person's age, if the other person is unable to carry out the inherent requirements of the particular employment because of his or her age.

<sup>76</sup> *Commonwealth v Human Right and Equal Opportunity Commission and Others* (1999) 167 ALR 268, 285.

<sup>77</sup> *Gilshenan v P.D. Mulligan (Newcastle) Pty Ltd* (1995) EOC 92-781. The Tribunal found that he was competent at his previous position and ruled that the respondent had discriminated against him on the basis of his age.

<sup>78</sup> *Goodworth v Marsdens Motors Pty. Ltd (No 1)* [1996] NSWEOOT; EOC 92-837.

respondent. The company claimed she was inefficient, incompetent and the office was overstaffed. The Managing-Director however purportedly told a trainee that Ms Goodworth was ‘older and her health is not good. We want someone younger. You can do the same job that she did.’

The inherent requirements provision in the ADA is set up in a similar way to s 15(4) of the DDA. Both Acts provide an inclusive list of considerations that a court or tribunal should turn their minds to when considering whether a person is able to carry out the inherent work tasks.<sup>79</sup> These include; whether the person’s past training, qualifications and experience are relevant to the job, whether another person is already employed by the employer and their performance, and any other relevant factors that are reasonable to take into account.<sup>80</sup> Since the courts consider matters on a case by case basis – judging each on its own merits rather than creating principles that apply to all cases,<sup>81</sup> and ‘reasonable’ is of course open to interpretation, the identification of inherent requirements is vulnerable to conscious and unconscious beliefs about ageing.

In two High Court cases - *Qantas Airways Ltd v Christie*<sup>82</sup> and *X v Commonwealth*<sup>83</sup> - the interpretation of inherent requirements was broad. In the former, Christie was an international pilot working for Qantas, which compulsorily retired pilots at age 60 because some countries did not allow pilots over that age to fly in their airspace. The complainant disputed the forced retirement, claiming that he was still able to fly a 747 plane. The Court rejected this argument reasoning that although Christie was able to physically fly the aircraft, he did not fulfil the inherent requirements of his job, which included the capability of piloting planes in all air spaces. Accommodating flights for the complainant that did not involve countries with the airspace age policy, was deemed as too onerous a task for Qantas.

#### A *Ageist Inherent Requirements Masked by Economic Rationalism*

In age cases, employers have tried to argue with mixed results that inherent requirements provide an economic benefit that offsets the discriminatory effects. In *Skinner v Lightning Bolt Pty Ltd*,<sup>84</sup> the Queensland Tribunal did decide that economic reasons such as there being no work could be used as a defence to discrimination. The

<sup>79</sup> ADA s 18(5); DDA s 15(4).

<sup>80</sup> ADA s 18(5)(c).

<sup>81</sup> An example of another case is: *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* [2000] FCA 1150; where a Federal Court found that it was acceptable for a Commonwealth Department to dismiss an employer in seeking to balance the age profiles of employees in the Department and provide opportunities for younger employees.

<sup>82</sup> *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

<sup>83</sup> *X v Commonwealth* [1999] HCA 63. All members of the High Court considered that the inherent requirements of a job are wider than the physical requirements and encompass other circumstances and capacities. Inherent requirements are those ‘characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral’.

<sup>84</sup> *Skinner v Lightning Bolt Pty Ltd* [2001] EOC 93-167. The complainants, aged 58 and 57 were laid off after three months of employment. The respondents claimed there was not enough work for them due to a down turn in trade as a large client had gone into liquidation. When one of the complainants returned to the respondent to get a reference he noticed two younger men aged 36 and 21 doing the jobs of the two complainants. The Tribunal found that there was no shortage of work for the complainants and inferred that they were in fact discriminated against because of their age.

Queensland Supreme Court dismissed the appeal agreeing with the Tribunal that the respondent had not substantiated an economic defence.<sup>85</sup>

In two cases involving pilots, such an economic defence was unsuccessful: *Bradley*<sup>86</sup> and *Blatchford*.<sup>87</sup> The complainant in *Blatchford*, who was 46 and held a commercial pilot's licence, applied to Qantas Airways for a pilot's job. Although he met the specified entry requirements, his application was refused. Qantas claimed that a 46 year old would not be able to be employed for a sufficient amount of time to recoup the training costs involved. The Tribunal members disagreed:

The Tribunal is not directly concerned with the principles of economic rationalism, but with the principles of equal opportunity. The principles of economic rationalism are not enshrined in legislation; the principles of equal opportunity are, and it is that the Tribunal is called upon to apply.

## VI AGEIST RIPPLE: (UN)REASONABLE REQUIREMENTS IN INDIRECT DISCRIMINATION

Indirect discrimination occurs when there is a requirement, condition or practice that is the same for everyone but has an unfair effect on a person of a particular age.<sup>88</sup> With this type of discrimination, the individual no longer has to show cause, that something happened because of age but instead must prove inequitable and unnecessary requirements or conditions. If a condition, requirement or practice can be shown to be reasonable, it cannot be discriminatory.<sup>89</sup>

<sup>85</sup> *Lightning Bolt Co Pty Ltd v Skinner & Anor* [2002] QCA 518. It should be noted that the appellants tried to put forward the personal characteristics defence in the appeal. They stated they wanted to employ more ambitious people who could be trained for a group that would be eligible for promotion. The Supreme Court stated that it did not matter why the company dismissed the workers as long as they did so because of their age.

<sup>86</sup> In *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* [1999] FCA 1524 the Federal Court upheld the HREOC Commissioner's finding that the complainant, Bradley had been discriminated against on the ground of age when, at age 37 he was rejected as a helicopter pilot in the Specialist Service Officer scheme in the Royal Australian Air Force which specified an entry age between 19 and 28.

<sup>87</sup> Applicants were screened against three criteria: flying experience, education and age; those aged 32 and over received only one out of a possible four points against the age criterion. *Blatchford v Qantas Airways Limited* [1997] NSWEO.

<sup>88</sup> HREOC, *All About Age Discrimination* <<http://www.hreoc.gov.au/age/index.html>> at 30 July 2007.

<sup>89</sup> Section 15(1) and (2) of the ADA: Discrimination on the ground of age--indirect discrimination:

(1) For the purposes of this Act, a person (*the discriminator*) *discriminates* against another person (*the aggrieved person*) on the ground of the age of the aggrieved person if:

- (a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and
- (b) the condition, requirement or practice is not reasonable in the circumstances; and
- (c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.

(2) For the purposes of paragraph (1)(b), the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.

With s 15(2) of the ADA, the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies with the discriminator. The concept of 'reasonableness' in indirect discrimination cases has been the subject of intense scrutiny under the DDA. These cases would probably be of relevance when applying s 15. For example, the majority in *Waters v Public Transport Corporations* held that reasonable in the circumstances meant reasonable in *all* the circumstances. This meant that the situation of both the respondent and complainant would need to be assessed.

Reasonableness is raised in diverse areas of law such as criminal law, administrative law and civil law. In theory, reasonableness is a neutral concept and a question of fact.<sup>90</sup> In practice reasonable or unreasonable 'reasonable' has traditionally been interpreted through the framework and context of those in power.<sup>91</sup> In discrimination law context for instance, concerns have been raised about the interpretation of reasonableness in some sexual harassment cases heard under the SDA and that it may be a gendered construct.<sup>92</sup> And, the risk of an ageist dictionary being used in definition is exacerbated since the ADA, unlike the SDA, does not contain any reference to any factors that should be taken into account when deciding whether a condition, requirement or practice is reasonable.

## VII THE FUTURE

A sustained lower birth rate,<sup>93</sup> increased longevity of the population<sup>94</sup> and the requirement for increased skill profiles of workers, all contribute to an urgent need for attitudinal change about age and work. We will continue to see a trend towards an ageing population. In fact, current projections indicate that almost one in two Australians will be over 50 by 2051.<sup>95</sup> Like many other 'developed' countries, we need to develop strategies for incorporating and encouraging mature aged workers to stay in the workforce in order to sustain the economy and community.<sup>96</sup>

Society is like a jigsaw puzzle - all of the pieces are interrelated in a complex and interactive manner. Any such strategies, including legal responses, must be underpinned with an acceptance of mature age workers in Australia. Currently, the language of merit can hide discrimination behind the guise of selection criteria and economic rationalising. However, the barriers deterring some from staying in the workforce are not their ability to perform their duties but instead are the skewed perceptions in the community about age and competence. Often, mature age workers must prove that they do not possess the negative traits attributed to them by those stereotypes, which are fuelled by the vacuum of information by both employers and employees about the rights and responsibilities of each.

The ADA promised to limit and reverse such negative attitudes about mature age workers and provide a legal path for those who are discriminated against. However, as

<sup>90</sup> *Waters v Public Transport Corporation* (1992) 173 CLR 349.

<sup>91</sup> See P Easteal, 'Violence Against Women in the Home: Kaleidoscopes on a Collision Course?' (2003) 3(2) *QUT Law & Justice Journal* 250-273 (available at <http://www.law.qut.edu.au/about/ljj/editions/v3n2/index.jsp>.)

<sup>92</sup> See F Pace, "'Concepts of 'Reasonableness' in Sexual Harassment Legislation: Did Queensland get it right?' (2003) 12 *QUT Law and Justice Journal* Part III-A.

<sup>93</sup> According to Australian Bureau of Statistics, *Australian Social Trends 2005* (Australian Bureau of Statistics, 2005) 23-7; from 1998 to 2003 the birth rate has been below replacement rate varying from 1.73 to 1.76.

<sup>94</sup> Currently, the median life expectancy is 80 for men and 85 for women; Australian Bureau of Statistics, *Australian Social Trends 2006* (Australian Bureau of Statistics, 2006) 8.

<sup>95</sup> Australian Bureau of Statistics, *3222.0 - Australia in 2051: Almost Half the Population Older Than 50 Years* (2005)  
<[<sup>96</sup> See The Australian Government Treasury, \*Australia's Demographic Challenges\* \(2004\)  
<<http://demographics.treasury.gov.au/content/discussion.asp>> at 30 July 2007.](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3222.0Media%20Release12004%20to%202101?opendocument&tabname=Summary&prodno=3222.0&issue=2004%20to%202101&num=&view=> at 30 July 2007..</a></p>
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we have seen in this paper the effectiveness of the ADA and that of state and territory age legislation, is hampered by serious construction faults and application difficulties, which are, at least in part, the consequence of their ageist birthplace and ‘parenting.’ The ADA is limited by its failure to deal with the norms and values that reflect the myriad of inequalities permeating our cultural landscape. Age discrimination laws, like other anti-discrimination legislation do not challenge the systemic discrimination, which arises in this cultural maelstrom of intrinsic ageism. In fact, the inclusion of the dominant reason test illustrates how the ADA may be even less effective than other discrimination law and may perpetuate ageism instead of confronting it. By making the standard of proof higher than in the other Federal anti-discrimination laws, age discrimination is presented as a less serious offence and also as a more acceptable action, or even a socially sanctioned act.<sup>97</sup>

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<sup>97</sup> HREOC, *HREOC Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, (2003) <[www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/age03/submissions/sub09.doc](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/age03/submissions/sub09.doc)> at 30 July 2007. See also Nicola Roxon (Shadow Attorney-General), *Age Discrimination Amendment Bill 2006* (Second Reading on 9 March 2006) <<http://www.nicolaroxonmp.com/Medrel0606/ADA.pdf>> at 27 July 2006.