

Chapter 2

The Age Discrimination Act

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The Age Discrimination Act

The *Age Discrimination Act 2004* (Cth) ('ADA') commenced operation on 23 June 2004. At the date of publication there have been a limited number of cases in which the ADA has been considered¹ and there has not yet been a successful claim of unlawful age discrimination. This chapter therefore focuses on the background to the legislation and its significant features as well as highlighting some similarities and differences with other federal unlawful discrimination laws that may be relevant to its interpretation and application.²

2.1 Introduction to the ADA

2.1.1 Background

The ADA is intended to act as a catalyst for attitudinal change, as well as addressing individual cases of age discrimination. The stated objects of the ADA are to, amongst other things, 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.³

Another object of the ADA is 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'.⁴ The Revised Explanatory Memorandum to the ADA (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

¹ See, for example, *Thompson v Big Bert Pty Ltd t/as Charles Hotel* [2007] FCA 1978; *O'Brien v Crouch* [2007] FMCA 1976; *Boyn v Schering Pty Ltd* [2008] FCA 961.

² Note that this Chapter aims only to provide a summary of some of the significant provisions of the ADA. As with the other Chapters in this publication, readers should not rely on it as being a comprehensive list of all aspects of the ADA and should refer to the ADA directly.

³ Section 3.

⁴ Section 3(e).

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.⁵

...

Given the ageing of Australia's population, the promotion of a mature age workforce is a priority for the Government.⁶

It can be noted, however, that the ADA does not just prohibit discrimination against older Australians on the basis of age. The ADA will, in general, also protect young people from discrimination on the basis of their age.

The *Age Discrimination (Consequential Amendments) Act 2004* (Cth) ('Consequential Amendments Act') was enacted along with the ADA. The Consequential Amendments Act provides a number of amendments to the ADA. It also provided consequential amendments to the *Workplace Relations Act 1996* (Cth) and the then *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act')).

On 21 June 2011, the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) amended the ADA to establish an office for an Age Discrimination Commissioner within the Australian Human Rights Commission. The Age Discrimination Commissioner will be responsible for raising awareness of age discrimination, educating the community about the impact of age discrimination and monitoring and advocating for the elimination of age discrimination across all areas of public life.

2.1.2 Structure of the ADA

The general scheme and structure of the ADA is similar to that of the *Disability Discrimination Act 1992* (Cth) ('DDA') and *Sex Discrimination Act 1984* (Cth) ('SDA'). The Act sets out definitions of direct and indirect age discrimination and then sets out the areas of public life in which such discrimination is unlawful.

2.1.3 Application of the ADA

The ADA applies throughout Australia, including all States and Territories and external Territories of Australia.⁷ The prohibition on discrimination also applies in relation to discriminatory acts occurring in Australia but which also involve people, things or events outside Australia.⁸ The ADA also applies, to the extent constitutionally permissible:

⁵ Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 5.

⁶ Ibid 10.

⁷ Sections 9(2), 10(5).

⁸ Section 9(3).

- to discrimination against Commonwealth employees and persons seeking to become a Commonwealth employee;⁹
- to qualifying bodies operating under Commonwealth laws;¹⁰
- 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;¹¹
- in relation to Australia's international obligations under ILO 111, the ICCPR, the CRC and the *International Covenant on Economic, Social and Cultural Rights*,¹² as well as other matters in respect of which the Commonwealth has power to legislate under s 51(xxix) of the Constitution;¹³
- discrimination by corporations (including foreign corporations within the meaning of s 51(xx) of the Constitution);¹⁴
- 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);¹⁵
- 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);¹⁶ and
- discrimination in international or inter-state trade and commerce.¹⁷

The ADA 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.¹⁸

The ADA does not purport to displace or limit the operation of State and Territory laws capable of operating concurrently with the ADA.¹⁹ It deals with any potential inconsistency between federal and State/Territory laws by providing that where complainants have a choice as to jurisdiction they are required to elect whether to make their complaint under federal or State/Territory legislation.²⁰

⁹ Section 10(3).

¹⁰ Section 10(4).

¹¹ Section 10(6).

¹² Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹³ Section 10(7).

¹⁴ Section 10(8), (9).

¹⁵ Section 10(10)(a).

¹⁶ Section 10(10)(b).

¹⁷ Section 10(11).

¹⁸ Section 13.

¹⁹ Section 12(3).

²⁰ Section 12(5).

2.1.4 Offences

While the ADA makes age discrimination unlawful in certain circumstances, it is not, per se, an offence to discriminate on the basis of age.²¹ The ADA does, however, create specific offences:

- it is an offence to publish or display an advertisement (or cause or permit its publication or display) which indicates an intention to unlawfully discriminate on the basis of age;²²
- it is an offence ('victimisation') to intentionally cause detriment to a person because that person has made a complaint of discrimination or has taken part in discrimination proceedings;²³ and
- it is an offence to fail to disclose the source of actuarial or statistical data when required to do so by the President of the Australian Human Rights Commission ('Commission') under s 54(2) of the ADA.²⁴

Conduct constituting either of the first two of these offences falls within the definition of 'unlawful discrimination' in s 3 of the AHRC Act. Accordingly, a complaint in relation to such conduct can be made to the Commission.

2.2 Age Discrimination Defined

2.2.1 'Age' defined

'Age' is defined in s 5 of the ADA as including 'age group'. The ADA provides the following by way of example: 'The reference in subsection 26(3) to students above a particular age includes a reference to students above a particular age group'.

The definition of age does not extend to cover the age which might be imputed to a person,²⁵ although the definition of direct age discrimination includes less favourable treatment because of 'a characteristic that is generally imputed to persons of the age of the aggrieved person'.²⁶

2.2.2 Direct discrimination

The definition of direct discrimination is contained in s 14 of the ADA as follows:

²¹ Section 49.

²² Section 50. Similar provisions are contained in the RDA (s 16), the SDA (s 86) and the DDA (s 44).

²³ Section 51. Victimisation is also made an offence under the RDA (s 27(2)), the SDA (s 94) and the DDA (s 42).

²⁴ Section 52. Similar provisions exist in the SDA (s 87) and the DDA (s 107).

²⁵ This can be contrasted with the definition of disability under s 4 of the DDA.

²⁶ Section 14.

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

The extension of the definition of direct discrimination to include less favourable treatment because of ‘a characteristic that appertains generally’ to persons of that age or ‘a characteristic that is generally imputed’ to persons of that age addresses the stereotyping of a particular group of persons on the basis of actual or implied distinguishing or idiosyncratic traits.²⁷ However it is not necessary to establish that the identified characteristic exists in every case: it is only necessary to establish that it generally exists or operates.²⁸

In *Thompson v Big Bert Pty Ltd t/as Charles Hotel*,²⁹ the applicant alleged that she had been discriminated against on the basis of her age and sex in her employment as a bar attendant at the respondent’s hotel where she had worked for approximately six years. In late 2005, the applicant’s previously regular shift arrangements were altered and she believed that this was part of a plan to force her departure from the job as the new shifts would make it more difficult for the applicant to arrange childcare. The applicant also gave evidence that the owner of the hotel had been heard remarking that he wanted to replace some of the older staff with ‘young glamours’ and that this amounted to direct and indirect discrimination on the basis of her age. The applicant was 37 years of age at the time of the variation to the shift arrangements.

In relation to the direct age discrimination claim, the applicant argued that the dominant reason for the reduction in her hours was her age, or alternatively, a characteristic that appertains generally to persons of the applicant’s age or age group, or a characteristic that is generally imputed to persons of her age group.³⁰ The characteristic said to appertain generally to, or be generally

²⁷ See, for example, *Commonwealth v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 191, 207 (Wilcox J), in the context of the SDA.

²⁸ (1993) 46 FCR 191, 207.

²⁹ [2007] FCA 1978.

³⁰ [2007] FCA 1978, [43].

imputed to, persons in their late 30s is that ‘they are less attractive and less glamorous, than persons in a younger age group’.³¹

Buchanan J dismissed the applicant’s claim. His Honour was satisfied that the changes in the applicant’s working arrangements were initially prompted by management’s need to reduce the wages bill for the hotel and the subsequent deterioration in the relationship between the new manager of the premises and the applicant that led to the manager removing the applicant from shifts so that they would not have to work together. One feature of those changes was to place the applicant from time to time on shifts with a greater number of customers. This, in his Honour’s view, was ‘inconsistent with any suggested desire to replace her with “young glamours,”³² but was entirely consistent with the manager’s desire ‘to be rid of her presence without terminating the employment altogether’.³³

The applicant’s claims of indirect age and sex discrimination were also dismissed.³⁴

2.2.3 Indirect discrimination

Section 15 of the ADA 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:
 - (c) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and
 - (d) the condition, requirement or practice is not reasonable in the circumstances; and
 - (e) 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.

Section 15 is similar in substance to the indirect discrimination provisions in the SDA.

However, unlike s 7B(2) of the SDA, the ADA does not contain any reference to the factors to be taken into account when determining whether a condition,

³¹ [2007] FCA 1978, [43].

³² [2007] FCA 1978, [44].

³³ [2007] FCA 1978, [44].

³⁴ [2007] FCA 1978, [46], [50].

requirement or practice is reasonable in the circumstances.³⁵ 'Reasonableness' in the context of indirect discrimination has been the subject of significant judicial consideration in DDA cases³⁶ and this is likely to be relevant in interpreting and applying s 15 of the ADA.

2.2.4 The 'dominant reason' test

Up until the amendments brought about by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), the ADA included a dominant reason test in determining whether or not an act has been done 'because of' the age of a person.³⁷

The Amendment Act, however, brings s 16 of the ADA into line with the SDA,³⁸ *Racial Discrimination Act 1975* (Cth) ('RDA')³⁹ and DDA,⁴⁰ so that if an act is done for two or more reasons and a discriminatory ground is one of those reasons, then the act is taken to be done because of the because of the age of the person, 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 their age was a reason for the less favourable treatment they received.

2.2.5 Age discrimination and disability discrimination

The ADA 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).⁴¹

The Explanatory Memorandum to the ADA 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

³⁵ Section 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.

³⁶ See further 5.2.3(f).

³⁷ The Commission's concerns about the application of a 'dominant reason' test, amongst other things, were raised in its submissions to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003: see www.humanrights.gov.au/legal/submissions/age_discrimination.html.

³⁸ See s 8 of the SDA.

³⁹ See s 18 of the RDA.

⁴⁰ See s 10 of the DDA.

⁴¹ Section 6.

discrimination that would also be covered by the DDA should be dealt with under the legislative regime established by that Act.⁴²

It can be noted, however, that this section will not necessarily prevent a person from bringing a claim about both age and disability discrimination. The Explanatory Memorandum to the ADA states:

this Bill is not designed to limit a person's rights if they are the subject of discrimination. If particular circumstances or actions result in a person being discriminated against both on the ground of age (in a way that is not related to disability) and also on the ground of disability, then the person may still initiate a complaint about unlawful discrimination on the grounds of age and disability.⁴³

This would seem to contemplate a person bringing a complaint about distinct (although possibly related) acts, some of which are attributable to age discrimination alone, others which are attributable to disability discrimination.

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

Unlike the DDA⁴⁴ and RDA,⁴⁵ the ADA does not prohibit discrimination on the basis of the age of a person's relative or associate.

2.3 Proscribed Areas of Age Discrimination

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

2.3.1 Discrimination in employment and occupation

(a) Scope of the prohibition

The prohibition on age discrimination in employment extends to:

- Discrimination against employees,⁴⁶ commission agents⁴⁷ and contract workers.⁴⁸ It is unlawful to discriminate in recruitment and

⁴² See Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 38. The operation of this provision is unlikely to disadvantage applicants as establishing disability discrimination might be expected to be easier than establishing age discrimination. This is because the DDA does not require an applicant to prove that disability was the dominant reason for the doing of an act (s 16 ADA, discussed at 2.2.4 above), only that it was *one of the reasons* (see s 10 DDA).

⁴³ See Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth) 39.

⁴⁴ See ss 7 of the DDA.

⁴⁵ See ss 11-14 of the RDA.

⁴⁶ Section 18.

⁴⁷ Section 19.

⁴⁸ Section 20.

offers of employment, as well as the actual terms and conditions of employment, access to promotion and training and dismissal or any other detriment. These provisions do not extend, however, to voluntary work or domestic duties performed in private households,⁴⁹ and provide an exception where a person cannot perform the inherent requirements of the particular position because of their age.⁵⁰

- Partnerships consisting of more than six partners. It is unlawful to discriminate 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.⁵¹ It is an exemption to this provision where a person cannot perform the inherent requirements of the partnership because of their age.⁵²
- Qualifying bodies which provide authorisations or qualifications needed for carrying on an occupation, profession or trade. It is unlawful to discriminate in the conferring or withdrawing of such authorisation or qualification, and in the terms or conditions on which an authorisation or qualification is granted.⁵³ It is an exception to this provision where a person cannot perform the inherent requirements of the particular profession or occupation because of their age.⁵⁴
- Registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth). It is unlawful to discriminate by refusing membership to the organisation, in the terms and conditions on which an organisation is prepared to admit a member or in the access to benefits provided by the organisation.⁵⁵
- Employment agencies. It is unlawful to discriminate by refusing to provide services or in the terms or conditions or manner in which their services are provided,⁵⁶ unless the person cannot carry out the inherent requirements of the particular employment because of their age.⁵⁷

⁴⁹ Section 18(3).

⁵⁰ Sections 18(4), 19(3) and 20(2) respectively.

⁵¹ Section 21.

⁵² Section 21(4).

⁵³ Section 22.

⁵⁴ Section 22(2).

⁵⁵ Section 23.

⁵⁶ Section 24.

⁵⁷ Section 24(2).

(b) 'Inherent requirements' exemption

As noted above in relation to the particular aspects of employment that are covered by the prohibition of age discrimination, such discrimination will not be unlawful where a person is unable to carry out the inherent requirements of the particular position or employment because of their age.

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.⁵⁸

In relation to similar provisions in the DDA⁵⁹ and the then *Industrial Relations Act 1988* (Cth), the High Court has held that the 'inherent requirements' of a particular employment means 'something essential' to, or an 'essential element' of, a particular position.⁶⁰ The question of whether something is an inherent requirement of a particular position is required to be answered with reference to the function which the employee performs as part of the employer's undertaking and by reference to that organisation.⁶¹ However employers are not permitted to organise or define their business to permit discriminatory conduct.⁶²

2.3.2 Discrimination in areas of public life other than employment

The ADA also makes age discrimination unlawful in the following areas.

(a) Access to goods, services and facilities⁶³

This provision makes it unlawful for someone who provides goods, services⁶⁴ and facilities to discriminate against a person on the basis of age by refusing

⁵⁸ Section 18(5). Similar tests are provided for in the areas of discrimination against commission agents (s 19(4)), contract workers (s 20(3)), partnerships (s 21(5)).

⁵⁹ See section 21A of the DDA. This section and cases which have considered it in detail are discussed at 5.3.1(d).

⁶⁰ *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J with whom Brennan CJ agreed on this point), 305 [74] (McHugh J), 318 [114] (Gummow J); *X v Commonwealth* (1999) 200 CLR 177.

⁶¹ *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 284 [1] (Brennan CJ).

⁶² *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)).

⁶³ Section 28.

to provide the goods, services or facilities, in the terms or conditions on which those goods, services or facilities are offered, or in the manner in which they are offered.

(b) Education⁶⁵

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 (for example, primary or high schools).⁶⁶

(c) Accommodation⁶⁷

This provision makes it unlawful to discriminate against a person on the basis of their age by refusing an application for accommodation,⁶⁸ 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 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.⁶⁹

(d) Access to premises⁷⁰

This provision makes it unlawful to discriminate against a person on the basis of age in allowing or refusing access to premises⁷¹ that the public or a section

⁶⁴ Note that s 5 defines 'services' widely to include superannuation, banking, insurance, grants, loans, credit or finance, transport, travel, entertainment, recreation or refreshment, telecommunications, services provided by a professional or tradesperson or services provided by a government, government authority or local government body.

⁶⁵ Section 26.

⁶⁶ Section 26(3).

⁶⁷ Section 29.

⁶⁸ Note that accommodation is defined to include residential or business accommodation: s 29(4).

⁶⁹ Section 29(3). The term 'near relative' is defined in s 29(4).

⁷⁰ See s 27 of the ADA.

⁷¹ Premises is defined in s 5 of the ADA to include structures (such as buildings, aircraft, vehicles or vessels), places and parts of premises.

of the public is entitled to enter or use, or on the terms and conditions on which such access is permitted.

(e) Land⁷²

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 based⁷³

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 ADA, 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 programs⁷⁴

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.

2.4 Ancillary Liability

The ADA provides for liability for an unlawful act where a person ‘causes, instructs, induces, aids or permits another person’ to do that act.⁷⁵ The approach to this section is likely to be assisted by consideration given to analogous provisions in the SDA⁷⁶ and DDA.⁷⁷

⁷² See s 30 of the ADA.

⁷³ See s 32 of the ADA.

⁷⁴ See s 31 of the ADA.

⁷⁵ Section 56.

⁷⁶ See *Elliott v Nanda* (2001) 111 FCR 79, 292-93 [163], 294-295 [169] in relation to the meaning of ‘permit’ in the context of s 105 of the SDA, discussed at 4.10.

⁷⁷ See *Cooper v Human Rights & Equal Opportunity Commission* (1999) 93 FCR 481, 490 [27], 493-496 [37] – [41], in relation to s 122 of the DDA, discussed at 5.4.2.

The ADA also makes employers vicariously liable for age discrimination by employees, unless they can establish that they took reasonable precautions and exercised due diligence in order to avoid such discrimination.⁷⁸

2.5 Victimization

Victimization that results from either actual or threatened detriment is prohibited under s 51 of the ADA and may give rise to civil and/or criminal proceedings. Whilst s 51 is contained within Part 5 of the ADA that deals with offences, an aggrieved person may bring a civil action for a breach of s 51 because the definition of 'unlawful discrimination' in s 3 of the AHRC Act specifically includes conduct that is an offence under Division 2 of Part 5 of the ADA (which includes s 51).

2.6 General Exemptions Under the ADA

In addition to the exemptions provided in relation to specific provisions of the ADA (outlined above), the ADA contains a number of general exemptions.⁷⁹

2.6.1 'Positive discrimination'

The ADA 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:

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

Example 1: 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.

Example 2: This paragraph would cover the provision to a particular age group of a scholarship program, competition or similar opportunity to win a prize or benefit.⁸⁰

- (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

⁷⁸ Section 57. Section 123(2) of the DDA is in the same terms (see 5.4.1). See also ss 18A and 18E of the RDA (see 3.6) and s 106 of the SDA (see 4.9).

⁷⁹ The Commission's concerns about a number of the exemptions contained in the ADA, amongst other things, were raised in its submissions to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003: see <www.humanrights.gov.au/legal/submissions/age_discrimination.html>.

⁸⁰ Example 2 was introduced by the *Age Discrimination Amendment Act 2006* (Cth) commencing on 22 June 2006.

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.

This section is said to recognise that there are some circumstances in which age based distinctions are legitimate or justified by other strong policy interests.⁸¹ The Explanatory Memorandum to the ADA 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 ADA extends beyond the current understanding of 'special measures' in other federal unlawful discrimination laws. Under the SDA,⁸² RDA⁸³ and DDA,⁸⁴ special measures are essentially confined to those actions taken in order to

⁸¹ See Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 50.

⁸² See s 7D of the SDA.

⁸³ See s 8 of the RDA.

⁸⁴ See s 45 of the DDA.

achieve substantive equality, or to meet the 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.⁸⁵ The DDA limits special measures to those ‘reasonably intended’ to address a special need or disadvantage and whose discriminatory effects are ‘necessary for implementing the measure’.⁸⁶

Section 33 of the ADA is broader in its scope than the ‘special measures’ provisions found in the SDA, RDA and DDA because it authorises positive measures to be taken for purposes other than achieving substantive equality or meeting special needs. It extends to any ‘bona fide benefit’ (an expression which is not defined). Unlike the RDA or the SDA, s 33 of the ADA does not contain any temporal limitation such that the measure is no longer protected once its purposes have been achieved, although this may be implicit in ss 33(b) and (c) which require reference to be made to an existing need or disadvantage.

2.6.2 Exemption for youth wages

The ADA contains an 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 ADA states:

Youth wages are a well-recognised feature of workforce relations in Australia. This exemption will protect the competitive position of young people in the workforce by allowing employers and the like to continue to recruit and employ young people and remunerate them on the basis of an appropriate youth wage.⁸⁷

⁸⁵ See s 7D(4) of the SDA; Article 1(4) of the *International Convention for the Elimination of all Form of Racial Discrimination*, to which s 8(1) of the RDA refers and *Gerhardy v Brown* (1985) 159 CLR 70, 139-40.

⁸⁶ See s 45 of the DDA.

⁸⁷ Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 47.

2.6.3 Exemption relating to superannuation, insurance and credit

The ADA 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.⁸⁸

This exemption is in the same terms as that contained in s 46 of the DDA. The application of that provision of the DDA and the meaning to be given to the expression ‘reasonable’ therein, has been considered in a number of cases discussed at 5.5.2(a).

The ADA also 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.⁸⁹

Section 54 of the ADA provides for the Australian Human Rights Commission and its President to have the power to require the production of actuarial or statistical data where a person has acted in a way that would, apart from the above exemptions, be unlawful. It is an offence not to provide the source of any such actuarial or statistical data if required to do so.⁹⁰

The ADA also provides an exemption in relation to anything done in direct compliance with Commonwealth legislation (and regulations or instruments made under such legislation) which relates to superannuation and for certain public sector insurance schemes.⁹¹ The *Age Discrimination Amendment Act 2006* (Cth) expands the s 38 exemption. The exemption now applies to anything done in direct compliance with a regulation that relates to superannuation, even if the enabling Act does not relate to superannuation.⁹²

⁸⁸ Section 37(1), (2), (3).

⁸⁹ Section 37(4), (5).

⁹⁰ Sections 52, 54. Similar provisions exist under the DDA: see s 107.

⁹¹ Section 38.

⁹² See the new s 38(1)(b).

2.6.4 Exemption for charities, religious and voluntary bodies

Similar to the exemptions contained in the SDA⁹³ and DDA,⁹⁴ the ADA provides for exemptions for charities, religious and voluntary bodies.

The exemption for 'charities' is by way of an exemption for provisions in charitable instruments that '[confer] charitable benefits, or enables charitable benefits to be conferred, wholly or in part on persons of a particular age' and 'any act done to give effect to such a provision'.⁹⁵

An act or practice of 'a body established for religious purposes' that 'conforms to the doctrine, tenets or beliefs of that religion' or 'is necessary to avoid injury to the religious sensitivities of adherents of that religion' is also exempt from the ADA.⁹⁶

In relation to voluntary bodies, the ADA provides as follows:

36 Voluntary bodies

- (1) 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.

- (2) In this section:

registered organisation means an organisation registered, or an association recognised, under the *Fair Work (Registered Organisations) Act 2009*.

voluntary body means an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose 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.

The Explanatory Memorandum states, in relation to section 36:

This clause provides an exemption for age discrimination by voluntary bodies, where the discrimination relates to admission to membership of the voluntary body or the provision of benefits, facilities or services to members of the body. The exemption does not extend to other possible acts of discrimination by

⁹³ See ss 36 (Charities), 37 (Religious bodies), 39 (Voluntary bodies) of the SDA.

⁹⁴ See s 49 (Charities) of the DDA.

⁹⁵ Section 34.

⁹⁶ Section 35.

voluntary bodies, such as in employment or in the provision of services to the public.⁹⁷

2.6.5 Exemption in relation to health

The ADA provides an exemption in relation to:

- Exempted health programs, which are defined as:
 - 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.⁹⁸

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.⁹⁹

- 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.¹⁰⁰

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

The ADA 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 general exemption is given in relation to acts done in direct compliance with those acts or subsidiary legislative instruments contained in

⁹⁷ See Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 51. In the context of the similarly-worded provisions of the SDA, it has been held that the exemption provides protection to voluntary bodies only in their relationships with their members, not in their relationships with non-members: see *Gardner v All Australian Netball Association Ltd* (2003) 197 ALR 28, and the discussion at 4.7.2.

⁹⁸ Section 42(1), (2).

⁹⁹ See note to s 42(1) of the ADA.

¹⁰⁰ Section 42(3).

Schedule 1 to the ADA.¹⁰¹ However a two year exemption was provided in relation to acts done in direct compliance with other Commonwealth acts and subsidiary instruments.¹⁰²

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

- acts or legislative instruments of a State or Territory,¹⁰³ unless it is an instrument specified in regulations made under the ADA;¹⁰⁴ and
- a court order,¹⁰⁵ an order or award of an industrial relations tribunal,¹⁰⁶ a fair work instrument within the meaning of the *Fair Work Act 2009* (Cth)¹⁰⁷ or transitional instrument or Division 2B State instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).¹⁰⁸

The ADA 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* (Cth)),¹⁰⁹ 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* (Cth)).¹¹⁰

The exemption relating to acts of a State or Territory was considered in *Keech v State of Western Australia Metropolitan Health Service t/as King Edward Memorial Hospital* ('Keech').¹¹¹ In *Keech*, the applicant was injured at work at the age of 66 and paid compensation under the *Workers' Compensation and Injury Management Act 1981* (WA) (the WA Act). The WA Act provided different schemes of payment whereby workers injured before attaining the age of 64 would be entitled to compensation for a longer period than workers injured after attaining this age. The applicant argued that by paying her compensation for the period prescribed by the WA Act, the respondent had treated her less favourably than a younger employee who incurred a workplace injury at the same time as she did. The applicant also argued that the respondent's conduct was not exempt from the ADA as it was not in direct compliance with the WA Act. She said the WA Act prescribed a date at which entitlements to compensation could cease, but it did not oblige employers to stop paying at this time.

¹⁰¹ Section 39(1).

¹⁰² Section 39(2).

¹⁰³ Section 39(4).

¹⁰⁴ Section 39(5).

¹⁰⁵ Section 39(7).

¹⁰⁶ Section 39(8)(a).

¹⁰⁷ Section 39(8)(b)(i).

¹⁰⁸ Section 39(8)(b)(ii).

¹⁰⁹ Section 40.

¹¹⁰ Section 41.

¹¹¹ [2010] FCA 1332.

Siopis J considered that the respondent's conduct was unlikely to constitute age discrimination but found it unnecessary to finally determine this issue, because in any case the respondent had directly complied with the WA Act. His Honour interpreted the WA Act as imposing an obligation on employers to pay compensation for a prescribed period and the respondent had directly complied with this requirement. As such, the employer's conduct was exempt from the ADA.

The Age Discrimination Amendment Act 2006 (Cth):

- creates a new exemption for acts done by a person in direct compliance with the provision of an Act, regulation or other instrument contained in the new Schedule 2;¹¹²
- adds Commonwealth Acts, regulations and other instruments to Schedule 1, expanding the Acts, regulations and other instruments to which the s 39(1) exemption applies;
- amends s 39, so the exemption now includes acts done in direct compliance with a provision of a Commonwealth Act, regulation or other instrument which requires a person to form an opinion about the age of another person upon whom a document is to be served;¹¹³ and
- expands the s 41 exemption by:
 - specifying additional Acts, regulations and instruments for which the exemption is available;¹¹⁴ and
 - creating a new exemption for things done 'in accordance with an exempted employment program'.¹¹⁵ 'Exempted employment program' is defined as being a program, scheme or arrangement that:
 - (a) is conducted by or on behalf of the Commonwealth Government; and
 - (b) is primarily intended to:
 - (i) improve the prospects of participants getting employment; or
 - (ii) increase workplace participation; and
 - (c) meets at least one of the following requirements:
 - (i) it is also intended to meet a need that arises out of the age of persons of a particular age, regardless whether the need also arises out of the age of persons of a different age;

¹¹² See new s 39(1A).

¹¹³ See new s 39(9).

¹¹⁴ See new s 41(2AA) and s 41(6).

¹¹⁵ See new s 41A.

- (ii) it is also intended to reduce a disadvantage experienced by people of a particular age, regardless whether the disadvantage is also experienced by persons of a different age;
- (iii) it requires participants to enter into contracts, and is not made available to persons under the age of 18;
- (iv) it is made available to persons eligible for a particular Commonwealth benefit or allowance;
- (v) it is not made available to persons eligible for a particular Commonwealth benefit or allowance.¹¹⁶

2.6.7 Exemption in relation to migration and citizenship

The ADA provides an exemption for anything done:

- in relation to the administration of the *Migration Act 1958* (Cth) or the *Immigration (Guardianship of Children) Act 1946* (Cth) or subsidiary instruments;¹¹⁷ or
- in direct compliance with the *Australian Citizenship Act 1948* (Cth) or the *Immigration (Education) Act 1971* (Cth).¹¹⁸

The exemption in relation to the administration of the *Migration Act 1958* (Cth) or the *Immigration (Guardianship of Children) Act 1946* (Cth) or subsidiary instruments is a potentially broad exemption as it appears to exempt discretionary acts not mandated by those laws or subsidiary instruments.¹¹⁹

¹¹⁶ See new s 41A(3).

¹¹⁷ Section 43(1).

¹¹⁸ Section 43(2).

¹¹⁹ The exemption in relation to migration is narrower in the DDA. Section 52 of the DDA does not exempt discretionary acts not mandated by the *Migration Act 1958* (Cth) or its Regulations.