

The Age Discrimination Act 2004

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Introduction

The *Age Discrimination Act 2004* (Cth) (the Act), recently enacted by the Federal Parliament, prohibits direct and indirect discrimination on the basis of age, in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information.¹ The Act also makes it an offence to, *inter alia*, publish or advertise (including in a newspaper, magazine, television or radio) with the intention of unlawfully discriminating against someone on the basis of age,² or victimise someone for making a complaint of age discrimination to the Human Rights and Equal Opportunity Commission (the Commission).³

The Act aims to act as a catalyst for attitudinal change, as well as address individual cases of age discrimination, the objects of the Act being to, *inter alia*, raise community awareness that people of all ages have the same fundamental rights and equality before the law, and eliminate discrimination on the basis of age as far as is possible in the areas of public life specified in the Act.⁴

Australia's ageing population and workforce, and the corresponding need for older workers to remain in active employment is undoubtedly the driving force behind the Act,⁵ one of the objects of the Act being to 'respond to demographic change and Australia's ageing population by removing barriers to older people participating in society, particularly in the workforce, and changing negative stereotypes about older people'.⁶ The Revised Explanatory Memorandum to the Act (the Explanatory Memorandum) comments that:

The proposed new age discrimination Bill will be an integral part of a wide range of key Government policy priorities to respond to the ageing workforce and population, and the important social and economic contribution that older and younger Australians make to the community.

...

Age discrimination is clearly a problem for both younger and older Australians. In relation to older Australians, in particular, many recent reports have emphasised the negative consequences of age discrimination on the wellbeing of older Australians and the broader consequences for the community. There is also evidence that the ageing of Australia's population will lead to an increase in the problem of age discrimination if Government action is not taken to address this issue. Government action is needed to address the generally unfounded negative stereotypes that employers and policy makers may have about both younger and older Australians, which limit their contribution to the community and the economy.⁷

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¹ See Part 4, Divisions 1 – 3 of the Act.

² See s 50 of the Act.

³ See s 51 of the Act.

⁴ See s 3 of the Act.

⁵ See Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 5 – 10.

⁶ See s 3(e) of the Act.

⁷ See Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 5.

Given the ageing of Australia's population, the promotion of a mature age workforces is a priority for the Government.⁸

Of course, the Act does not just prohibit discrimination of older Australians on the basis of age. The Act will also protect young people from discrimination on the basis of their age.

The Act was introduced into parliament by then Attorney-General Daryl Williams in January 2003, following extensive consultations by the Attorney-General's department with a wide range of organisations. These included the Commission, business, employee, industry, financial services, health services, youth, older people and social welfare groups. After much parliamentary debate the Act was enacted into law on 15 June 2004, and it commenced on 22 June 2004.

The Senate Legal and Constitutional Committee inquired into the Act (on reference from the Senate), and in its report, recommended some amendments be made to the Act.⁹ However none of those amendments were subsequently enacted. The Commission made a submission to that inquiry, expressing some concerns it had in relation to some aspects of the Act (which remain ongoing).¹⁰

The *Age Discrimination (Consequential Amendments) Act 2004* (Cth) (Consequential Amendments Act) was enacted along with the Act. The Consequential Amendments act provides a number of amendments to the Act and as well as consequential amendments to the *Workplace Relations Act 1996* (Cth) and *Human Rights and Equal Opportunity Act 1986* (Cth) (HREOCA). The Consequential Amendments Act will commence on the commencement of the Act. This paper does not specifically discuss the provisions of the Consequential Amendments Act.

This paper seeks to provide a roadmap to the Act (as amended by the Consequential Amendments Act), and is structured as follows:

- Part 1 considers the concept of age discrimination.
- Part 2 briefly discusses Australia's international obligations to address and eliminate age discrimination.
- Part 3 outlines existing federal legislative protection against age discrimination.
- Part 4 discusses the scheme and structure of the Act.
- Part 5 briefly outlines the functions conferred on the Commission under the Act.
- Finally, Part 6 contains some concluding comments.

1. The concept of age discrimination

⁸ See Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 10.

⁹ See Senate Legal and Constitutional Committee, *Provisions of the Age Discrimination Bill 2003*, 2003.

¹⁰ Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, available on the Commission's website at: http://www.humanrights.gov.au/legal/submissions/age_discrimination.html.

In many spheres of public (as well as personal) life, age is often used as a proxy for desired characteristics such as fitness, financial viability, responsibility, honesty or skill.¹¹ For example, a prospective employer may use age as a proxy for knowledge or experience. However, age is a 'blunt' tool on which to make such judgements.¹² It is no more reliable an indicator of those things than a person's sex or race.

Using age as a proxy obscures our assumptions and stereotyped views about age and people's capabilities at certain ages. Age-based stereotypes are common and familiar: research indicates that employers assume older people to be lacking in enthusiasm and drive, inflexible and resistant to change, as well as possessing deteriorating physical and mental capabilities.¹³ At the other end of the spectrum young people are often assumed to be untrustworthy or irresponsible.¹⁴ Such assumptions can have grievous consequences: the Australian Bureau of Statistics reports that 60% of unemployed jobseekers over 55 year and 30% over 45 years consider the most difficult problem they face in finding work is being considered 'too old' by employers.¹⁵

Categorising people exclusively accordingly to age also renders the differences between people within the same age group invisible (or put another way, obscures the similarities that exist between people of different age groups). People within a particular age group are differentiated by such characteristics as their education, economic status, religion, sex or disability, and such differences are often more important than those differences which exist between people of different age groups. For instance, an older person with mobility limitations may have more in common with a young person who has similar mobility limitations, than other people of her own age without such limitations. Ignoring the differences between people of a certain age group can create unfairness and inequity. It would be unfair, for example, if, in the situation just described, age rather than *need* was used to determine a person's eligibility to benefits or services that might assist all people with mobility limitations. Consequently, while using age as a proxy for certain characteristics is easy and appears to be efficient, it can often be obsolete and over or under inclusive.¹⁶

However it is important to note at this point that not all age discrimination will constitute *unlawful* age discrimination under the Act. As is the case in relation to other types of discrimination prohibited under Federal anti-discrimination law, an alleged discriminatory act will only constitute *unlawful* discrimination where a complainant can bring that act within the legislation. The legislative hurdles required to be jumped by a complaint in order to establish age discrimination under the Act is discussed in Part 4 below.

2. Australia's international obligations in relation to age discrimination

¹¹ See Human Rights and Equal Opportunity Commission, *Age Matters*, 2000, 11.

¹² Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 10.

¹³ See Senate Employment, Education and Training References Committee, Commonwealth Parliament, *Report on the inquiry into long term unemployment*, 1995, 53; Richard Pickersgill et al, *Productivity of Mature and Older Workers: Employers' Attitudes and Experiences*, (ACIRRT, University of Sydney, 1996).

¹⁴ See for instance, Human Rights and Equal Opportunity Commission, *Age Matters*, 2000, Chapters 3, 4.

¹⁵ See Australian Bureau of Statistics, *Job Search Experience of Unemployed Persons*, July 2003, Catalogue No 6222.0.

¹⁶ See Human Rights and Equal Opportunity Commission, *Age Matters*, 2000, 11.

Australia has the following international obligations to avoid and eliminate age discrimination:

- Additional grounds under the *Discrimination (Employment and Occupation) Convention* 'ILO 111'.¹⁷

The ILO 111 requires States Parties to eliminate employment and occupation related discrimination on the grounds of race, sex, colour, religion, political opinion, national extraction and social origin.¹⁸ Article 1.1(b) of ILO 111 permits States to add grounds for its domestic purposes. In 1989 the Australian Government added the following grounds: *age*, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference and trade union activity.¹⁹ For the purposes of ILO 111, employment and occupation are defined broadly, and include, 'access to vocational training, access to employment and to particular occupations, and terms and conditions of employment'.²⁰

ILO 111 is not part of Australian domestic law. It is however scheduled to HREOCA, with the effect that employees aggrieved by employment related discrimination may make a complaint to the Commission on the basis of age.²¹

- Articles 2 and 26 of the *International Covenant on Civil and Political Rights*.²²

Article 2 of the ICCPR requires States Parties to: 'respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*'. Article 26 provides *inter alia* that: 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or any other opinion, national or social origin, property, birth or other status'. While neither article 2 or 26 specifically mentions 'age' as a ground of discrimination, the UN Human Rights Committee has held that in Article 26 of the ICCPR, 'other status' includes age.²³

The ICCPR is not part of Australian domestic law. However like ILO 111, it is scheduled to HREOCA, with the effect that a person may make a complaint to the Commission in relation to any act or practice alleged to be in breach of the ICCPR.²⁴

- Article 2 of the *International Covenant on Economic, Social and Cultural Rights*.²⁵

Like Article 2 of the ICCPR, Article 2 of the ICESCR requires States Parties to: 'respect and ensure to all individuals within its territory and subject to its jurisdiction

¹⁷ Opened for signature on 25 June 1958, [1974] ATS 12 (entered into force on 15 June 1974).

¹⁸ See ILO 111, art 1.1(a).

¹⁹ See *Human Rights and Equal Opportunity Regulations 1989* (Cth), r 4.

²⁰ See ILO 111, art 1.3.

²¹ See HREOCA, s 31(b). See also discussion of ILO 111 in the Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 40.

²² Opened for signature on 23 March 1976, [1980] ATS 23 (entered into force on 28 January 1983).

²³ See *Love v Australia*, Communication No 983/2001, UN Doc CCPR/C/77/D/983/2001; *Schmitz-de-Jong v Netherlands*, Communication No 855/1999, UN Doc CCPR/C/72/D/855/1999.

²⁴ See HREOCA, s 31(b).

²⁵ Opened for signature on 19 December 1966, [1976] ATS 5 (entered into force on 10 March 1976).

the rights recognised in the present Covenant, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*'. On the basis of the UN Human Rights Committee's comments in relation to Article 26 of the ICCPR set out above, 'other status' in Article 2 of the ICESCR arguably includes the ground of age.

However, the ICESCR is not part of Australian domestic law, and it is not scheduled to HREOCA. Accordingly, a person may not make a complaint to the Commission in relation to any act or practice alleged to be in breach of the ICESCR.

- The *Convention on the Rights of the Child*.²⁶

CROC contains many social, economic and cultural rights for the benefit of people under 18. Whilst CROC is not part of Australian domestic law it has in effect been scheduled to HREOCA. Hence a person may make a complaint to the Commission in relation to any act or practice alleged to be in breach of CROC, though such a complaint may only give rise to a report to the Attorney-General for tabling in Federal Parliament. Such a complaint will not give rise to any legal enforceable remedy under the Act.²⁷

- *Political Declaration and Madrid International Plan of Action 2002* adopted at the Second World Assembly on Ageing, 2002:²⁸

The Second World Assembly on Ageing in Madrid, Spain in April 2002²⁹ was aimed at addressing a range of issues faced by older persons, including discrimination. At the conclusion of the assembly the participants adopted the *Political Declaration and Madrid International Plan of Action 2002*, the former being specifically referred to in the objects of the Act.³⁰ Relevantly, article 5 of the *Political Declaration* provides, *inter alia*, that:

Article 5

We commit ourselves to eliminate all forms of discrimination, including age discrimination. We also recognize that persons, as they age, should enjoy a life of fulfilment, health, security and active participation in the economic, social, cultural and political life of their societies. (emphasis added)

However the commitments made by Australia under this declaration are not binding on Australia in international law (in the same manner as a Convention).

These obligations are significant as the external affairs power is one of the primary constitutional powers relied upon by the Parliament to give the Act its constitutional validity.³¹

²⁶ Opened for signature on 20 November 1989, [1991] ATS 4, (entered into force on 16 January 1991).

²⁷ See HREOCA, s 31(b).

²⁸ The Second World Assembly on Ageing was held in Madrid, Spain on 8 – 12 April 2002. A record of the proceedings and links to the *Political Declaration and Madrid International Plan of Action 2002* adopted at the conclusion of the assembly are available at: <http://www.un.org/ageing>

²⁹ See ss 3(e), 10(7)(e),(f) of the Act.

³⁰ See s 3(e) of the Act.

³¹ See s 10(7) of the Act.

3. Existing federal legislative protection against age discrimination

The prohibition against age discrimination is not new. Age discrimination has been for many years unlawful under State and Territory anti-discrimination and equal opportunity legislation.³² In the Federal anti-discrimination landscape however, age discrimination has remained on the periphery; it is only addressed to a limited extent in HREOCA (and to a limited extent, under the *Workplace Relations Act 1996* (Cth)) in the area of employment and occupation.

As stated above, under HREOCA, the Commission has power to inquire into and attempt to conciliate complaints alleging age discrimination in employment and occupation.³³ However unlike complaints made to the Commission under the *Racial Discrimination Act 1975* (Cth) (RDA), the *Sex Discrimination Act 1984* (Cth) (SDA) or the *Disability Discrimination Act 1992* (DDA), complaints of age discrimination do not give rise to any enforceable legal right or remedy.³⁴ If the Commission finds that an act or practice constitutes age discrimination, the action that may be taken by the Commission is limited to preparing a report with recommendations, which report is then provided to the Attorney-General for tabling in Federal Parliament.³⁵

The Act will operate to remedy this gap in protection, as well as applying more broadly.³⁶

4. Scheme and structure of the Act

The scheme and structure of the Act is similar to that of other more recent Federal anti-discrimination law. That is, the Act makes it unlawful to directly or indirectly discriminate against someone on the basis of their age in certain areas of public life. The Act also creates several age exemptions, which if applicable, provide a statutory defence to an allegation of age discrimination.

4.1 Application of the Act

The Act applies throughout Australia, including all States and Territories and external Territories of Australia.³⁷ The prohibition on discrimination also applies in relation to

³² See *Anti-Discrimination Act 1977* (NSW), Part 4G; *Equal Opportunity Act 1984* (SA) s 85A; *Equal Opportunity Act 1984* (WA), Part IVB; *Discrimination Act 1991* (ACT), s 7(1)(ib); *Equal Opportunity Act 1995* (Vic), s 6(A); *Anti-Discrimination Act 1991* (Qld), s 7(1)(f); *Anti-Discrimination Act 1998* (Tas), s 16(b); *Anti-Discrimination Act 1992* (NT), s 19(1)(d).

³³ See HREOCA, s 32(1)(b). For the purposes of that section, 'discrimination' includes 'any distinction, exclusion or preference made on the ground of **age**': see *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth), r 4(a)(i).

³⁴ Under s 46PO of HREOCA a person may make an application to the Federal Court or Federal Magistrates Court alleging discrimination by one or more of the respondents to a complaint terminated pursuant to ss 46PE or 46PH.

³⁵ Since 1996, the Commission has made the following reports to the Attorney-General in relation to age discrimination in employment and occupation: HREOC Report No.1, Compulsory age retirement (1996); HREOC Report No.2, Redundancy arrangement and discrimination (1997), HREOC Report No.4, Age discrimination in trade union membership (1997); HREOC Report No.8, Age discrimination in the Australian Defence Force (2000); HREOC Report No.11, Discrimination on the ground of age (2000); HREOC Report No.14, Age discrimination in the Australian Defence Force (2002); HREOC Report No.26, Age discrimination in the Australian Defence Force (2004).

³⁶ See Part 4.1 in the text below in relation to the application of the Act.

³⁷ See ss 9(2), 10(5) of the Act.

discriminatory acts occurring in Australia but which also involve people, things or events outside of Australia.³⁸ The Act also applies, to the extent constitutionally permissible:

- to discrimination against Commonwealth employees and persons seeking to become a Commonwealth employee;³⁹
- to qualifying bodies operating under Commonwealth laws;⁴⁰
- to acts done under Commonwealth or Territory (excluding ACT and NT) laws by Commonwealth or Territory (excluding ACT and NT) governments, administrators or public bodies;⁴¹
- in relation to Australia's international obligations under ILO 111,⁴² the ICCPR,⁴³ ICESCR,⁴⁴ CROC,⁴⁵ as well as other matters in respect of which the Commonwealth has power to legislate under s 51(xxix) of the Constitution;⁴⁶
- discrimination by corporations (including foreign corporations within the meaning of s 51(xx) of the Constitution);⁴⁷
- discrimination in the course of, or in relation to, banking (other than State banking not extending beyond the limits of the State concerned, within the meaning of s 51(xiii) of the Constitution));⁴⁸
- discrimination in the course of, or in relation to, insurance (other than State insurance not extending beyond the limits of the State concerned, within the meaning of s 51 (xiv) of the Constitution);⁴⁹ and
- discrimination in international or inter-state trade and commerce.⁵⁰

The Act is intended to bind the executive governments of the Commonwealth and each of the States (including the ACT and NT) and of Norfolk Island and the Administrators of the Territories.⁵¹

The Act does not purport to displace or limit the operation of State and Territory laws capable of operating concurrently with the Act.⁵² It deals with any potential inconsistency between Federal and State/Territory laws by providing that where complainants have a

³⁸ See s 9(3) of the Act.

³⁹ See s 10(3) of the Act.

⁴⁰ See s 10(4) of the Act.

⁴¹ See s 10 (6) of the Act.

⁴² See discussion of ILO 111 in Part 2 of the text above.

⁴³ See discussion of the ICCPR in Part 2 of the text above.

⁴⁴ See discussion of the ICESCR in Part 2 of the text above.

⁴⁵ See discussion of CROC in Part 2 of the text above.

⁴⁶ See s 10(7) of the Act.

⁴⁷ See ss 10(8), (9) of the Act.

⁴⁸ See s 10(10)(a) of the Act.

⁴⁹ See s 10(10)(b) of the Act.

⁵⁰ See s 10(11) of the Act.

⁵¹ See s 13 of the Act.

⁵² See s 12(3) of the Act.

choice as to jurisdiction they are required to elect whether to make their compliant under Federal or State/Territory legislation.⁵³

4.2 Direct and indirect discrimination⁵⁴

The Act prohibits direct and indirect discrimination, the definitions of which broadly reflect the formal and substantive models of equality.

Formal equality is the term usually used to describe the concept of equality, which insists on equal treatment: that is, that people should be assessed without regard to certain characteristics (or ‘grounds’ of discrimination) such as sex or age.⁵⁵

Substantive equality is the term used to describe the notion that differential treatment may be required to prevent or compensate for disadvantage experienced because of a particular characteristic, such as age.⁵⁶ Its focus is therefore on the equality of outcomes, rather than procedural equality.⁵⁷ Indeed it recognises that in some circumstances procedural equality may perpetuate and reinforce disadvantage.

Direct discrimination occurs when a person is treated less favourably on the basis of a particular attribute or ‘ground’ such as sex, race or in this case age. Hence direct discrimination provisions generally require a comparison to be made between the way a complainant is treated (or in which it is proposed that they be treated) and the way in which a person without the relevant ground of discrimination is treated or would be treated in the same or similar circumstances. That other person, whether actual or hypothetical, is often referred to as the ‘comparator’. The complainant must also generally demonstrate some form of causal connection between the ground of discrimination and the treatment said to constitute discrimination. As will be discussed further in this paper, the Act requires that age be the dominant reason for the treatment said to constitute unfavourable treatment. The definition of direct discrimination is contained in s 14 of the Act as follows:

14 Discrimination on the ground of age – direct discrimination

For the purposes of this Act, 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 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 persons of the age of the aggrieved person; or

⁵³ See s 12(5) of the Act.

⁵⁴ This discussion is based on a similar discussion in C Lenehan, ‘Purvis (on behalf of Daniel Hoggan) v State of NSW (Department of Education and Training) and Human Rights and Equal Opportunity Commission’, (Paper presented at the launch of *Federal Discrimination Law 2004* at the Law Society of South Australia, 24 March 2004), [3.2].

⁵⁵ H Collins, ‘Discrimination, Equality and Social Inclusion’, (2003) 66 *Modern Law Review* 16, 16–17.

⁵⁶ *Ibid* at 17.

⁵⁷ *Ibid*.

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

As with other anti-discrimination legislation, the Act prohibits less favourable treatment of a person not only because of their age, but also because of a characteristic that appertains generally to persons of that age or a characteristic that is generally imputed to persons of that age. The extension of the definition in this way addresses the stereotyping of a particular group or persons on the basis of actual or implied distinguishing or idiosyncratic traits.⁵⁸ However it is not necessary to establish the identified characteristic exists in every case, it is only necessary to establish that it generally exists or operates.⁵⁹

In contrast,⁶⁰ indirect discrimination occurs when an ostensibly neutral rule, practice or policy has the effect of disproportionately disadvantaging members of a group defined by a relevant ground of discrimination. The focus on effects or outcomes reflects the model of substantive equality.⁶¹ Not all policies which have this effect are unlawful under federal discrimination law. If the policy is 'reasonable' in the circumstances, then the disproportionate disadvantage is justifiable. The distinction being made is therefore a lawful distinction. For example, a restaurant advertises for a waitress, stipulating a minimum of 6 years experience. People under 21 years are therefore effectively barred from applying (because the minimum working age is approximately 16 years). If the employer can establish that 6 years' experience is reasonably necessary, then the condition would be a reasonable rule, practice or requirement and there would be no unlawful discrimination.

Section 15 of the Act defines indirect discrimination as follows:

15 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 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.

⁵⁸ See for instance, *Commonwealth v HREOC (Dopking No 1)* (1993) 46 FCR 191, 207 (Wilcox J).

⁵⁹ *Ibid.*

⁶⁰ Direct and indirect discrimination provisions in anti-discrimination legislation are generally considered by the courts as mutually exclusive: See *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 171, 184 (Brennan and Dawson JJ); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ); *Australian Medical Council v Wilson* (1996) 68 FCR 46, 55; *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 97 (Sackville J); *Minns v New South Wales* [2002] FMCA 60 (Raphael FM); *Mayer v Australian Nuclear and Technology Organisation* [2003] FMCA 209 (Driver FM). In *Minns v New South Wales* (a case under the DDA), Raphael FM held that this does not prevent an applicant from arguing that the same set of facts constitutes direct and indirect discrimination: 'The complainant can surely put up a set of facts and say that he or she believes that those facts constitute direct discrimination but in the event that they do not they constitute indirect discrimination', [245].

⁶¹ H Collins, 'Discrimination, Equality and Social Inclusion', (2003) 66 *Modern Law Review* 16 at 17.

Section 15 generally takes the form of the indirect discrimination provisions in the SDA, which is both simpler to understand and apply and broader than the definitions used in the DDA and RDA. Section 15(2) of the Act, (like s7C of the SDA), also specifies that the burden of proof in establishing that a condition, requirement or practice is reasonable in the circumstances lies with the alleged discriminator. Placing the onus on the respondent is logical as information concerning the reasonableness of the particular condition, requirement or practice would generally be in the possession of the respondent.

However unlike s7B(2) of the SDA, the Act does not contain any reference to the factors to be taken into account when determining whether a condition, requirement or practice is reasonable in the circumstances.⁶² The inclusion of a similar provision to s7B(2) of the SDA in the Act may have provided important guidance for parties to a complaint, as well as assisted the Commission in the administration of the legislation.⁶³

4.2.2 Direct or indirect discrimination on the ground of age

An alleged discriminatory act will only be discriminatory under the Act where that act is done on the basis of age. As 'age' is defined to include a 'age group',⁶⁴ an allegedly discriminatory act need not be done because of a person's particular age; it will be enough to establish that it was done because of the person's age group.

However the definition of age does not extend to cover the age which might be imputed to a person.

4.2.3 The 'dominant reason' test

The Act includes a dominant reason test. That is, it provides that where an act is done for two or more reasons, that act will only be discriminatory if the person's age was the **dominant reason** for the doing of the act. That test is set out in s 16 as follows:

16 Act done because of age and for other reason

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 a person only if:

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

The introduction of a dominant reason test represents a departure from the position in other Federal anti-discrimination law. Under the SDA,⁶⁵ RDA⁶⁶ and DDA,⁶⁷ if an act is

⁶² S 7B of the SDA provides that these matters include, (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

⁶³ See Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, [6].

⁶⁴ See s 5 of the Act.

⁶⁵ See s 8 of the SDA.

⁶⁶ See s 18 of the RDA.

done for two or more reasons and a discriminatory ground is one of those reasons, then the act is done for the discriminatory reason, whether or not it was the dominant or substantial reason for doing the act. This means that to substantiate a complaint, a person only needs to show that a ground of discrimination, for example their race, sex or disability, was a reason for the less favourable treatment they received.

In practice, the inclusion of a dominant reason test in the Act is likely to make it harder for people to make successful complaints of discrimination on the basis of age, and may lead to considerable legal complexity. The meaning and practical difficulties in applying a ‘dominant reason’ test, especially when a court is faced with dual purposes, has led to much discussion in the case law in the area of legal professional privilege.⁶⁸ Indeed the dominant purpose test was removed from the RDA in 1990 because of concerns about the practical application of the test.⁶⁹

Arguably the dominant reason test also implies that age discrimination is ‘less important’ than other types of discrimination. This could reduce the potential of the Act to educate and effect attitudinal change and may therefore undermine the object of the Act to eliminate discrimination against people on the ground of age.

4.2.4 Age discrimination and disability discrimination

The Act provides that, a reference to discrimination against a person on the ground of the person’s age is taken not to include a reference to discrimination against a person on the ground of a disability of the person (within the meaning of the DDA).⁷⁰

The Explanatory Memorandum to the Act states that this provision:

deals with the situation where there is an overlap between the operation of this Act and the DDA. For example, an overlap could occur where a person has a disability that is or could be related to their age (such as impaired hearing or mobility). This provision ensures that the Act does not create a second or alternative avenue for complaints of disability discrimination where such complaints are properly covered by the DDA. Complaints of age discrimination that would also be covered by the DDA should be dealt with under the legislative regime established by that Act.⁷¹

People’s experiences of discrimination are often multi-dimensional and complex. The Commission regularly receives complaints alleging multiple grounds of discrimination. To date the Commission has been able to effectively deal with this issue through its complaint handling processes. In its submission to the Senate Legal and Constitutional Committee’s inquiry into the Act the Commission argued that, in the same way, any

⁶⁷ See s 10 of the DDA.

⁶⁸ See, for example, *Esso Australian Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Sparnon v Apand* (1996) 68 FCR 322.

⁶⁹ See the then President of the Commission, Sir Ronald Wilson’s adverse comments concerning the dominant purpose test in the RDA in *Ardesbirian v Robe River Iron Associates* (1990) EOC 92-299. In that case, President Wilson stated that:

The application of the [dominant reason test] presents considerable difficulty in a case such as this, requiring an evaluation to be made of the respective weight of the two reasons in contributing to the decision.

For examples of the application of the ‘dominant purpose’ test as it then was in the RDA see *Ardesbirian v Robe River Iron Associates* [1990] HREOCA 2 (18 May 1990) EOC 92-299; *Surti v State of Queensland* [1993] HREOCA 3 (22 February 1993).

⁷⁰ See s 6 of the Act.

⁷¹ See Revised Explanatory Memorandum, *Age Discrimination Act 2004* (Cth), 38.

potential overlap between grounds of discrimination covered by the DDA and the Act could be effectively dealt with through the Commission's initial complaint assessment process.⁷² In this regard it is interesting to note that no other Federal or State or Territory anti-discrimination legislation contains such a provision.

Nonetheless this section will not necessarily operate to prevent someone making a complaint under the DDA and the Act where they believe that they were treated less favourably on the basis of their age *and* their disability (though they would only be successful under the Act if the dominant reason for their treatment was their age).⁷³

4.2.4 Discrimination against a relative or associate on the basis of age

Unlike other Federal anti-discrimination legislation, the Act does not prohibit discrimination on the basis of the age of a person's relative or associate. An example of this type of discrimination would be where a person seeking to lease premises is discriminated because they have elderly parents living with them who are not perceived as being desirable in a particular establishment.⁷⁴ The lack of such a provision will potentially undermine the aim of the Act to achieve attitudinal change – even though such provisions in other Federal and State/Territory laws do not generate a substantial number of complaints.⁷⁵

4.3 Proscribed areas of age discrimination

The areas of public life in which age discrimination is proscribed is set out in Part 4, Divisions 1 – 3. In general they reflect those proscribed in other Federal anti-discrimination legislation. Each of these areas is considered in turn.

4.3.1 Discrimination in employment

The first area in which age discrimination is prohibited under the Act is the area of work. That prohibition extends to:

- (a) discrimination against employees,⁷⁶ commission agents⁷⁷ and contract workers⁷⁸ including in relation to recruitment and offers of employment, as well as the actual terms and conditions of employment, access to promotion and training and dismissal or any other detriment. However this provision does not extend to voluntary work or domestic duties performed in private households,⁷⁹ and provides an exception where a person cannot perform the inherent requirements of the particular position because of their age;⁸⁰

⁷² See Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, available on the Commission's website at: http://www.humanrights.gov.au/legal/submissions/age_discrimination.html, [4].

⁷³ See Revised Explanatory Memorandum, *Age Discrimination Act 2004* (Cth), 39.

⁷⁴ See Senate Legal and Constitutional Committee, *Committee Hansard*, 9 September 2003, 14.

⁷⁵ See Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, available on the Commission's website at: http://www.humanrights.gov.au/legal/submissions/age_discrimination.html, [7.2].

⁷⁶ See s 18 of the Act.

⁷⁷ See s 19 of the Act.

⁷⁸ See s 20 of the Act.

⁷⁹ See s 18(3) of the Act.

⁸⁰ See ss 18(4), 19(3), 20(2) of the Act respectively.

- (b) partnerships consisting of more than six partners including in relation to decisions about who can become a partner, and the terms and conditions upon which a partnership is offered. This provision also covers denying or limiting access to benefits, expelling a partner or subjecting a partner to any other detriment;⁸¹ However this provision provides an exception where a person cannot perform the inherent requirements of the partnership because of their age;⁸²
- (c) qualifying bodies which provide authorisations or qualifications needed for carrying on an occupation, profession or trade discriminating including in relation to conferring or withdrawing such authorisation or qualifications, and in the terms or conditions on which an authorisation or qualification is granted.⁸³ However this provision provides an exception where a person cannot perform the inherent requirements of the particular profession or occupation because of their age;⁸⁴
- (d) registered organisations under Schedule 1B to the *Workplace Relations Act 1996* including in relation to membership or the organisation or benefits provided by the organisation;⁸⁵ and
- (e) employment agencies including in relation to refusing to provide services and the terms or conditions or manner in which their services are provided,⁸⁶ unless the person cannot carry out the inherent requirements of the particular employment because of their age.⁸⁷

Exemption where person unable to carry out inherent requirements of the position

Age discrimination in the area of employment will not be unlawful however where a person is unable to carry out the inherent requirements of the particular position or employment because of their age (the exemption operating as a statutory defence to an allegation of age discrimination).⁸⁸

In determining whether a person is unable to carry out the inherent requirements of a particular position or employment, the following factors must be taken into account:

- the person's past training, qualifications and experience relevant to the particular employment;
- if the person is already employed by the employer – the person's performance as an employee; and
- all other relevant factors that it is reasonable to take into account.

⁸¹ See s 21 of the Act.

⁸² See s 21(4) of the Act.

⁸³ See s 22 of the Act.

⁸⁴ See s 22(2) of the Act.

⁸⁵ See s 23 of the Act.

⁸⁶ See s 24 of the Act.

⁸⁷ See s 24((2) of the Act.

⁸⁸ The inherent requirements defence set out in the Act is similar to that contained in s 15(4) of the DDA, and ss 143(1D), 170CK(3) and 170LU(6)(b) of the *Workplace Relations Act 1996*. Cases in which this defence has been discussed by the High Court include

In relation to similar provisions in the DDA and *Industrial Relations Act 1988*, the High Court has held that the ‘inherent requirements’ of a particular employment means ‘something essential’⁸⁹ to a particular position. The question of whether something is an inherent requirement of a particular position is required to be answered in reference to the function which the employee performs as part of the employer’s undertaking and by reference to that organisation.⁹⁰ However employers are not permitted to organise or define their business to permit discriminatory conduct.⁹¹

4.3.2 Discrimination in areas of public life other than employment

The Act also makes age discrimination unlawful in the following areas:

(a) Access to goods, services and facilities⁹²

This provision makes it unlawful for someone who provides goods, services and facilities to discriminate against a person on the basis of age by refusing to provide the goods, services or facilities, or in the way in which or terms and conditions on which those goods, services⁹³ or facilities are offered.

(b) Education⁹⁴

This provision makes it unlawful for an educational authority to discriminate against a person on the basis of age in refusing or failing to accept the person’s application for admission, or in the terms and conditions on which the authority is prepared to accept the application. It also makes it unlawful to deny or limit access to benefits provided by the educational institution, to expel a student or subject a student to any other detriment on the basis of their age.

However this provision provides an exception where an educational institution is established for persons of particular ages (*ie* primary or high schools).⁹⁵

(c) Accommodation⁹⁶

This provision makes it unlawful to discriminate against a person on the basis of their age by refusing an application for accommodation, in the terms and conditions on which accommodation is offered or giving a person a lower priority in an accommodation waiting list. This provision also makes it unlawful to deny or limit

⁸⁹ *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J). See also *X v Commonwealth* (1999) 200 CLR 177.

⁹⁰ *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 284 [1] (Brennan CJ).

⁹¹ *X v Commonwealth* (1999) 200 CLR 177, 189-90 [37] (McHugh J); 208 [102] (Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed)).

⁹² See s 28 of the Act.

⁹³ Note that s 5 of the Act defines ‘services’ widely to include, superannuation, banking, insurance, grants, loans, credit or finance, travel, recreation or refreshment, telecommunications, services provided by a professional or tradesperson or services provided by a government, government authority or local government body.

⁹⁴ See s 26 of the Act.

⁹⁵ See s 26(3) of the Act.

⁹⁶ See s 29 of the Act.

access to benefits associated with accommodation or to evict the person or subject the person to any other detriment on the basis of their age.

However this provision provides an exception where accommodation is provided by a person who lives on the premises or whose near relative lives on the premises, where the accommodation is offered to three or less persons.⁹⁷

(d) Access to premises⁹⁸

This provision makes it unlawful to discriminate against a person on the basis of age in allowing or refusing access to premises⁹⁹ that the public or a section of the public is entitled to enter or use, or on the terms and conditions on which such access is permitted.

(e) Land¹⁰⁰

This provision makes it unlawful to discriminate against a person on the basis of age in relation to the selling of, or other dealings in land. This includes refusing to sell land or applying discriminatory terms and conditions on which an interest in land is offered.

However this provision contains an exception in relation to the giving of land in a will or as a gift.

(f) Requests for information on which unlawful age discrimination might be based.¹⁰¹

This provision makes it unlawful to ask a person to provide information if the information is being requested in connection with or for the purposes of doing an act which would be unlawful under the Act, and persons of a different age would not be asked to provide that information in situations which are the same or not materially different.

(g) Administration of Commonwealth laws and programs¹⁰²

This provision makes it unlawful for a person who performs functions or exercises powers under Commonwealth laws or under Commonwealth programs or has any other responsibility for the administration of those programs or laws, to discriminate against a person on the basis of age in the exercise of those powers or responsibilities.

4.4 General exemptions under the Act

In addition to the exemptions provided in relation to specific provisions of the Act (outlined above), the Act contains a number of general exemptions to the proscription

⁹⁷ See s 29(3) of the Act.

⁹⁸ See s 27 of the Act.

⁹⁹ Premises is defined in s 5 of the Act to include structures (such as buildings, aircraft, vehicles or vessels), places and parts of premises.

¹⁰⁰ See s 30 of the Act.

¹⁰¹ See s 32 of the Act.

¹⁰² See ss 22, 31 of the Act.

provisions of the Act. While all Federal anti-discrimination legislation contains such exemptions, the Act is unique in both the number and breath of its exemptions.

Each of the exemptions contained in the Act will be examined in turn.

As a preliminary point it is relevant to note that exemptions in anti-discrimination legislation are narrowly construed, the following principles of construction being applicable:

- First, in construing legislation designed to protect human rights, the courts have a special responsibility to take account of and give effect to the objects and purposes of the legislation.¹⁰³ In accordance with this principle, exemptions and other provisions which restrict rights conferred by such legislation are strictly construed by Australian courts.¹⁰⁴ For instance, that approach has been applied to exemptions under the SDA.¹⁰⁵
- Further, in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.¹⁰⁶ This approach does not only apply in circumstances where there is an ambiguity or inconsistency in the Act.¹⁰⁷ A strict construction of the provisions of Division 4 of the Act would be required to give effect to the object of the Bill to eliminate age discrimination.¹⁰⁸
- A strict construction is also required by the structure of Part 4, Division 4. In that regard, it is relevant to note that the exemptions do not operate in a blanket fashion. They are designed to cover only particular sets of circumstances and areas of activity, while maintaining the unlawfulness of acts of discrimination falling outside the exemptions. A broad construction of one or more of the exemptions provided for in Part 4, Division 4 such that they overlapped or completely subsumed other exemptions would defeat the purpose evident from the carefully wrought structure of that division, as well as being contrary to the objects of the Act as a whole.

4.4.1 Positive discrimination exemption

The Act provides an exemption allowing positive measures to be taken (or positive discrimination) on the basis of age, as follows:

33 Positive Discrimination

This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of this Act, if:

¹⁰³ *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J; *IW v City of Perth* (1997) 191 CLR 1 at 14 per Brennan CJ and McHugh J, at 22-23 per Gaudron J, at 27 per Toohey, at 39 and 41 – 42 per Gummow J and at 58 per Kirby; *X v Commonwealth* (1999) 200 CLR 177 at 223 per Kirby J.

¹⁰⁴ *X v Commonwealth* (1999) 200 CLR 177 at 223 per Kirby J; *Qantas Airways Limited v Christie* (1998) 193 CLR 280 at 333 and footnotes 168-169 per Kirby J.

¹⁰⁵ See for example, *Gardner v All Australia Netball Association Limited* (2003) 197 ALR 28 at [19], [23] – [24] per Raphael FM; *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739 at [89] per Wilcox J.

¹⁰⁶ See *Acts Interpretation Act 1901* (Cth), s 15AA.

¹⁰⁷ *Mills v Meeking* (1990) 91 ALR 16 at 30-31, per Dawson J.

¹⁰⁸ See s 3(a) of the Act.

- (a) the act provides a bona fide benefit to a person of a particular age; or

Example: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.

- (b) the act is intended to meet a need that arises out of the age of the persons of a particular age; or

Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.

- (c) the act is intended to reduce a disadvantage experienced by persons of a particular age.

Example: Older people are often more disadvantaged by retrenchment than other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.

That section recognises that there are some circumstances in which age based distinctions are legitimate, broadly socially accepted, or justified by other strong policy interests.¹⁰⁹ The Explanatory Memorandum to the Act explains the intention of this provision as follows:

- (a) [s 33(a)] recognises and permits a range of concessions and benefits that are provided in good faith to people of a particular age. The most common examples are discounts and concessions provided to older people. Such benefits are not seeking to give older people an unfair advantage or to exclude or disadvantage people of other ages, and have broad social acceptance.
- (b) [s 33(b)] recognises and permits measures that seek to address the needs of people of particular ages that are different to or more acute than the needs of other ages ... While this provision refers to the beneficial act in question being 'intended' to meet an age-related need, it is not necessary to establish that the person actually doing the particular act has a certain intention at the time ... [T]he provision is also directed at situations where a beneficial program or facility is established by a person or body with the intention of meeting an age-related need, but is operated by another person or body who simply carries out the policies determined by those who established the beneficial program.
- (c) [s 33(c)] recognises and permits measures that seek to overcome age-related disadvantage. Where a particular age group has been historically disadvantaged, or where social circumstances at the time are such that a particular age group has less access to certain social benefits or opportunities, measures that are aimed at alleviating these problems are allowed ... As with the needs-based exemption, the requisite intention to reduce disadvantage need not be held by the person actually providing the beneficial treatment.

The concept of positive discrimination embodied in this section of the Act extends beyond the current understanding of 'special measures' in other Federal anti-discrimination law. In the SDA,¹¹⁰ RDA¹¹¹ and DDA,¹¹² special measures are largely confined to those actions taken in order to achieve substantive equality, or to meet the

¹⁰⁹ See Revised Explanatory Memorandum, *Age Discrimination Act 2004* (Cth), 50.

¹¹⁰ See s 7D of the SDA.

¹¹¹ See s 8 of the RDA.

¹¹² See s 45 of the DDA.

special needs of a particular group. Under the SDA and RDA, the taking of special measures ceases to be authorised once the purpose for which they were implemented has been achieved.¹¹³ The DDA limits special measures to those ‘reasonably intended’ to address a special need or disadvantage.¹¹⁴ Special measures provisions to date therefore have generally only allowed *temporary* affirmative action measures to be taken for the purposes of redressing particular disadvantage or the impact of past discriminatory policies or practices.¹¹⁵ The positive discrimination exemption under the Act however does not contain such an express temporal limitation. That section is broader because it authorises positive measures to be taken for purposes other than that of achieving substantive equality. Nor does it impose any requirement that those measures be reasonable. That breadth arguably undermines the aim of the Act to eliminate age discrimination.¹¹⁶

There does at least appear to be a temporal limitation on measures taken pursuant to ss 33 (b) and (c). It also remains to be seen how the courts might interpret this provision, and in particular, whether a court will require positive measures taken under s 33 to be ‘reasonably appropriate and adapted’) to the benefit proposed to be provided or need that is intended to be met or disadvantage intended to be reduced. Such an interpretation arguably may also be required so not to undermine the object of the Act to eliminate age discrimination.¹¹⁷

4.4.2 Exemption for youth wages

The Act contains a blanket exemption for youth wages as follows:

25 Exemption for youth wages

This Division does not make it unlawful for a person to discriminate against another person on the ground of the other person’s age, in relation to youth wages:

- (a) in the arrangements made for the purpose of determining who should be offered work; or
- (b) in determining who should be offered work; or
- (c) in payment, or offer of payment, of remuneration for work.

In this section:

youth wages means remuneration for persons who are under 21.

The Explanatory Memorandum to the Act states sets out the reason for the exemption being to ‘protect young people’s competitive position in the labour market’. Arguably the causal relationship between youth wages and full-time employment is not so clear. This issue was extensively considered in the Commission’s report into age discrimination, *Age Matters*, which concluded that:

Determining the acceptability of otherwise of junior rates has been difficult because of the lack of unequivocal evidence as the effect their abolition would have on the youth labour market overall. If there is no significant detrimental effect, the differences cannot be justified. The evidence, however, is inconclusive.¹¹⁸

¹¹³ See for example, s 7D(4) of the SDA.

¹¹⁴ See s 45 of the DDA.

¹¹⁵ C Ronalds and R Pepper, *Discrimination Law and Practice*, (2nd Ed, 2004), 89.

¹¹⁶ See s 3(a) of the Act.

¹¹⁷ See s 3(a) of the Act.

¹¹⁸ See Human Rights and Equal Opportunity Commission, *Age Matters*, 2000, 114.

On the basis of this, it may be that the issue of youth – or age specific – wages would have been better dealt with by way of a targeted special measures provision.¹¹⁹ This would ensure that such programs or policies were designed and targeted to address disadvantage of a particular group, and that once that disadvantage had been remedied the program or policy would no longer be exempt from the Act.¹²⁰

4.4.3 Exemption relating to superannuation, insurance and credit

The Act provides an exemption in relation to age-based discrimination in the terms and conditions on which an annuity, insurance policy or membership of a superannuation scheme is offered or refused, where the discrimination:

- is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- is reasonable having regard to the matter of the data and other relevant factors; or
- in a case where no such actuarial or statistic data is available, and cannot reasonably be obtained – the discrimination is reasonable having regard to any other relevant factors.¹²¹

¹¹⁹ See Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, available on the Commission's website at:

http://www.humanrights.gov.au/legal/submissions/age_discrimination.html, [8]. The Commission argued that the issue of youth wages would have been better with by way of a targeted positive measures provision or an exemption in relation to acts done in direct compliance with an award, industrial agreement or Commonwealth legislation rather than by the introduction of a blanket exemption. This would ensure that:

- only those programs and policies that are designed and targeted to address disadvantage by a particular group are exempt from the operation of the Act; and
- once the disadvantage that the program or policy had been set up to address has been remedied then the policy or program would no longer be a special measure and exempt from the Act.

¹²⁰ See Revised Explanatory Memorandum, *Age Discrimination Act 2004* (Cth), 12.

¹²¹ See ss 37(1),(2),(3) of the Act. The issue of 'reasonableness' in relation to actuarial data in insurance was considered in *QBE Travel Insurance v Bassanelli* [2004] FCA 396, a case involving a similar provision under the DDA. In that case the applicant sought travel insurance for an overseas trip. She was denied the insurance on the basis of her disability, metastatic breast cancer. The applicant's evidence was that she did not expect insurance for her pre-existing medical condition, but rather other potential losses such a theft, loss of luggage, other accidental injury, or injury or illness to her husband. The respondent conceded that there was no actuarial or statistical data relied upon in making the decision to refuse insurance, but maintained that their conduct was 'reasonable' and therefore fell within s 46(1)(g) of the DDA. Mansfield J held that ss 46(1)(f),(g) were not alternative sections. Hence a respondent had to prove that the discrimination was based on actuarial or statistical data **and** was reasonable having regard to all relevant factors. He held that 'reasonable' as used in s 46(1) ought to be given its ordinary meaning, and in determining whether discrimination by an insurer was reasonable, the court must look at all the relevant factors – not just the material known to the insurer at the time:

Clearly the reasons advanced by an insurer in support of its discriminatory conduct will be considered carefully, and the material on which the reasons are based will be given due weight. But determination of the reasonableness of the discrimination is a matter of fact should be determined in light of all relevant matters, and should be determined objectively on that material.

After considering all the expert evidence, Mansfield J found against the respondent saying that:

I consider the appellant applied a decision-making process which was formulaic or tended to stereotype the respondent by reference to her disability. Such grouping of individuals, whether by race or disability, without proper regard to an individual's circumstances or to the characteristics that they possess, may cause distress and hurt. This case provides an illustration. The DDA ... requires that the particular circumstances of an individual who is discriminated against must be

Hence it will not be unlawful under the Act, for instance, to offer motor vehicle insurance to drivers aged under 25 years on different terms and conditions to those aged over 25 years where there is actuarial or statistical data that demonstrates a higher accident rate for those persons.

The Act also provides an exemption in relation to legislation which regulates superannuation and seeks to give effect to particular policy objectives and in relation to acts done by persons in compliance with such legislation.¹²²

In relation to the provision of credit, the Act provides an exemption for age-based discrimination in the terms and conditions on which credit is provided to a person where the discrimination:

- is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- is reasonable having regard to the matter of the data.¹²³

Note that the Act makes it an offence not to provide the source of any such actuarial or statistical data if required to do so by the Commission or the President of the Commission.¹²⁴

4.4.4 Exemption for charities, religious and voluntary bodies

The Act provides an exemption to charities, religious and other voluntary bodies as follows:

34 Charities

(1) This part does not:

- (a) affect a provision in a charitable instrument that confers charitable benefits, or enables charitable benefits to be conferred, wholly or in part on persons of a particular age; or
- (b) make unlawful any act done to give effect to such a provision.

(2) In this section:

Australia includes the external territories.

charitable benefits means benefits for the purposes that are exclusively charitable according to the law in force in any part of Australia.

charitable instrument means a deed, will or other document, whether made before or after the commencement of this Act, that confers charitable benefits or enables charitable benefits to be conferred on persons.

35 Religious bodies

addressed, but not in a formulaic way ... the reference to 'any other relevant factors' confirms that legislative intent.

¹²² See s 38 of the Act.

¹²³ See s 37(4),(5) of the Act.

¹²⁴ See ss 52, 54 of the Act.

This part does not affect an act or practice of a body established for religious purposes that:

- (a) conforms to the doctrine, tenets or beliefs of that religion; or
- (b) is necessary to avoid injury to the religious sensitivities of adherents of that religion.

36 Voluntary bodies

This part does not make it unlawful for a voluntary body to discriminate against a person, on the ground of the person's age, in connection with:

- (a) the admission of persons as members of the body; or
- (b) the provision of benefits, facilities or services to members of the body.¹²⁵

In this section:

registered organisation means an organisation within the meaning of Schedule 1B of the *Workplace Relations Act 1996*.

voluntary body means an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purposes of making a profit, but does not include:

- (a) a registered organisation; or
- (b) a body established by a law of the Commonwealth, of a State or of a Territory; or
- (c) an association that provides grants, loans, credit, or finance to its members.

Similar exemptions are contained in the SDA¹²⁶ and the DDA.¹²⁷

The Explanatory Memorandum makes it clear that the exemption provided to voluntary bodies is not intended to apply to other possible acts of discrimination by voluntary bodies, such as in employment or the provision of services to the public or administration of Commonwealth programs.¹²⁸ However the position may not be so clear in relation to religious bodies.

4.4.5 Exemption in relation to health

The Act provides an exemption in relation to:

- exempted health programs, which are defined as:¹²⁹

a program, scheme or arrangement that:

- (a) relates to health goods or services or medical goods or services; and
- (b) is reasonably based on evidence about matters (including safety, effectiveness, risks, benefits and health needs) that affect people of a particular age in a different way to people of a different age.

The evidence mentioned in paragraph (b) is the evidence that was reasonably available at the time the program, scheme or arrangement was established.

¹²⁵ In *Gardner v All Australia Netball Association Limited* [2003] FMCA 81, [26] Raphael FM held that the equivalent provision in the SDA only provided protection for voluntary bodies in their relationships with non-members. As the applicant was not (and could not be – individual netballers not being eligible to become members of the AANA) a member of the AANA, but not in their relationships with non-members.

¹²⁶ See ss 36 (Charities), 37 (Religious bodies), 39 (Voluntary bodies) of the SDA.

¹²⁷ See s 49 (Charities) of the DDA.

¹²⁸ See Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 51.

¹²⁹ See s 42(1),(2) of the Act.

An example of such a program might be a scheme that provides free influenza vaccines to older people, on the basis of evidence showing that older people are at greater risk of complications as a result of influenza than are people of other ages.¹³⁰

- decisions taken by health or medical providers in relation to the provision of health or medical goods or services (including anything done in compliance with an exempted health program). This provision provides that it will not be discriminatory to take a person's age into account in determining whether or not to provide that person with particular health or medical services or goods, where that determination is *reasonably* based on evidence and professional knowledge about the ability of persons of that age to benefit from those goods or services.¹³¹

4.4.6 Exemption relating to direct compliance with laws, orders of courts including taxation legislation and social security legislation

The Act also provides an exemption in relation to acts done in direct compliance with certain Federal and State and Territory laws, court orders and industrial awards and agreements. The section creates two classes of exemption. A blanket exemption is given in relation to acts done in direct compliance with those acts or subsidiary legislative instruments contained in Schedule 1 to the Act.¹³² However a two year exemption is provided in relation to acts done in direct compliance with other Commonwealth acts and subsidiary instruments.¹³³

An exemption is also provided in relation to acts done in direct compliance with:

- acts or legislative instruments of a State or Territory,¹³⁴ unless it is an instrument specified in regulations made under the Act,¹³⁵ and
- a court order,¹³⁶ an order or award of an industrial relations tribunal¹³⁷ or a certified agreement within the meaning of the *Workplace Relations Act 1996*.¹³⁸

This exemption is generally uncontroversial except in the following way. The section operates to exempt the Australian Defence Forces (ADF) from the purview of the Act. This is because Schedule 1 to the Act includes ADF legislation and subsidiary instruments. This is problematic given that a number of the complaints of age discrimination in employment made to the Commission under HREOCA have been complaints against the ADF.¹³⁹ Several of these complaints have led to a report being tabled in the Federal Parliament containing a finding of discrimination, and some to court proceedings. There is arguably no clear reason why the ADF (except so far as it

¹³⁰ See note to s 42(1) of the Act.

¹³¹ See s 42(3) of the Act.

¹³² See s 39(1) of the Act.

¹³³ See s 39(2) of the Act.

¹³⁴ See s 39(3) of the Act.

¹³⁵ See s 39(5) of the Act.

¹³⁶ See s 39(7) of the Act.

¹³⁷ See s 39(8)(a) of the Act.

¹³⁸ See s 39(8)(b) of the Act.

¹³⁹ See n35 above.

relates to minimum age for enlistment and cadet schemes) should not be subject to the Act in the same manner as other employers. This would ensure that the uses of age as an arbitrary proxy for such things as fitness by the ADF would be prohibited.¹⁴⁰

The Act also provides an exemption in relation to anything done by a person in direct compliance with a taxation law (within the meaning of the *Income Tax Assessment Act 1997*), and various pieces of social security legislation and subsidiary instruments, including the Community Development Employment Projects Scheme (within the meaning of the *Social Security Act 1991*).¹⁴¹

4.4.7 Exemption in relation to migration and citizenship

The Act provides an exemption in relation to for anything done:

- in relation to the administration of the *Migration Act 1958* or the *Immigration (Guardianship of Children) Act 1946* or subsidiary instruments;¹⁴² or
- in direct compliance with the Australian Citizenship Act 1948 or the Immigration (Education) Act 1971.¹⁴³

The exemption in relation to the administration of the *Migration Act 1958* or the *Immigration (Guardianship of Children) Act 1946* or subsidiary instruments is a very broad exemption as it appears to exempt discretionary acts not mandated by those laws or subsidiary instruments. This exemption therefore has the potential to remove all action taken under those laws and subsidiary instruments – whether they acts done in compliance with a law, or discretionary acts done to administer the law.¹⁴⁴

4.5 Offences under the Act

The Act makes it an offence to publish or display discriminatory advertising,¹⁴⁵ victimise a person in relation to a complaint of age discrimination,¹⁴⁶ aid, induce, instruct or permit unlawful age discrimination.¹⁴⁷ The Act also makes employers vicariously liable for age

¹⁴⁰ Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, available on the Commission's website at: http://www.humanrights.gov.au/legal/submissions/age_discrimination.html, [5.4].

¹⁴¹ See s41

¹⁴² See s 43(1) of the Act.

¹⁴³ See s 43(2) of the Act.

¹⁴⁴ Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, available on the Commission's website at: http://www.humanrights.gov.au/legal/submissions/age_discrimination.html, [9].

¹⁴⁵ See s 50 of the Act.

¹⁴⁶ See s 51 of the Act.

¹⁴⁷ See s 56 of the Act. See *Elliot v Nanda* (2001) 111 FCR 79, 292-93 [163], 294-295 [169] in relation to the meaning of 'permit' in a similar provision in the SDA. In that case, Moore J held that the notion of 'permitting' under the Act should not be approached narrowly. He stated that 'In my opinion, a person can, ... permit another person to do an act which is unlawful, ... if, before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a position where there is a real, and something more than a remote possibility that the unlawful conduct will occur'. See also to similar effect *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 48,490 [27], 493-496 [37] – [41], a case involving s 122 of the DDA. In that case Madgwick J held that the Coffs Harbour City Council had permitted discrimination by allowing a redevelopment of a cinema complex without requiring that

discrimination by employees, unless they can establish that they took reasonable precautions and exercised due diligence in order to avoid such discrimination.¹⁴⁸ These offences are however not proposed to be discussed in this paper.

5. The role of the Commission under the Act

Like other Federal anti-discrimination laws the Commission has functions under the Act – though the Act does not make provision for the appointment of an ‘Age Discrimination Commissioner’ (in the same way that the SDA makes provision for the appointment of a Sex Discrimination Commissioner, for instance).¹⁴⁹

Nonetheless the role of the Commission under the Act is similar to its role under the other Federal anti-discrimination laws. Its functions in relation to the Act include, to:

- inquire into complaints of age discrimination;¹⁵⁰
- promote an understanding and acceptance of and compliance with the Act;¹⁵¹
- disseminate information on age discrimination and the responsibility of persons and organisations to avoid such discrimination;¹⁵²
- undertake research and education programs to promote the objects of the Bill;¹⁵³
- Examine enactments or proposed enactments (when requested by the Attorney-General) to determine whether they are consistent or contrary to the objects of the Bill;¹⁵⁴
- to report to the Attorney-General about any laws or action required in relation to age discrimination;¹⁵⁵

wheelchair access be incorporated as part of the redevelopment. In doing so he set out in the following principles:

1. The first step is to establish whether or not an unlawful act occurred.
2. To find that a person has permitted an act, it is necessary to show that they could have prevented it.
3. The high standard of knowledge required to prove liability as an accessory in criminal cases is not required. Section 122 of the DDA has been drafted so as to be wider in its scope and the DDA was intended to have far-reaching consequences.
4. Where it is shown that permission was given for an unlawful act of discrimination, it is not necessary to show either knowledge or belief that there was no defence or exemption available to the principal.
5. It will be an exception to s 122 for a permitter to show that an act was permitted on the basis of an honest and reasonable mistake of fact.

¹⁴⁸ See s 57 of the Act.

¹⁴⁹ This is a reflection of the amendments sought to be made by the Government to the structure of the Commission in the Australian Human Rights Commission Legislation Bill 2003 (which is still before the Parliament).

¹⁵⁰ The Commission has the power to inquire into complaints of age discrimination pursuant to s 11(1)(aa) of HREOCA. This is noted at the end of s 53 of the Act. Where a complaint is terminated by the Commission under ss 46PE or 46PH, under s 46PO of HREOCA, a person may make an application to the Federal Court or Federal Magistrates Court alleging discrimination by one or more of the respondents to the terminated complaint.

¹⁵¹ See s 53(1)(aa) of the Act (inserted by the Consequential Amendments Act, Sch 2, Item 10).

¹⁵² See s 53(1)(ab) of the Act (inserted by the Consequential Amendments Act, Sch 2, Item 10).

¹⁵³ See s 53(1)(ac) of the Act (inserted by the Consequential Amendments Act, Sch 2, Item 10).

¹⁵⁴ See s 53(1)(d) of the Act.

- prepare and publish guidelines for avoiding age discrimination;¹⁵⁶
- intervene in proceedings that involve issues of age discrimination;¹⁵⁷ and
- grant temporary exemptions to the prohibition against age discrimination in the Act.¹⁵⁸

The Commission will not however have an *amicus curiae* function as it now does in relation to matters brought under the SDA, DDA, RDA or HREOCA,¹⁵⁹ until and after the commencement of the Australian Human Rights Commission Legislation Bill 2003, which is currently before the Parliament.¹⁶⁰

6. Concluding comments

While the Act is a welcome beginning, it does not offer the level of protection against age discrimination as may have been hoped. For instance, the dominant reason test is likely to make it harder for complainants to establish discrimination under the Act, and lead to considerable legal complexity. The breadth and range of the exemptions provided in the Act are also problematic, and potentially undermine the object of the act to promote attitudinal change and eliminate age discrimination.

Nonetheless the Act will finally provide Commonwealth and Territory employees with a legally enforceable remedy against age discrimination in employment, and prohibit age discrimination in the administration of Commonwealth programs, practices and policies. The Act will also raise awareness as to age-based stereotypes and will hopefully act as a catalyst for attitudinal change in relation to the capabilities and qualities of older people in particular. The Act will also assist in establishing minimum national standards in relation the prohibition against age discrimination in specific areas of public life – including in legislation and Government programs, practices and policies.

¹⁵⁵ See s 53(1)(e) of the Act.

¹⁵⁶ See s 53(1)(ad) of the Act (inserted by the Consequential Amendments Act, Sch 2, Item 10).

¹⁵⁷ See ss 53(1)(g), 53(1)(1A), (1B) of the Act (inserted by the Consequential Amendments Act, Sch 2, Item 14).

¹⁵⁸ See s 53(1)(a) of the Act.

¹⁵⁹ See s 46PV of HREOCA.

¹⁶⁰ See Sch 2, Item 25 of the Consequential Amendments Act.