

**SUBMISSION TO THE  
AUSTRALIAN LAW REFORM  
COMMISSION**



**Submission in response to the ALRC Issues Paper 41,  
*Grey Areas – Barriers to Work in Commonwealth Laws***

 **AUSTRALIAN INDUSTRY GROUP**

**20 June 2012**

# **ALRC Issues Paper 41**

## ***Grey Areas – Barriers to Work in Commonwealth Laws***

### **1. Introduction**

Ai Group welcomes the opportunity to comment on the *Grey Areas – Age Barriers to Work in Commonwealth Laws* Issues Paper (**Issues Paper**) released by the Australian Law Reform Commission in April 2012.

Ai Group represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries.

The Australian population is getting older. The Commonwealth Government reported in 2010 that there were 5 people of working age (15-64) for every one person aged over 65 in Australia. This proportion is predicted to be 2.7 people of working age to every person over 65 by 2050.<sup>1</sup> Importantly, of Australian workers aged between 55 and 64, only 68% of men and 50% of women are employed.<sup>2</sup> This is lower than other comparable countries, such as the United States, United Kingdom, Canada and New Zealand.<sup>3</sup> These statistics signal that as Australia ages, we will become more and more reliant on mature aged workers.

Ai Group recognises Australia's immediate to long term need to increase the participation of mature age workers in the workforce. It is critical to Australia's productivity performance and to address skills and labour shortages that businesses are encouraged to engage and maintain mature age workers. It is equally important that mature aged workers are not precluded from remaining in or returning to the

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<sup>1</sup> Commonwealth of Australia 2010, *Australia to 2050: future challenges*, Attorney General's Department, Canberra, p.4

<sup>2</sup> *Ibid*, p.15

<sup>3</sup> *Ibid*, p.15

workforce by obstacles present in the frameworks for the aged pension, taxation and superannuation.

While we agree that barriers to mature age participation in the workforce need to be broken down and removed, it is important that new barriers are not inadvertently erected by the process. For example, creating additional workplace rights for mature aged workers may inadvertently create a disincentive for employers to employ them.

It is essential that the focus of the ALRC's inquiry be on removing existing barriers, not on creating new entitlements.

In this submission we have responded to many of the questions set out within the Issues Paper. We have not responded to every question but rather those that have direct relevance to our membership.

## **2. Ai Group's involvement and support for mature age participation**

Ai Group and its members are acutely aware of the need to increase mature age participation in the workforce.

Over the past 18 months Ai Group has partnered with the Department of Education, Employment and Workplace Relations (DEEWR) to develop and deliver the '[Investing in Experience](#)' toolkit. The toolkit has been designed as a one-stop guide for employing people aged 45 years and over. It outlines the benefits of employing mature age workers and provides advice and resources to help employers implement positive age management practices in their organisation.

Ai Group is also an industry leader in the Corporate Champions program run by DEEWR. The program invites employers to become Corporate Champions in the recruitment and retention of mature age workers in their workplace. Employers who become Corporate Champions are provided with tailored support to assist them to achieve the standards outlined in the 'Investing in Experience' Employment Charter.

Ai Group is also an industry member on the Consultative Forum on Mature Age Participation, chaired by Mr Everaldo Compton AM.

### 3. Framing principles

**Question 1:** The ALRC has identified as framing principles: participation, independence, self-agency, system stability, system coherence and fairness. Are there other key principles that should form the ALRC's deliberations?

Ai Group supports the framing principles identified in the Issues Paper, being participation, independence, self-agency, system stability, system coherence and fairness.

We are of the view that these are valid considerations relating to the contribution of mature aged workers to the workforce and the Australian economy more broadly.

### 4. Age Pension

The Pension Review by Dr Jeff Harmer in February 2009 (**Harmer Review**)<sup>4</sup> and the Consultative Forum on Mature Age Participation in its initial report in December 2011<sup>5</sup> both indicated that the age pension operates as a disincentive for some pensioners to engage in paid work.<sup>6</sup> This is because any income earned from paid employment is taken into account for the means test which determines a person's eligibility for the age pension and the quantum of benefits received under it.

The Harmer Review concluded that any disincentive to work flowing from the current structure of the age pension could be overcome by better dealing with the costs of work.<sup>7</sup> The Review's final report suggested that there is a case to consider mechanisms that provide a stronger incentive to age pensioners to take up paid work

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<sup>4</sup> Harmer J, *Pension Review Report*, 27 February 2009, p.126

<sup>5</sup> Consultative Forum on Mature Age Participation, *Aging and the Barriers to Labour Force Participation in Australia*, December 2011, p.25

<sup>6</sup> See above n.4.

<sup>7</sup> See above n.4, p.139.

or transition into retirement with a combination of work and retirement.<sup>8</sup> One of the mechanisms suggested in the final report was varying the means test for the Age Pension to allow for concessional treatment of low to moderate levels of income from employment.<sup>9</sup> Ai Group agrees that the current means test for the Age Pension can operate as a barrier for some mature age workers to participate in the workforce or other productive work and believes that there is merit in considering whether the income test and assets test be combined into one single test.

**Question 2:** As there is a five year difference in qualifying age for a Service Pension under the *Veterans' Affairs Entitlement Act 1986* (Cth), should it be increased incrementally in the same manner as for the Age Pension?

Ai Group support increasing the qualifying age for the Service Pension.

**Question 3:** In what ways, if any, should the means test for the Age Pension be changed to remove barriers to mature age participation in the workforce or other productive work?

Ai Group supports giving close consideration to combining the assets test and income test for the age pension into a single test.

**Question 4:** In what ways, if any, should the Pension Bonus Scheme be changed to remove barriers to mature age participation in the workforce?

**Question 5:** How effective has the Work Bonus been in removing barriers to work for mature age persons? In what ways, if any, could it be improved?

The Pension Bonus Scheme and the Work Bonus are similar schemes in that they both provide incentives to persons ineligible for the Age Pension to remain in or to re-enter the workforce. Ai Group supports giving close consideration to how either of these schemes can be improved.

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<sup>8</sup> See above n.4, p.138

<sup>9</sup> See above n.4, p.139

## 5. Income tax

In 2008 the Commonwealth Government established the *Australia's Future Tax System Review (Henry Review)*. The Review Panel, comprising of Dr Ken Henry AC (Chair), Dr Jeff Harmer (Secretary of FaHCSIA), Professor John Piggott (University of New South Wales), Mrs Heather Ridout (Australian Industry Group), and Mr Greg Smith (Adjunct Professor, Australian Catholic University), handed down its final report on 2 May 2010. The report recommended a wide range of changes to Australia's taxation system to make it more efficient, equitable, transparent and effective.

The final report acknowledged how the Australian income tax system, namely the tax-transfer system, could discourage workforce participation more generally.<sup>10</sup> Ai Group supports further consideration being given to the recommendations made by the Henry Review panel.

**Question 6:** In what ways, if any, can the complexity of the tax-transfer system be minimised to remove barriers to mature age participation in the workforce?

**Question 8:** A number of tax offsets are available to encourage mature age participation in the workforce including the Senior Australians Tax Offset, Pensioner Tax Offset, Low Income Tax Offset and the Mature Age Worker Tax Offset.

- (a) In what ways, if any, might these offsets be improved to encourage participation?
- (b) The Australia's Future Tax System Review recommended that these tax offsets be removed. What disincentives would this create for mature age participation in the workforce?

**Question 9:** What other changes, if any, should be made to income tax laws to remove barriers to mature age participation in the workforce and other productive work?

See paragraphs above.

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<sup>10</sup> The Treasury, *Australia's Future Tax System – Final Report*, Part 1, Chapter 3

**Question 7:** In what ways, if any, do the tax exemptions for social security payments affect mature age participation in the workforce?

We note that tax exemptions for social security payments may have negative impacts on work incentives in two ways. They generally raise disposable income and reduce the imperative to earn income (so if a person has a target income that is met by removing the tax on social security payments, they will have less need to work).

Secondly and paradoxically, making social security payments exempt from tax can raise effective marginal tax rates and reduce the incentive to earn additional income. This is because additional income can attract tax in full and, as a result of the income test on social security payments, simultaneously reduce the amount of social security payment a person is entitled to receive. If the social security payment was taxable, any reduction in the amount of social security entitlement due to the income test would be partly offset by a reduction in the amount of tax paid when the person earns additional income from employment.

## **6. Superannuation**

Superannuation, comprising of both compulsory contributions to superannuation and voluntary contributions to superannuation and retirement savings, is a key and necessary feature of Australia's retirement income system. Superannuation arrangements should not discourage people from remaining in or re-entering the workforce and they should not discourage employers from employing mature aged workers.

For example some changes to superannuation for older people such as mandating superannuation guarantee contributions for older employees may raise costs of employment and have a detrimental impact on the incentive to employ older people. This impact can be expected to grow over the next few years as the rate of Superannuation Guarantee is set to rise from 9 per cent to 12 per cent.

More appropriate would be for the Government to encourage Australians to grow their retirement savings by removing the age ban for voluntary contributions to superannuation and increase the maximum amount of concessional contributions for persons over 50.<sup>11</sup>

**Question 10:** What changes, if any, should be made to the Superannuation Guarantee scheme, to remove barriers to work for mature age persons?

**Question 13:** In what ways, if any, does the age restriction on government co-contributions in the Superannuation (Government Co-contribution for Low Income Earners) Act 2003 (Cth) create barriers to work for mature age persons? What changes should be made to the Act to remove such barriers?

**Question 14:** What effect, if any, does the increased concessional contributions cap for persons aged 50 years and over have on mature age participation in the workforce?

**Question 15:** What effect, if any, does the 'bring forward rule' (in relation to the non-concessional contributions cap) have on mature age participation in the workforce? What changes should be made to this rule to address barriers to such participation?

**Question 19:** What changes, if any, should be made to the taxation of superannuation benefits to remove barriers to work for mature age persons?

**Question 20:** What other changes, if any, should be made to superannuation laws, including tax laws, to remove barriers to mature age participation in the workforce?

See paragraphs above.

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<sup>11</sup> See Commonwealth Budget 2012, which announced that the increase of the concessional contributions cap will be deferred for 2 years.



**Question 11:** The *Superannuation Industry (Supervision) Regulations 1994*

(Cth) prescribe age-based restrictions on voluntary contributions. Members cannot:

- (a) make voluntary contributions from age 65 until age 75 unless they meet a work test; or
- (b) make voluntary contributions from age 75. What effect do these restrictions have on mature age participation in the workforce?

What changes, if any, should be made to these regulations to remove barriers to work for mature age persons?

Ai Group supports removing the ban on voluntary superannuation contributions for people aged over 75. The same work test that applies to people aged between 65 and 75 should apply to people aged over 75.

**Question 16:** The age settings for access to superannuation benefits are:

- (a) 55 years increasing to 60 years for 'preservation age'—when persons may access superannuation if retired; and
- (b) 65 years for unrestricted access to superannuation.

The Australia's Future Tax System Review recommended that the preservation age be raised to 67 years. In what ways, if any, do existing age settings provide incentives for retirement for mature age persons, rather than continued workforce participation? What changes should be made to address these incentives?

Ai Group supports aligning the preservation age with the increase to the Pension Age. This will encourage people to remain in employment longer and is also consistent with the increasing life expectancy of Australians.

**Question 17:** In practice, how do the 'transition to retirement' rules encourage continued mature age participation in the workforce? What changes, if any, should be made to these rules to encourage continued workforce participation?

**Question 18:** In practice, do persons of preservation age have sufficient access to the 'transition to retirement' rules? If not, what measures could improve such access?

Ai Group supports the 'transitional to retirement rules' as it allows persons to continue working while accessing a portion of their superannuation savings.

## 7. Employment

Ai Group is of the view that the *Fair Work Act 2009 (Cth)* and the industrial framework more broadly do not generally discourage the participation of mature aged workers in the workforce. This is evident by the increasing average age of workers in the manufacturing industry, which has a median workforce age of 41 years.<sup>12</sup> This is also consistent with the feedback we receive from our members in the industry.

Employers welcome the skills of mature aged workers and are generally open to providing them with flexible working practices as they transition into retirement. Nonetheless, employers often report a difficulty in retaining the skills of mature aged workers once they enter retirement.

**Question 34:** In what ways, if any, can the practices of private recruitment agencies be regulated to remove barriers to mature age employees entering or re-entering the workforce?

Ai Group does not agree that increasing the regulation of private recruitment agencies will be an effective means of removing barriers to mature age employees entering or re-entering the workforce. Rather, consultative and educative approaches are more likely to achieve a shift in practices by recruiting agencies and their clients.

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<sup>12</sup> Australian Government, SkillsInfo website < <http://www.skillsinfo.gov.au/industry-information/manufacturing> > at 18 June 2012.

The regulatory burden already imposed on recruitment agencies and employers more generally is substantial.

**Question 35:** Should s 65 of the *Fair Work Act 2009* (Cth) be amended to include age as a basis upon which an employee may request flexible working arrangements?

Ai Group opposes any expansion of the right to request provisions in the *Fair Work Act*. The existing provisions were the subject of a lengthy consultation process during the development of the National Employment Standards and the *Fair Work Act* and are intended to be a facilitative provision to prompt employers and employees to discuss matters of workplace flexibility more broadly. For example clause 258 of the explanatory memorandum for the *Fair Work Bill 2008* explained that “*the intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements*”.

Employees who do not have a formal entitlement under s 65 of the *Fair Work Act* (including mature age workers) may, and often do, make a request for flexible working arrangements. This is acknowledged in the explanatory memorandum:

*“270. An employee who is not eligible to request flexible working arrangements under this Division (e.g. because they do not have the requisite service) is not prevented from requesting flexible working arrangements, However, such a request would not be subject to the procedures in this Division”.*

In practice, many mature age workers request and are granted flexible work arrangements without using the right to request provisions. This is the result of open dialogue between employees and their employers about achieving meaningful flexibility in the workplace. This, in our view, is a more effective means of promoting working arrangements that balance the needs of mature age employees with the operational requirements of their employers.

**Question 36:** In practice, do mature age employees negotiate individual flexibility arrangements made under s 202 of the *Fair Work Act 2009* (Cth)? Are such arrangements a useful and appropriate flexibility mechanism for mature age employees?

Section 202 of the *Fair Work Act* requires that enterprise agreements include a term that enables an employee and his or her employer to enter into an individual flexibility arrangement (IFA) to vary the effect of an enterprise agreement to meet the genuine needs of the employee and employer (including arrangements for when work is performed).

In our view IFAs are not currently providing meaningful flexibility for most employers and employees. The *Fair Work Act* places many limitations on the making and operating of IFAs, for example, section 341(3) of the *Fair Work Act* prevents an employer from offering an employee an IFA as a condition of employment. This restriction denies the employer and employee the certainty that is necessary at the commencement of an employment relationship.

Another limitation to using IFAs is the ability for an IFA to be unilaterally terminated by either party by giving 28 days' written notice. This means that an employee and an employer entering into an IFA do not have the security of knowing that the IFA will continue for a reasonable period of time.

In our experience these limitations mean that IFAs are rarely used in practice.

**Question 37:** In practice, how effective are the general protections provisions under the *Fair Work Act 2009* (Cth) where a mature age employee, or prospective employee, has been discriminated against on the basis of age?

Section 351 of the *Fair Work Act* provides that an employer must not take 'adverse action' against an employee, or prospective employee, because of a person's age. Adverse action encompasses a wide range of situations including dismissing or demoting an employee, refusing to provide an employee with their legal entitlements,

treating an employee unfairly in relation to other employees, or failing to employ a prospective employee.

Section 351 the Act is an expansion of the protection that existed under the *Workplace Relations Act 1996* (Cth). Its wide scope duplicates the protections that already exist under Commonwealth, State and Territory anti-discrimination laws. This additional layer of regulation is unnecessary because the Commonwealth, States and Territories already comprehensively regulate this area of law.

Ai Group is of the view that section 351 of the *Fair Work Act* should be amended to limit its operation to termination of employment claims.

The expansion of the anti-discrimination provisions under the *Fair Work Act* has resulted in a number of undesirable consequences, including:

- Confusion for employees about the appropriate jurisdiction in which to pursue a discrimination claim;
- Additional red tape for employers;
- Higher costs for employers; and
- Higher costs for the community (such as the establishment of an anti-discrimination section within the Office of the Fair Work Ombudsman).

The opportunity for a complainant to bring an age discrimination claim in multiple jurisdictions is not only confusing for mature age employees but also enables claimants to “forum shop” for the jurisdiction in which their claim would most likely be more successful. This is unfair to employers who must ensure compliance with multiple laws covering the same subject matter which expose them to different remedies, penalties and processes.

Also, because of the reverse onus of proof under the General Protections provisions, a complainant simply needs to show that they were treated adversely by the employer on the basis of the complainant's age. The employer is then faced with the almost impossible task of disproving the claim, even where the claim is without merit.

**Question 38:** How does the operation of the modern award system affect mature age employees and in what ways, if any, can modern awards be utilised or amended to account for the needs of mature age employees?

In performing its award modernisation functions, the Australian Industrial Relations Commission (now Fair Work Australia) was required to include a flexibility term in all modern awards. The flexibility term enables an employee and his or her employer to enter into an IFA to vary the effect of a modern award to meet the genuine needs of the employee and employer (including arrangements for when work is performed).

As with enterprise agreements, Ai Group's experience is that IFAs under modern awards have failed to achieve meaningful flexibility for employers and mature age employees. While the intention of IFAs was intended to be a meaningful alternative to Australian Workplace Agreements, in practice, they have seldom been used.

As discussed in respect of Question 36, the effectiveness of IFAs is limited by the fact that they cannot be offered as a condition of employment and they can be unilaterally terminated by either party giving 28 days' written notice. These limitations act as barriers to a mature age employee remaining or re-entering the workforce.

Although the effectiveness of IFAs is limited, many modern awards contain facilitative provisions which allow deviation from specified award provisions by either individual or majority agreement. These provisions provide an effective means of achieving flexibility for mature age employees and allow variation of a modern award in a number of areas (including the method of arranging ordinary working hours). Unlike IFAs, facilitative provisions can be offered as a condition of employment and cannot be unilaterally terminated with notice.

**Question 39:** A number of compulsory retirement ages and licensing or requalification requirements exist in particular industries and professions. In what ways, if any, do these create barriers to mature age participation in the workforce or other productive work? If they do create barriers, should they be changed or are they appropriate?

While age restrictions for licensing, such as requirements for relicensing and restrictions for drivers aged 75+ (in NSW), represent barriers to workforce participation, in some cases these restrictions are necessary and justified on health and safety grounds.

**Question 40:** In what ways, if any, can strategic plans developed under the Australian Work Health and Safety Strategy 2012–2022 take account of occupational health and safety issues of particular relevance to mature age workers?

Ai Group is a member of Safe Work Australia and is working together with other stakeholders to develop the Australian Work Health and Safety Strategy 2012–2022 (**Strategy**). The Strategy is still in draft form and yet to be finalised by Safe Work Australia. It is therefore difficult to preempt the form, nature and content of any strategic plans contemplated by the Strategy in the future.

**Question 41:** Where is it best to include information about occupational health and safety issues relevant to mature age workers?

An employer's duty of care to provide a healthy and safe workplace extends to all employees, regardless of age. While risk of injury may be higher for mature aged workers in particular industries (e.g. construction and manufacturing) it is difficult and misleading to generalise the risk of injury for mature aged workers across all industries.

For this reason, we are of the view that guidance material will only be helpful to employers to the extent that it does not create additional legal obligations for employers of mature aged workers (in the way that Codes of Practice, Guidance Notes and Standards do).

If Government agencies such as Safe Work Australia decide to develop guidance material about the work health safety issues of mature aged workers, we are of the view that the approach adopted by Work Safe Western Australia would be the most suitable approach. A bulletin, such as the one published by Work Safe Western Australia, acts merely as an informative document for employers, without creating onerous legal obligations on the employer. Raising awareness on occupational health and safety issues (as opposed to creating any enforceable legal obligations) is the main focus of the bulletin:

*“This bulletin has been produced to raise awareness on occupational safety and health issues relevant to older workers. Employers have a general duty of care to address potential age-related factors and provide and maintain, as far as practical, a working environment where workers are not exposed to hazards and reduce the risks of injury or harm.*

*While certain risks are associated with ageing, these should be considered in the context of safety and health management for all workers. Reducing the workplace hazards and improving work and job design, particularly those associated with a physically demanding work environment, will bring benefits to all at the workplace.”<sup>13</sup>*

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<sup>13</sup> Work Safe Western Australia, *Understanding the safety and health needs of your workplace Older workers and safety* (2010), p.2



**Question 43:** What measures involving regulation and monitoring, if any, should be introduced to ensure:

- (a) employers are responsive to the needs of mature age employees; and
- (b) mature age employees are actively involved in developing and implementing such measures?

Ai Group strongly opposes the establishment of a reporting framework which would require employers to report against equality indicators related to age.

This would exacerbate the regulatory burden already imposed on employers (which is likely to increase given upcoming amendments to the *Equal Opportunity for Women in the Workplace Act 1999* (Cth)) and would be very time consuming and costly for reporting entities.

It may encourage negative stereotypes about mature age employees (such as mature age employees being less productive than younger employees, resistant to change, and difficult to train) by suggesting that regulation, rather than communication, is needed to recruit and retain mature age employees.

Imposing a reporting framework on employers may shift the focus from developing positive and flexible management practices to the burden of complying with a reporting framework. Ai Group believes that the best approach is to educate employers about the benefits of recruiting and retaining mature age employees.

In our experience, the most effective way of responding to the needs of mature age employees, is for employers to foster a workplace that encourages open communication and dialogue with mature age employees. Many employers already reap the benefits of having a best practice approach to recruiting and retaining mature age employees. To assist and encourage best practice, Ai Group supports the development and implementation of educative materials, such as Ai Group's guide to '*Investing in Experience*'.

**Question 44:** What are some examples of employment management best practice aimed at attracting or retaining mature age employees?

In 2011, Ai Group, in conjunction with the Australian Government, published *'Investing in Experience'* a guide designed to build employer confidence in recruiting and retaining mature age employees.

In developing a best practice approach, employers should consider the numerous benefits of employing and retaining mature age employees, including:

- Addressing future labour shortages (due to Australian's ageing population);
- Higher retention rates;
- Lower rates of absenteeism;
- Reducing the costs of replacing mature age employees;
- Special skills and knowledge;
- Mentoring capabilities; and
- Employee loyalty.

As set out in *'Investing in Experience'*, management best practice for recruiting mature age employees includes undertaking a job analysis which considers the requirements of the job and any flexible working practices which may attract and/or retain mature age employees (such as part-time work, job-sharing or working from home). The job advertisement should use age-inclusive language, focus on the requirements of the position, and be advertised widely to achieve a wide pool of applicants. The advertisement should make it clear that all people with the right skills, qualifications and experience will be considered.

When short listing candidates, employers should focus on a candidate's skills and abilities (rather than their age), use a mixed-age panel if possible, communicate the benefits of working for the organisation, and clarify any flexible working arrangements available for the position.

Management best practice for retaining mature age employees includes:

- Developing an anti-discrimination policy which addresses age discrimination;
- Restructuring work practices to accommodate emerging population trends (including amending policies to support health, welfare, and work-life balance, investigating flexible working arrangements, providing opportunities for employees to work in new areas, and enhancing collaboration and communication in the workplace);
- Providing training to enhance an employee's skill set;
- Allowing mature age employees to mentor less-experienced employees; and
- Considering redeployment for an employee whose priorities have changed or who is no longer able to perform a physically demanding role.

**Question 45:** What are the most effective ways of raising awareness and providing education and training to remove barriers to mature age participation in the workforce and other productive work?

In our experience, there are a number of ways employers can ensure that workplace training and education encourages mature age participation in the workforce, including discussions with mature age employees to discuss career expectations and determine training opportunities.

Education and training opportunities for mature age workers can vary depending on the individual and workplace. For example some training opportunities can include job rotation and on-the-job coaching, or linking training with mentoring opportunities and flexible work practices.

*Recognition of Prior Learning* is an effective means of acknowledging a mature age employee's existing skills and knowledge and identifying training gaps.

Also, employer organisations, like Ai Group, and other training providers can play an important role in providing training to mature aged workers and their employers. In addition, there are a number of Government programs that can assist employers with training mature age employees.<sup>14</sup>

**Question 46:** What other changes, if any, should be made to the employment law framework to remove barriers to mature age participation in the workforce or other productive work?

In our opinion, change to the employment law framework will not have a significant impact on the access to work of mature aged workers.

Rather, the barriers to mature age participation in the workforce or other productive work are more prevalent in areas discussed earlier on in the Issues Paper, such as the Age Pension, Income Tax and Superannuation. In our view, these areas of the law should be rectified to provide incentives for mature age workers to remain in or re-enter the workforce, as opposed to imposing additional obligations on employers, which would not be effective or desirable.

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<sup>14</sup> For example, the "*Productivity Places Program*" or the "*Experience+ Training*" grant by the Department of Education, Employment and Workplace Relations.

## 8. Workers compensation and insurance

### Workers compensation

A worker's entitlement to workers' compensation is determined by the jurisdiction in which that worker performs his/her work. The Issues Paper discusses workers compensation generally, but focuses mainly on the Commonwealth scheme.

Ai Group's membership mainly comprises of businesses that are covered by State and Territory workers' compensation schemes and therefore, our responses to this part of the Issues Paper are reflective of this.

Workers' compensation schemes have great difficulty in determining and addressing the link between injuries and the ageing process. This is an important and difficult issue which will not be easily resolved. Any proposed solutions need to be thoroughly analysed before implementation to avoid adverse consequences for employees, employers or the community.

**Question 47:** Should volunteers be eligible for workers' compensation at a Commonwealth level or is current state and territory coverage sufficient?

Under State and Territory workers' compensation legislation, volunteers are only eligible for workers' compensation in limited circumstances (most commonly if they are voluntary emergency workers such as ambulance workers or fire fighters). For example, in NSW, voluntary ambulance workers are deemed to be workers for the purposes of workers' compensation legislation<sup>15</sup>, while in Victoria, specific legislation provides that volunteers assisting Government agencies (including the State Emergency Services and the Country Fire Authority) are entitled to workers' compensation if injured while carrying out specified duties.<sup>16</sup>

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<sup>15</sup> *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 13.

<sup>16</sup> For example, the *State Emergency Services Act 1987* (Vic) and the *Country Fire Authority Act 1958* (Vic).

In addition, at the Commonwealth level, section 5(6) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) currently provides that the Minister may declare persons (including volunteers) who engage in activities or perform acts at the request of the Commonwealth or a licensee to be employees.

Traditionally, except in limited circumstances, volunteers are not deemed to be workers for the purposes of workers' compensation legislation. Ai Group is of the view that this should remain unchanged. Most volunteers rely on other forms of insurance (such as public liability insurance) if they are injured while volunteering.

**Question 48:** In what ways, if any, should retirement provisions in Commonwealth workers' compensation legislation be amended? For example, are any of the following approaches appropriate:

- (a) removing all age based restrictions;
- (b) removing all age based restrictions, but imposing benefit period or amount restrictions; or
- (c) increasing the age at which compensation is no longer payable to age 67, except in certain circumstances?

Like the Commonwealth scheme, a large number of other jurisdictions cease payment of weekly benefits in respect of a workplace injury at, or soon after, the worker reaches 'retirement age'.<sup>17</sup> The Issues Paper suggests that this may represent a barrier to the workforce participation of mature aged workers. Ai Group does not agree with this suggestion.

In our view, the retirement provisions act as an incentive to mature age workers to recover and return to work, rather than rely on weekly benefits.

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<sup>17</sup> See Safe Work Australia, *Comparison of workers' compensation arrangements in Australia and New Zealand*, April 2012, table 2.4(e).

Studies suggest that the longer a person is away from work because of a workplace injury, the less likely the person will return back to the workplace.<sup>18</sup> If mature age employees are able to access weekly benefits for an indefinite period of time, this may act as a disincentive to continued participation in the workforce.

Also, the removal of age based restrictions in workers' compensation legislation more generally would have significant cost implications for employers. This is particularly so, given statistics which indicate that workers who are over 65 years of age have amongst the highest average total cost of workers' compensation claims.<sup>19</sup>

## **Insurance**

It is not uncommon for income protection insurance to be provided by the employer as a term of an enterprise agreement. In such cases the employer is liable to pay a premium to the insurance company on behalf of the employee for the employee's benefit.

We do not support a mandatory increase in the age limit at which income protection insurance is no longer available, particularly where the employer is the provider of the benefit. This would represent a significant increase in insurance costs for employers, which would decrease their capacity to provide income protection insurance to employees and/or other benefits to employees under enterprise agreements.

Similarly we do not support changes to the insurance system which would significantly increase the cost of premiums for employers who provide income protection benefits to their workers.

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<sup>18</sup> *Australasian Faculty of Occupational and Environmental Medicine of the Royal Australian College of Physicians' Position Statement on the Health Benefits of Work*, released in October 2011, p 12.

<sup>19</sup> Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers' Compensation Statistics* (2011), 28.

**Question 50:** In what ways, if any, do age-based limitations and higher premiums for insurance policies for mature age persons act as a barrier to participation in the workforce or other productive work?

**Question 51:** In what ways, if any, should the insurance industry be regulated to address barriers to mature age participation in the workforce or other productive work? For example:

- (a) Should insurance industry Codes of Practice be amended to encourage or mandate the removal or extension of age-based limitations on insurance policies?
- (b) Should a regulatory framework be introduced to ensure that age-based limitations on insurance policies are appropriate?

**Question 52:** What other changes, if any, should be made to insurance laws to remove barriers

See paragraphs above.

## 9. Migration

**Question 53:** A skilled migration visa under the Migration Regulations 1994 (Cth) may only be obtained if the applicant is under 50 years of age. Should the age limit be increased?

The age limit for the most common permanent visas within the skilled migration category was until recently 45. Ai Group supported an increase to this age limit and the Australian Government's agreement to lift this to 50 in July last year was most welcome and appropriate.

The current immigration rules also offer a much greater degree of flexibility than is implied by the above question which is not quite accurate. While the bulk of skilled migration visas can only be obtained if the applicant is under 50 years of age there are a number of important exceptions.



While the Skilled Migration Program generally has an age limit of 49, for business owners or senior executives sponsored by a state or territory government the age limit is 54. There is no age restriction for persons wishing to migrate under the Family migration category with the exception of Aged Parent visas. Men applying under this category must be 65 or over and for women this is slightly different. Also, from 1 July, the 'under 55' age limit will not apply to the Venture Capital Stream of the Business Talent visa. Importantly also, the heavily utilised 457 temporary business visa has no age limit.

These significant improvements and flexibilities to the program are welcome and mean we now have very good arrangements for attracting migrants with the potential to make an important contribution to the economy.

Ai Group does not believe that raising age limits should be a priority and we note that generally unemployed people in the 45-65 year old age group have more difficulty in obtaining work than younger jobseekers and are, therefore, at risk of remaining unemployed for a long time.

We also note that without a significant increase in the overall intake (and more than proportional increases in immigration of younger people), raising the immigration age limits would detract from the benefits that immigration has in ameliorating the impacts of our ageing society. The Australian Bureau of Statistics (ABS) projects that, between 2011 and 2020, the number of persons aged 50 and over in Australia will increase by more than 22 per cent. By 2050, the number aged 50 and over will have increased by over 80 per cent, or by 6.4 million. In comparison, the number of persons aged 18 to 49 is projected to grow by just over 35 per cent by 2050. Currently, the age structure of the migrant population plays a role in boosting the rates of growth in the younger age ranges.

Further, account needs to be taken of the prospect that unless they already have substantial wealth, older migrants may be less likely than younger migrants to build sufficient retirement savings to avoid reliance on the age pension.

**Question 54:** In order to obtain a range of visas under the General Skilled Migration category, applicants must obtain a pass mark in a 'points test' where points are allocated according to age, with no points for those aged 45 and over. Should this be amended, and if so, how?

To be more accurate, it should be clearly noted that the Australian Government has recently increased the age under which potential migrants can apply under this category from 45 to 49 inclusive, which is again most welcome.

Ai Group notes that the purpose of the points test is to help boost the favourable impacts of the overall migration program and to select the best migrants that our economy needs. While no points are allocated for those aged between 45 and 49 inclusive, people in this age range can still be successful in their application if they have higher performance in other areas such as the level of their qualification or the amount of training they have had in Australia. Ai Group does not believe there is a need to further amend this element of the points test.

**Question 55:** An applicant over 50 years of age may not apply for a permanent employer-sponsored visa under the Migration Regulations 1994 (Cth) from 1 July 2012 unless they are an 'exempt person'.

- (a) Should the age limit be increased?
- (b) What considerations should be taken into account in determining whether a person should be eligible for an age exemption?

With regard to Question 55(a), Ai Group does not think that there is a strong case for increasing the age limit.

In respect of Question 55(b), we note that from 1 July this year, exemptions to the age limit for the Employer Nomination Scheme and the Regional Skilled Migration Scheme will apply in the following (summarised) circumstances:

- Ministers of Religion where the person is being nominated by a religious institution.

- Researchers, scientists and technical specialists employed by Australian Government agencies. These applicants have high qualifications and experience.
- Senior academics employed by a university in Australia. A senior academic is a person to be employed at an Academic Level of B, C, D or E as a University Lecturer (ANZSCO: 242111) or Faculty Head (ANZSCO: 134411).
- Persons who have been working on their subclass 457 visa for at least the 4 years immediately preceding the visa application, with their nominating employer and who have been paid a salary that is at least equivalent to the Fair Work High Income Threshold (AUD\$118,100.00 as at July 2011) for each year in the 4 year period

Ai Group believes these exemptions are appropriate and that the Government should always be open to expanding these exceptions to assist in ameliorating specific skill shortages.