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The Executive Director
Australian Law Reform Commission
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Dear Executive Director,

Please find attached ACTU Submission in response to the ALRC inquiry into age barriers to work in Commonwealth laws.

Yours sincerely,



Dave Oliver
Secretary



Submission in response to the ALRC inquiry into age barriers to work in Commonwealth laws June 2012

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1. INTRODUCTION AND EXECUTIVE SUMMARY

The ACTU is the peak body representing 47 unions and almost two million working Australians. A significant number of our members fall into the category of a mature aged worker.¹

Greater labour force participation of Australians over 55 has grown from around one quarter (24%) to one third (34%) over the past 10 years, and the trend is predicted to continue.²

However, older Australians face particular barriers to participating in the workforce, from age-based discrimination to health related limitations and lack of flexible work arrangements. We therefore welcome this opportunity to make a submission on behalf of Australian unions in response to the Australian Law Reform Commission's (ALRC) Inquiry into Age Barriers to Work in Commonwealth Laws.

The importance of removing barriers to workforce participation for mature age workers

Participation in the labour force through meaningful, paid employment can enhance the lives of mature aged workers; it promotes social inclusion through financial independence, community engagement and positive mental and physical health.

Facilitating workforce participation of mature age workers also brings significant benefits to the economy, particularly in times of labour market shortages, by opening up the availability of the skills and experience of older workers.

At the same time, we acknowledge that mature workers have already contributed significantly to the workforce throughout their lives; we believe that senior Australians have the right to choose when to retire, and that the dignity of older Australians should be upheld in retirement. The Australian workforce is diverse, and this diversity must be taken into consideration when removing barriers to workforce participation. At present, many workers are unable to continue working until retirement age due to the nature of their work, or due to their health or caring commitments, and are therefore accessing income support prior to receiving the Age Pension. Older workers from lower socio-economic backgrounds are likely to find it more difficult to find and retain meaningful employment. Some are delaying retirement for financial reasons. Others are choosing to work beyond retirement age and seeking to mix sources of income from work, superannuation and/or pension support.

Making it more difficult for workers to retire will not necessarily lead to those workers finding or retaining meaningful paid employment. The ACTU would not, in principle, support any measures that would restrict choices by making it more difficult for workers to access their entitlements to the aged pension or superannuation. The most effective measures to improve workplace participation for mature aged workers will:

- provide additional incentives for employers and employees to encourage mature aged workers to stay in the workforce, particularly those from low-income households;

¹ We note that the Issues Paper has defined an older worker according to the Australian Bureau of Statistics (ABS) definition as a worker over the age of 45; however, there is a range of other ages used to indicate 'older worker' such as the preservation age of 55 at which private superannuation savings can be accessed and the current age of 65 at which the Age Pension can be accessed.

² ABS, *Australian Social Trends*, Sep 2010, Cat. 4102.0

- remove restrictions that prevent older Australians from being treated equally in the workforce; and
- address discriminatory attitudes and practices by employers that force older Australians out of work before they might otherwise wish to retire.

The need for a holistic framework

The ACTU notes that a narrow focus on legislation and regulation alone would not be sufficient to address the many direct and indirect barriers faced by mature aged workers. The social consequences of workplace barriers for mature aged workers are severe, and must therefore be addressed through policy actions that encompass superannuation reform, the tax and transfer system, the welfare system, workers' compensation, insurance and adequate provision of social support and infrastructure.

The ACTU supports the following recommendations to:

- Ensure mature workers have genuine choice as to whether they wish to retire or remain in the paid workforce and facilitate options which support dignified and decent retirement incomes and meaningful and satisfying employment options which take into account health, lifestyle and caring commitments;
- Acknowledge and address the negative impact of insecure employment on mature age workers;
- Ease the restrictions on income tests for income support payments such as the Age Pension, either by raising the earnings threshold, or reducing the withdrawal rate of payments;
- Further reduce the effective marginal tax rate to increase the take-home pay of low-income workers. To be most effective, this change should apply to recipients of all income support payments, not just the Age Pension;
- Remove the upper age limit for superannuation contributions to enable all workers, regardless of age, to receive super from their employer;
- Remove the \$450 minimum earnings threshold below which employers are not required to contribute to their employee's voluntary superannuation contribution;
- Extend the superannuation guarantee framework to all employees, including casual, contract and self-employed workers;
- Improve the retirement income of women through top-up and co-contribution schemes and payment of super on periods of paid and unpaid parental leave;
- Implement a fairer system of tax concessions on superannuation with a fixed offset deducted from an employee's marginal tax rate;
- Maintain the superannuation preservation age at 65 for those who wish to retire at that age and access their superannuation;

- Lift the 25 hour work limit for workers who are in receipt of the Carers Allowance;
- Extend the right to request flexible work arrangements to older workers, particularly those with caring responsibilities;
- Clarify that the Fair Work Act (FW Act) discrimination provisions operate irrespective of whether the action is not unlawful under state or territory discrimination law;
- Ensure the FW Act General Protections for prospective employees against discrimination on the basis of age are enforced with respect to prospective employers and labour hire companies;
- Remove age based restrictions for access to workers compensation;
- Invest in retraining and recruiting mature age workers for jobs within Australia, including the use of the newly created Jobs Board; and
- Implement the ‘full triangle’ of regulation, including enforceable, meaningful legal rights and obligations, preventative measures such as enforceable undertakings and reporting requirements and whole of organisation education and awareness activities.

2. 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 inform the ALRC’s deliberations?

The ACTU agrees with the framing principles set out by the ALRC, and would welcome the opportunity to make some brief remarks on these principles, and in particular, how they apply to the ILO’s decent work agenda.

The decent work agenda was adopted by the International Labour Organization (ILO) in 2002, and further endorsed by the ACTU and our affiliates at our 2009 Congress. It recognises the central role of work in people’s lives and that the quality of work is crucial to a cohesive and more equal society. We believe that working life should provide people with economic security, freedom, dignity, and equal opportunity. Participation in paid employment should be meaningful and satisfying, and should encompass reasonable working hours, safe, fair and equal treatment at work.

If we are to promote a more socially inclusive workforce, we must ensure that participation in employment provides workers with real choices about when, where and how they work. The ACTU’s Inquiry into Insecure Employment, chaired by former Deputy Prime Minister Brian Howe, found that almost one quarter of all employees in Australia (23.9%, or 2.2 million workers)³ are engaged in casual employment. Not only is casual and ad hoc employment a source of financial and social insecurity, it is also synonymous with weaker rights and entitlements, poorer career development opportunities and lower job satisfaction. The growth of casual employment has been significant over the past few decades, increasing from 15.8% in

³ ABS, *Forms of Employment*, November 2011 (Released April 2012), Cat 6359.0

1984 to around 27.7% in 2004.⁴ In many cases, casual and insecure employment can lead to social exclusion, rather than social inclusion, by denying workers the chance to participate in the workforce in a meaningful way. This is a particular issue for mature aged workers, who may wish to work more flexible hours but should not have to trade their job security for additional flexibility.

Stability and cohesion of support systems designed to provide older workers with the choice to remain in meaningful employment are critical. In particular, social and community support structures for older workers (such as assistance with caring responsibilities) must have a focus on allowing the person to maintain a connection to employment on a regular, predictable and integrated basis.

In line with our decent work agenda, the ACTU would interpret the ALRC's principle of self-agency to mean that workers must be given a meaningful choice in terms of when and if they retire, as well as the work that they are asked to perform prior to retirement. This choice is often denied workers in insecure employment, whether they are casuals, contractors or employees on fixed term contracts. We will continue to campaign for more secure employment opportunities for all workers, including mature age employees, and encourage the ALRC to consider job security and quality of employment as an additional framing principle when considering its terms of reference.

3. AGE PENSION

Australian unions are proud of the role that they have played in increasing the adequacy of retirement incomes through campaigning for the introduction of the superannuation scheme. However, we recognise that for many workers, the Age Pension will continue to provide much of their post-retirement income. It is therefore important that, while promoting compulsory and voluntary retirement savings, we do not distract from the need to maintain and enhance the value of the Age Pension. To that end, the ACTU supports raising the Age Pension to 35% of the full time adult average weekly wage by 2025. We do not believe that placing additional restrictions around access to the age pension would be effective in pushing people back into the workforce, as these restrictions would not address the underlying causes that make it difficult for mature age people to find and keep work. We did not support increasing the retirement age to 67, and we would not support any further increases to the retirement age. We would prefer to see positive measures to encourage people to continue working, rather than withholding the age pension from those who need it. The ACTU notes that steep withdrawal rates on income support payments, combined with low earnings thresholds, can discourage payment recipients (including Age Pensioners) from participating in the labour force. Tight income tests on income support payments raise both the effective marginal tax rate and the effective average tax rate faced by low-income workers. There is a case for making these tests less stringent, such as by raising the earnings threshold or reducing the withdrawal rate of payments. The ACTU would support such changes.

4. INCOME TAX

Principles of a fair tax-transfer system

Tax revenue funds the provision of services and infrastructure that are important to the Australian community, and the tax transfer system can lead to a fairer and more prosperous society, taking into account the needs of the community. Personal income tax is the primary means of achieving this goal.

⁴ *Ibid.*

The ACTU supports a progressive tax system, where higher income earners pay a larger proportion of their income in taxes than lower- and middle-income earners. Progressive taxation leads to more equity in the income tax system and ensures that all Australians pay their fair share, with income redistributed towards those who need it most. Any tax reforms considered by the ALRC as part of this inquiry should strengthen, not weaken, the government's ability to provide public services and social security. The tax system should ensure a fair redistribution of wealth and income to achieve equal opportunity and to alleviate the disadvantage faced by particular social groups, including mature age workers.

Improving workforce participation through the taxation system

Promoting workforce participation is an imperative for public policy for several reasons. First, obtaining decent work is a key way for people to lift themselves and their families out of social exclusion. Decent work with decent wages is the best social inclusion strategy yet devised. Second, boosting workforce participation has economy-wide benefits. With an ageing population, the ratio of working-age people to seniors declines; to maintain economic growth and ensure fiscal sustainability, promoting workforce participation is a laudable and necessary goal of public policy.

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?

There are many aspects of public policy that can promote workforce participation, of which the tax system is only one element. Investing in skills and education is important. However, the tax and transfer systems do have a significant role to play. People are more likely to work, or to seek additional work, if they keep a larger proportion of an extra dollar they earn, in particular, low-income earners who are more responsive to changes in their net incomes. Future tax reforms that aim to promote workforce participation should be aimed where they get the biggest 'bang for the buck': with low- and middle-income earners.

One of the main ways to encourage labour market participation and reduce complexity in the taxation system is to reduce the effective marginal tax rate (EMTR) so that workers, particularly those on lower incomes, are able to take home more of their earnings. We note that the new income tax scales, due to take effect from 1 July 2012, will reduce EMTRs for many low-income workers. However, further reductions are still desirable. Bearing in mind the ALRC's framing principles of system cohesion and stability, the ACTU would not support significant structural change to one payment, such as making the Age Pension payments exempt from income tax, in the absence of change to other forms of income support payments. However, any wide scale changes to the tax-transfer system to encourage further participation from low-income and disadvantaged groups would only serve to benefit mature age workers who face similar barriers to employment.

One of the claimed benefits of tax cuts implemented during the 2000s was increased workforce participation. This was based on an assumption that a reduction in marginal tax rates would increase the labour supply, and the increase in after-tax income will lead people to work more or to seek work in the first place. However, evidence suggests that the labour supply response of different groups of workers to a change is not equal. Many other factors affect the decision to seek work or increase hours of work. Increasing after-tax income of older Australians may encourage them to continue working; however, there is evidence to suggest that people in higher-income households are less responsive to changes in their net incomes than low-income people. Therefore, any changes to the tax system to benefit mature age workers

should take this into consideration and target incentives towards low- and middle-income earners, as they are most responsive to changes in their after-tax incomes. Tax cuts for higher income workers over 45 are less likely to result in material change in their workforce participation and would therefore be a less effective use of resources.

5. SUPERANNUATION

The ACTU has always been a strong supporter of the superannuation system as the main way to provide Australians with an opportunity to live in comfortable retirement. Australian unions were central to the creation of the superannuation system in Australia in 1992, and we continue to support compulsory superannuation as one of the pillars of the Australian retirement incomes system. We welcome steps taken by the Commonwealth Government, in response to sustained campaigning by Australian unions, to increase the superannuation guarantee from nine per cent to 12%, which will take place between 2013 and 2020. These reforms have successfully reduced the retirement savings gap from an average of \$87,900 in June 2009 to \$79,200 in June 2011⁵. We also welcome the increase in the upper age limit for compulsory contributions to 75 years. However, we recognize that workers reaching retirement age face unfair barriers to earning and accessing their superannuation which can act as a disincentive to workplace participation.

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

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?

Superannuation is a form of deferred wages, and so when an employer does not pay employees their superannuation entitlements, this is effectively a wage cut for those workers. It is therefore imperative to extend the entitlement to super contributions to all employees, regardless of age and minimum earnings. While we welcome the increase in the upper age limit for super contributions, we believe that this age limit should be removed entirely for those who wish to continue working after 75. We also advocate for the abolition of the minimum earnings threshold, which is currently at \$450 per month per employer. This threshold is inadequate in the context of the increase in casual or part-time employment, whereby a worker may be employed by two or three different employers to make ends meet. In this scenario, an employee may earn over the \$450 threshold but still would not be entitled to their superannuation because they work for more than one employer. This can be a common issue among older workers, many of whom transition to retirement by taking on part-time or *ad hoc* employment.

⁵ Financial Savings Council. *Retirement Savings Gap as at July 2011* (released March 2012).
http://www.fsc.org.au/downloads/file/ResearchReportsFile/FINAL_FSCSuperannuationSavingsGapReport2011.pdf

We note that contractors and the self-employed are not always eligible to receive super contributions and we support extending the super guarantee framework to these workers. This would encourage more self-employed workers to remain in the workforce for longer.

Recognising the lower superannuation balances achieved by many women, we also endorse the implementation of further measures to improve the retirement income adequacy of older women, such as top-up and co-contribution schemes.

Australian unions have also consistently advocated for an increase in superannuation contributions to 15% by 2025. This would lead to an increase in retirement income for future generations of older workers and, combined with removing the upper age limit on super contributions, would act as a further incentive for workers to remain in employment for longer.

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?

Australians' retirement incomes are supported, in part, by the concessional taxation of superannuation contributions. In principle, we support the concessional treatment of superannuation. However, as noted earlier, tax incentives are most effective in changing the behaviour of low- and middle-income employees and encouraging them to continue to participate in the workforce. We note that the concessional cap for mature age workers was temporarily increased to \$100,000 in response to the Global Financial Crisis in the 2008-2009 and 2009-2010 financial years. We support the government's decision to reduce this cap back down to \$25,000, and believe that this cap is set at an appropriate level to encourage older workers to remain employed for longer and thereby increase their retirement savings. A higher cap would likely only benefit those employees on higher incomes who are already more likely to remain in work, and who may already have multiple streams of retirement income.

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?

The ACTU rejects the notion that existing age settings encourage workers in meaningful paid employment to retire before they are ready to, and we do therefore do not support raising the Superannuation Preservation Age or the Age Pension Eligibility Age. We oppose the Henry Review Retirement Incomes Report recommendation that the Superannuation Preservation Age be lifted to 67 years of age. Aligning the Age Pension Eligibility Age and the Superannuation Preservation Age would be counterproductive to the needs of Australian workers, and will unfairly limit choice for older workers in relation to when they can retire.

Instead, the government should introduce more flexible arrangements to accommodate the needs of employees who are transitioning to retirement. This approach strikes a more appropriate balance between encouraging those who wish to work for longer to do so, while providing older Australians with dignity and respecting the legitimacy of their choice to retire when it suits them.

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?

One major change to superannuation laws would be to make the system fairer, in order to encourage more low-income workers to participate in employment.

While recognising that the super contributions tax rebate for low-income earners will increase the retirement savings of many low -aid workers, we are concerned that the tax treatment of contributions remains deeply unequal as a disproportionate and unfair share of the tax concessions accrue to very high income earners. The present system for taxing contributions is a 15% “flat tax” that provides a greater tax concession to high-income earners than to low and middle-income earners. Whereas high-income earners receive a 31.5% concession on superannuation contributions., low income earners receive no concession – they pay the same rate on super contributions as they do on their ordinary wage income. In 2010-11, the concessional taxation of employer contributions was worth \$13.3 billion. Total tax concessions associated with superannuation were worth \$27.2 billion.⁶ It is important that these costly measures are targeted to those Australians who are in the greatest need of assistance in saving for retirement.

We welcome the government’s introduction of a rebate that reduces the tax on contributions to 0% for low income earners and a surcharge that increases the tax rate to 30% for very high income earners. However, the system remains broadly ‘flat’, with many high income earners receiving larger concessions than middle-income workers. This means that under the current system, higher income earners still disproportionately benefit from the concessional rate on superannuation. The solution would be to implement a simpler and fairer system of contribution taxation based on each employee’s marginal tax rate minus a fixed offset, for example, 15%. The Australia’s Future Tax System Review (the Henry Review) recommended a similar system. This offset could be higher for low-income, mature-age employees, which would provide the government with additional savings which could then be spent on training or other measures targeted towards improving workforce participation of mature age workers and other low-income workers.

It is important that any changes to superannuation regulations and related tax laws are evidence-based. In relation to how existing contribution and tax rules impact on the willingness and ability of mature age workers to remain in employment, the government could commission research that estimates the impacts and how they vary across different occupations and social groups. The ACTU would recommend further research into the most effective ways to remove barriers to mature age participation among different income groups.

⁶ Department of the Treasury, [Tax Expenditures Statement 2011](#), January 2012.

6. SOCIAL SECURITY

Question 25. In practice, does the 25 hour work, volunteering, study and training limitation for Carer Payment present a barrier to mature age participation in the workforce or other productive work? What changes, if any, should be made to remove barriers to mature age participation in the workforce or other productive work?

The ACTU acknowledges the contribution to society that carers make, and notes that carers often face significant problems in juggling their work and caring responsibilities. Older workers are more likely to have additional caring responsibilities, including for an older spouse, an older dependent with a disability or illness or for children or grandchildren. Those employees who have juggled work and caring commitments for long periods of time are likely to have severely reduced incomes, financial security and retirement savings. The ACTU has long advocated for changes to government payments to include superannuation contributions on behalf of carers in receipt of Carer Payments or Allowances. In addition, the 25 hour work limitation should be lifted to provide carers with more flexibility to take on more work when it is available and convenient to them.

Question 30. What other changes, if any, should be made to social security laws and the *Guide to Social Security Law* to remove barriers to mature age participation in the workforce and other productive work?

The question of how best to reduce low-income earners' disincentives to work is an important and complex one. Progressive reform of the social security system is needed, but increases in the tax-free threshold can also assist to reduce disincentives for those on income support who wish to move into paid employment. In particular, low income earners who are not in the labour force or who work part time can face high effective marginal tax rates (EMTRs), which can discourage workforce participation.

We argue that the most effective change to social security entails lowering and reducing the EMTR to enable Australians on social security payments to keep more of the money they earn while remaining on their social security payments. We note that this would be of particular benefit to those Australians on the Age Pension.

EMTRs are the sum of the tax paid and social security withdrawn as a result of earning an additional dollar of private income. An EMTR of 60%, for example, means that a low-income person will retain only 40c out of an additional dollar that he or she earns by working. Social security payments (such as Newstart and Youth Allowance) are typically withdrawn at 60c in the dollar: for each additional dollar that a payment recipient earns from work, they lose 60c of their payment. It is this steep 'taper rate' that is the main source of the participation disincentives that are faced by low-income earners. In some ways, high EMTRs are an inevitable by-product of Australia's highly targeted system of social assistance, in which payments are tightly means tested.

The problem of high EMTRs has got worse, not better. Researchers from NATSEM estimate that the proportion of working-age Australians who face EMTRs of more than 50 per cent increased from 4.8% in 1996-97 to 7.1% in 2006-07.⁷ Low income people can face EMTRs well in excess of the 46.5% marginal rate paid by high-income earners.

⁷ NATSEM. *Trends in effective marginal tax rates 1996-97 to 2006-07* AMP/NATSEM Income and Wealth Report, Issue 14, September 2006.

A reduction in the EMTR and a more gradual taper rate on income support payments would be the most effective changes to social security laws to encourage further workforce participation, especially among mature aged workers.

7. EMPLOYMENT

Recruitment agencies and adverse action

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?

Increased devolution of employer responsibilities has seen recruitment agencies and labour hire companies become more involved in the decision making process of hiring and firing employees.

The *Fair Work Act 2009* (FW Act) contains expanded provisions to prevent employees from facing adverse action on the basis of a discriminatory reason, such as age. Under section 341 of the FW Act prospective employees are now protected from discrimination on the basis of age. A labour hire agency that discriminates against a prospective employee on the basis of their age during the recruitment process is in breach of their obligations under the Act.

However, further education of recruitment agencies to make them aware of their obligations and of the public as to their rights under the FW Act is required. In addition, greater regulation to ensure the anti-discrimination provisions are adequately enforced is needed. Unions play an important role in educating employees and potential employees of their rights and in enforcing workplace and discrimination laws but wider activity is required by government, the industry and employer organisations.

Flexible working arrangements

The right to request flexible work arrangements for those older workers who wish to maintain their connection to the paid workforce but on reduced or changed working arrangements, is critical to removing barriers to employment participation of mature workers.

Flexible work arrangements enable them to 'scale down' their work commitments for health and personal reasons or, for a significant portion of employees in this age group, to balance work and caring commitments.

The ability to work part-time or flexible hours has been found to be the most important facilitator, after good health, for older people to work beyond retirement age.⁸

Yet employment regulation and workplace practices have not kept pace with the needs of the mature workers participating in the modern workforce. A number of current legislative reviews, including the FWA Review and the Report of the FWA General Manager, will inform the discussion on the adequacy of existing provisions for flexible work arrangements in order to assist workers to balance paid work and personal

⁸ National Seniors Productive Aging Centre, *Aging and the barriers to labour Force Participation in Australia* (2011), prepared for Consultative Forum on Mature Age Participation, 23

needs.⁹ In addition the government is currently considering its position in response to consultations regarding amendments to the NES right to request flexible work arrangements provision and the proposed *Fair Work Amendment (Better Work/Life Balance) Bill 2012*¹⁰. The ACTU has submitted comments to these reviews and inquiries¹¹.

National Employment Standards

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?

Currently the right to request flexible work arrangements under s.65 only pertains to a limited group of employees (those with caring responsibilities for children under school age and children with a disability up to the age of 16).

The ACTU has advocated for some time that the right to request flexible working arrangements should be extended to employees with caring responsibilities for any dependent who reasonably relies on them for care (as is the case in a number of European nations, New Zealand and the UK¹²). We support the extension of the right to older workers, and note that most advocates and representative organisations for seniors and older workers, including the Advisory Panel on the Economic Potential of Senior Australians, has recommended the right be extended to mature age workers.¹³

Without a positive, enforceable right to change working arrangements, many older workers will be unable or unwilling to maintain paid employment. No amount of financial incentives to postpone retirement, or education and awareness-raising of the benefits of employing older workers, will have effect without this the ability of older workers to change their working arrangements in a manner which enables them to continue to participate in the paid workforce.

However, simply extending the scope of the right to request flexible working arrangements provision will not provide older workers with a meaningful option to maintain their connection to paid employment.

Anecdotal evidence collated by the ACTU, backed up by the available research material, is that the right to request flexible work arrangements under s.65 has not operated effectively. The overwhelming evidence provided by union members highlights the irregularity, unpredictability and variance of employees' experiences using the right to request provisions.

This is because:

⁹ The Australian Government review of the Fair Work Act 2009 (FWA) is intended to examine and report on the extent to which the legislation is operating as intended and areas where the operation of the legislation could be improved consistent with the Objects of the Act. The review is due to be completed by August 2012. In addition, under s.653 of the *Fair Work Act 2009*, the General Manager of Fair Work Australia (FWA) must provide a report on (inter alia) the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements, and the operation of the provisions of the National Employment Standards (NES) relating to employee requests. The General Manager's report is due to be presented to the Minister by the 25 November 2012.

¹⁰ See <http://greensmps.org.au/worklifebalance>

¹¹ <http://www.actu.org.au/Publications/Submissions/SubmissiontothePostImplementationReviewoftheFairWorkAct.aspx>;

<http://www.actu.org.au/Publications/Submissions/ACTUSubmissiontoFairWorkAustraliaGeneralManagersReport.aspx>

<http://www.actu.org.au/Publications/Submissions/CommentsontheInquiryintotheFairWorkAmendmentBetterWorkLifeBalanceBill2012.aspx>

¹² Since enshrining the right to request flexible working arrangements in 2003, the UK legislation has subsequently been extended the right to all carers in 2007, to parents of older children in 2009 and in 2010 the Government announced its intention to further extend the right to all employees.

¹³ Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians- Turning Grey into Gold* (2011), Rec 15.

1. The provision (section 65 of the FW Act) places no obligation on employers to give proper consideration to a request or to reasonably accommodate a request;
2. Employers are only required to give an employee the reason for the refusal on 'reasonable business grounds' which are not defined and are used vaguely by employers (for example 'cost reasons') without further meaningful explanation; and
3. Employees are specifically denied a right to appeal an employer's unreasonable refusal of a request, unless they have the bargaining strength to reach agreement with their employer to do so in an enterprise agreement.¹⁴

Because of the lack of real, enforceable procedural rights, the right to request provisions have, in practice, remained nothing more than a right for employees to ask for something.

The lack of obligation on employers to demonstrate they have given proper consideration to a request has hampered the effectiveness of the provision.

Because employers are aware that they are not obliged to demonstrate they have seriously considered a request and are unlikely to have their refusal appealed, the success or otherwise of an employee's request is by and large subject to the vagaries of the attitudes of their line manager.

Discrimination case law demonstrates that biased attitudes towards older workers exists and this must be acknowledged as evidence of resistance by a significant number of employers to genuinely exploring options for flexible work arrangements in order to assist older workers maintain employment.¹⁵

The ACTU advocates the adoption of a provision along the lines of that contained in Section 14A of the *Victorian Equal Opportunity Act (1995)* which outlines the obligations of employers in considering a request, including weighing up the importance of the request on the employee's capacity to balance work with family and caring responsibilities against any potential effects the granting of such a request would have on the organisation.¹⁶

Amending the *Fair Work Act* right to request provisions to include an obligation on employers to demonstrate serious consideration of a request would give clear guidance to both employees and employers, minimising the need for refusals to go to formal dispute resolution.

Requiring employers to at least properly consider a request will assist in the cultural shift which needs to occur in those workplaces where management is resistant to 'thinking outside the square' and encourage management practices which acknowledge the benefits of including a diverse workforce to their organisation. It is worth noting the UK Coalition Government's conclusion where they noted that the most effective way to achieve cultural change in organisations to embrace the right to request flexible work arrangements provision was to introduce statutory obligations, stating that "even a sustained and extensive campaign is unlikely to have the significant effect on employment culture sought by this policy,

¹⁴ Ss. 739(2), 740 (2)

¹⁵It is worth noting that these cases represent merely the tip of the iceberg as by far the majority of cases are not acted on by victims or remain unreported: AHRC Annual Report, 2011: For the period of 2010-2011 complaints 45% of complaints brought under the Sex Discrimination Act were conciliated, most with confidentiality agreements.

¹⁶ UK legislation also places a statutory duty on employers to give serious consideration to a request according to a set procedure.

and a major challenge would be reaching and convincing those who are resistant to change- which promotion campaigns will always struggle to achieve without the pressure of change in the operating environment of businesses.”¹⁷

Denial of a right to appeal an employer’s unreasonable refusal of a request has hampered the effectiveness of the provision.

The *Fair Work Act* stipulates that employees have no right to appeal an employer’s unreasonable refusal of a request, unless the parties have agreed to allow such appeals in their enterprise agreement.

This is highly ironic, as it is vulnerable workers such as older workers, who already face discrimination and attitudinal barriers to decent employment opportunities who are likely to need the right to request flexible working arrangements. Yet, because of their weak bargaining power, they are most likely to be locked out of workplace bargaining or have inferior workplace agreements with no right to appeal an unreasonable refusal.

Evidence suggests a significant number of employers with access to legal and industrial advice specifically draft workplace agreements to deny employees requesting flexible work arrangements access to the general dispute resolution processes outlined in their workplace agreements.¹⁸

Recently published data from Fair Work Australia indicates that the rate of applications for FWA to deal with disputes in relation to a refusal by an employer for flexible work arrangements is very low.¹⁹ This is not surprising given employers are not legally obliged to seriously consider the request and, in any event, most employees do not have the right to take an appeal of an unreasonable refusal to fair Work Australia. However, overseas experience indicates that allowing for either an obligation to seriously consider a request, or a right to appeal a refusal, does not result in an increase in disputation.²⁰

The coverage of the NES should be extended to include casual and contract employees. Currently, almost one quarter of employees in Australia work in insecure employment arrangements such as casual and contract work, many of whom cannot meet the eligibility requirement of 12 months continuous service with an employer to be afforded protection of the NES entitlements. A significant proportion of older workers are engaged in insecure forms of employment in order to access reduced hours of work and are excluded from accessing the NES right to request flexible work arrangements.

The right to request flexible work arrangements provisions must be amended not only in the scope of employees able to access the right but also in the process; so that the provision fulfils the policy objective of encouraging employers to explore all options to accommodate a workforce of diverse characteristics and meets basic procedural fairness by providing a genuine enforceable right for all employees to seek independent review of unfair decisions.

¹⁷ HM Government, Consultation on Modern Workplaces: Extending the right to request flexible working to all: Impact Assessment, May 2011.

¹⁸ For example, the *Telstra Enterprise Agreement 2010-2012* specifically states that the dispute resolution clause “does not apply in relation to disputes about whether Telstra has reasonable business grounds to refuse a request for flexible work arrangements or a request for extended parental leave under the National Employment Standards”: *Telstra Enterprise Agreement 2010-2012 C2011/3478*

¹⁹ Fair Work Australia, Quarterly report to the Minister, October-December 2011 indicated there was a total of 42 complaints for the period July 2010 – December 2011.

²⁰ The UK conducted regular surveys of both employers and employees on the operation of the request provisions since its introduction into law in 2003. The most recent research indicates that 17% of employees have requested a change to their working arrangements, approximately 60% of requests were granted, and of the 40% refused, only one quarter were appealed. The Third Work-Life Balance Employees Survey, March 2007, Employment Relations Research Series No.58 and The Third Work-Life Balance Employers Survey, December 2007, Employment Relations Research Series No.86.

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?

The ACTU does not support individual flexibility arrangements (IFAs) provided under s.202 of the FWA. We believe there is ample scope under modern awards (and contracts of employment) for employers to roster work in a flexible and efficient manner. For example, the General Retail Industry Award 2010 allows an employer to:

- Implement long shifts of up to 11 hours on any day of the week;
- Require employees to work 'reasonable' additional overtime;
- Trade on weekday evenings and trade on weekends;
- Change rosters; and
- Provide flexible hours to employees such as starting or leaving work early or late.

If the genuine operational requirements of the business truly require even greater 'flexibility' (such as 24 hour rotating shifts), this is something that should be negotiated collectively with the workforce and their union, to ensure that workers' interests are properly accommodated.

In theory, there are a number of ways in which employees can access individual flexibility other than IFAs. These include informal over-award arrangements, contracts of employment and the right to request flexibility working arrangements under the NES. Employees that are in a strong position to negotiate with their employer do not need to rely on an IFA in order to access genuine flexibility. Those employees who have little say about their terms and conditions of employment, or who are in a vulnerable employment situation, are unlikely to derive any benefit from an IFA, including mature age employees who are more likely to find themselves in a vulnerable employment situation due to the increased discrimination against older workers.

The experience of Australian Workplace Agreements (AWAs) shows that, in practice, individual agreements that modify the operation of the safety net do not benefit employees.

This is because:

- It is overwhelmingly employers who initiate the use of such agreements;
- Employers seek agreements that provide them with increased discretion to set the terms and conditions of work;
- Employers commonly provide inadequate compensation for the removal of monetary entitlements²¹;
- Employers will apply pressure to employees to accept their preferred agreement;
- Employees are likely to be unaware of their right to refuse to make an agreement, and are not always well placed to make an assessment of whether the agreement disadvantages them;

²¹ See A Roan, T Bramble and G Lafferty, 'Australian Workplace Agreements in Practice: The 'Hard' and 'Soft' Dimensions' (2001) 43 *Journal of Industrial Relations* 387; R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

- Employees are reluctant or unable to challenge their employer, either by opposing the making of an agreement, or in seeking compensation²²; and
- Non-compliance with employment obligations and lack of enforcement by employees is particularly prevalent in industries where the employer is under competitive pressure to reduce labour costs such as parts of manufacturing, hospitality and retail and in the case of vulnerable workers including mature aged workers, particularly those working in precarious employment or in workplaces without a union presence.²³

The safeguards in the FWA provision for individual flexibility arrangements (including the model award clause) have proven ineffective in protecting employees entering IFAs.

The FWA does not require IFAs to be approved or registered by an independent authority and the lack of reliable data makes it difficult to assess the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements.

Over the last two years, however, it has become apparent that IFAs are being used by employers in a similar fashion to AWAs – that is, to drive down wages and conditions. Moreover there is very little evidence that IFAs provide employees with access to genuine flexibilities that assist them to balance their work and personal needs.

Lack of genuine employee consent

Unlike collective agreements, there is no process for ensuring that the employee has genuinely agreed to enter into a flexibility arrangement. Consequently, the legislative requirement of consent offers employees very little protection.

There have been many reports of employers unlawfully making entry into an IFA a condition of employment. In our experience, it's quite common for an employer to include an IFA in the bundle of documents to be signed at the commencement of employment, without explaining to the employee that they are not obliged to sign the IFA.

It also appears that IFAs, like AWAs, are 'template' documents that are developed by workplace relations consultants, law firms or employer organisations²⁴ raising questions as to whether the IFAs are produced following genuine negotiation.²⁵

²² See, for example, Queensland Industrial Relations Commission, *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers*, 2007; Standing Committee on Social Issues, Legislative Council, New South Wales, *Inquiry into the Impact of Commonwealth WorkChoices Legislation*, Report, 2006; Jude Elton and Barbara Pocock, 'Not Fair, No Choice: the impact of Work Choices on Twenty South Australian Workers and their Households', July 2007.

²³ Miles Goodwin and Glenda Maconachie, 'Employer Evasion of Worker Entitlements 1986-95: What and Whose?' (2005) Proceedings of the 19th AIRAANZ Conference, vol 1, 239-45: <http://airaanz.econ.usyd.edu.au/papers/Goodwin_Maconachie.pdf>.

²⁴ eg, the IFA available from the Clubs Tasmania website: <http://clubstas.com.au> or from the Queensland Pharmacy Industry.

²⁵ Fair Work Ombudsman, QLD– Pharmacy Industry Audit Program, Final Report, February 2012, p 11-12.

The ACTU remains concerned about the risk of undetected coercion in non-unionised workplaces particularly with respect to vulnerable workers given the process by which agreement is reached is generally not subject to external scrutiny. There has been at least one prosecution under the General Protections provisions of the Fair Work Act that involved an IFA.²⁶

The operation of the 'Better Off Overall' test

There are numerous reports of IFAs that clearly do not pass the BOOT, yet employer organisations frequently assert that arrangements that provide 'the opportunity to earn extra income' or that 'meet employee needs' can be used to offset the loss of entitlements. For example, in 2011, Spotless IFAs allowed Spotless to direct employees to work a shift, waiving their rights to the usual seven days' notice and overtime rates of pay. They received no compensation, except 'the opportunity to earn a higher income'.

The absence of genuine employee flexibility and good faith obligations with respect to employee proposals

Employers commonly assert that IFAs are used to tailor unique employment conditions that accommodate the needs and wants of individual employees, or that they are initiated at the request of an employee. However in our experience, most employers are not interested in negotiating individual flexibility arrangements that benefit employees and employee requests for flexible work arrangements made under the NES are often rejected without sufficient genuine consideration of accommodating the employee's needs.

Employers consistently object to submissions from employee organisations or community groups to extend the scope of the NES right to request provision to employees with caring responsibilities, mature workers or workers experiencing domestic violence. The same employer organisations complain about the prohibition on making flexibility arrangement a condition of employment, the inability to use IFAs to structure businesses as they see fit, and the prospect of needing to update a plethora of workplace arrangements on a rolling basis as employees opt out of previously agreed arrangements.

The legislative changes sought by these organisations are designed to ensure that IFAs can be used to lock employees into identical working arrangements for a lengthy period of time rather than provide employees with individual agreements that suit their particular circumstances.

The fact that there is no obligation on employers to consider employee proposals in good faith or take into account the employee's need for alternative working arrangements makes IFAs an attractive alternative for employers to enterprise bargaining and flexible working arrangements made the NES.

²⁶ In that case, six employees were asked to sign an IFA that removed penalty rates for overtime, weekend and public holiday work. Five of the six employees signed the agreement. One of the employees signed only after the director threatened that there would be no work for him if he did not sign. Another employee had his shifts cut following his refusal to sign. Similarly, Medibank Private has offered its employees the option of working from home provided the employee agrees to forgo the entitlement to overtime rates under the terms of the relevant collective agreement. *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064.

The ACTU is aware of a number of cases in which an employee sought flexible working hours in accordance with the right to request flexible working arrangements provision of the NES and was informed by their employer that they could not access the desired flexibility without entering into an IFA that removed penalty rates.

The ACTU advocates that, in addition to the NES right to request provisions, workplace agreements are the appropriate vehicle to facilitate employee's requests for flexible work arrangements. Collectively negotiated workplace agreements provide greater protections for employees and are less likely to result in vulnerable individuals needing flexible work arrangements to suffer diminution of basic rights and entitlements.

GENERAL PROTECTIONS PROVISIONS

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?

Discrimination has been cited as a key barrier to mature aged workers maintaining paid employment and consequently is an important part of the matrix of legislative support required to ensure older workers are able to participate in the labour market.²⁷

Age discrimination was the second most common complaint (13%) and family or carer's responsibilities (which affects many older workers) was the third most common complaint (12%), received and assessed by the Fair Work Ombudsman (FWO) in 2010-11. Both categories of discrimination complaints increased significantly since 2009-10.²⁸ The Australian Human Rights Commission reported that the greatest number of age-based discrimination complaints received in 2009-10 were employment related and the majority (50%) involved mature aged workers.

The ACTU supports the reverse onus of proof model adopted by the FWA general protections provisions. This model assists employees being discriminated against by requiring them to establish a prima facie case of discrimination, after which the employer must establish that the action was not for discriminatory reasons. Recent legislative reforms including replacing the 'dominant reason' with a less onerous test in the *Age Discrimination Act (2004)*, and amending the FWA to afford protection against direct discrimination on the basis of family or caring responsibilities, have also assisted protection of mature workers.

However, the FW Act General Protections against discrimination does not extend to carers who have been indirectly discriminated against and is compromised by the lack of clarity over the operation of s.351(2) which states that the protection may not apply where the action is not unlawful under any discrimination law in force in the place where the action is taken. This section should be amended to clarify that the protection applies irrespective of whether the action is lawful under State or Territory anti-discrimination legislation and ensure employees with family or caring responsibilities are protected from both direct and

²⁷ National Seniors Productive Aging Centre, *Aging and the barriers to labour Force Participation in Australia* (2011), prepared for Consultative Forum on Mature Age Participation, 15

²⁸ Fair Work Ombudsman Annual Report 2010-11, p.41.

indirect discrimination and the exemptions available to employers on the grounds that the discrimination is an 'inherent requirement of the job should be restricted'.

OTHER REFORM POSSIBILITIES

Modern awards

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?

During the award modernisation process, some significant protections for part-time workers were lost. Access to part-time employment options, greater employee control over rosters and greater certainty over hours of work which assisted many older workers to transition to reduced hours of work should be restored in modern awards. In addition, we support the introduction of casual conversion clauses to those modern awards that do not currently contain them, and we also support including a more comprehensive definition of a casual employee in modern awards.

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?

The ACTU notes that there is inconsistency across State and Territory regulation of various aspects of licensing and/or requalification requirements. Consistency of these regulations would assist awareness and compliance. ACTU generally supports an approach to licensing and/or requalification which is based on risk factors rather than age.

8. OCCUPATIONAL HEALTH AND SAFETY

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 aged workers?

The Australian Work Health & Safety Strategy 2012 – 2022 (the Strategy) has been developed for the purpose of improving health and safety outcomes for all Australian workers and does not differentiate between labour force participants on the basis of their age. This summed up on the vision of this strategy which calls for "healthy, safe and productive working lives."²⁹

The ACTU submits that the Strategy endorses a whole-of-working-life approach and that all workers regardless of their occupation or how they are engaged, have the right the fundamental right to be free from the risk of work-related death, injury and illness and the belief that healthy and safe work will allow Australians to have more productive working lives. Mature age workers, through their experience of workplace hazards and industry knowledge, can be an integral component in the delivery of strategic

²⁹ Australian Work Health & Safety Strategy 2012 – 2022

outcomes set out in the Strategy. The ACTU does not support the development of strategic plans which propose differing treatment based on the age of workers.

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

Information relating to Occupational Health and Safety should be available from multiple sources including local regulators, unions, community outlets such as libraries, local doctors and pharmacies and events targeted at mature age persons.

Question 42. In what ways, if any, do occupational health and safety duties and responsibilities act as a barrier to volunteering for mature aged persons?

There may be a barrier in perception among mature age workers regarding their protection as volunteers. This is a particular concern given the misinformation campaign that was waged earlier this year regarding the new WHS Act and the responsibilities of volunteers and volunteer organisations. We support the work of Safe Work Australia and other regulators, and feel that these bodies are best placed to develop information campaigns to counter misinformation and educate volunteers on their rights and responsibilities.

9. APPROACHES TO REGULATION AND MONITORING

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?**

The ACTU supports the inclusion of preventative measures aimed at encouraging long term cultural change in the regulation framework. Currently, the framework is biased towards the provision of remedial compensation once discrimination or adverse action has occurred in employment. The framework should provide the 'full triangle of regulation', including:

- meaningful, enforceable legal rights and obligations;
- preventative measures such as providing recommendations or entering into enforceable undertakings with employers; and
- Education, awareness raising and reporting activities aimed at encouraging a cultural shift amongst the community, employers and employees which values the contributions of older workers.

Amending the NES right to request flexible work arrangements provision to include an obligation on employers to demonstrate proper consideration of the request role and allowing all workers to appeal an unreasonable refusal of a request would go some way to providing a meaningful, enforceable legal framework.

The role of organisations such as the Australian Human Rights Commission should be given more power and resources to be more proactive in providing preventative actions, such as making recommendations or entering into enforceable undertakings with employers, as well as initiating inquiries into systemic discrimination and conducting own motion legal proceedings where appropriate.

The ACTU supports the use of reporting frameworks such as that administered by the Equal Opportunity for Women in the Workplace (EOWW) Agency. Such frameworks assist employers and employees to self-identify internal practices and procedures which may hinder or assist maintaining a diverse workforce, including mature age workers.

Similarly, employee organisations have a constructive role to play and, should a model along the lines of the EOWW Act be considered, it should be noted that the proposed amendments to the legislation include a role for unions and employees in the reporting and assessing process. This more inclusive approach will ensure cultural change occurs across the whole of the organisation.

The EOWW Amendment Bill also seeks to introduce benchmarks for organisations to use as guidance as to what policies, procedures and practices are suitable for their industry or sector. The ACTU supports the introduction of the benchmarks and would suggest such a model be adapted as part of any prospective framework for mature age employees.

10. EDUCATION AND AWARENESS

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

Employers who recognise the value in sustaining a diverse workforce are cognisant of their role in supporting employees to balance work with family and personal commitments. Where employers work constructively with employees and unions to develop appropriate employee rights and workplace practices, employees report a genuine faith in their management to work through their need to alter working arrangements whether it be on a long or short term basis. Employers who adopt this approach often report advantages of a harmonious, positive and committed workforce to their bottom line, including significant savings in hiring and training costs through retaining skilled and experienced staff.

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?

Education and awareness raising activities have minimal impact without the implementation of enforceable rights and obligations which are required to become part of the businesses operating procedure.

Experience also shows that effective cultural change occurs in an organisation when awareness raising and education initiatives are implemented across the whole organisation, not just senior management. Often rank and file employees and their union representatives are the driving force for change in organisations and they must be provided with information about their rights and support in implementing those rights. Unions play a significant role in providing this education and support. Ensuring all employees in an organisation have both access to information, training and support should be part of both individual

manager's key performance criteria as well as the organisational performance and accountability framework.

Question 46. What 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?

To be properly effective, employment – related legislation must also be integrated in the legal framework which regulates support services, social security, tax, superannuation and training and skills development regulation which should all be operating consistently to promote and support ongoing employment participation of mature workers.

11. WORKERS' COMPENSATION AND INSURANCE

The ACTU believes that every Australian worker has a right to a fair and safe workplace, regardless of their age. We welcome the creation of the Model Health and Safety Act 2010, which provides a consistent national approach to health and safety issues for workers across Australia. Australian law should ensure that no worker is disadvantaged if they are injured at work, due to their age or any other factor. We note that the provision of secure, ongoing work is a key factor in improving health and safety outcomes for all workers.

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?

The ACTU supports the development of nationally consistent workers' compensation standards which are available to all members of the workforce regardless of the retirement age (including the self-employed). The ACTU considers age-based restrictions to be exclusionary and discriminatory, and we would therefore support the removal of all age-based restrictions. Mature age workers should have access to compensation for all injuries that arise out of, or in the course of work, including during their breaks. If a workplace injury results in their death, this compensation should be made available to their dependents.

12. MIGRATION

Migration has contributed much to Australia's history and diversity, and migration schemes can be necessary to fulfil labour demands in particular industries or areas. However, the ACTU believes that the Commonwealth Government's priority should be on training and assisting Australian workers, including older workers, to find employment before looking to fill the gaps through migration. In 2010-11, there were 113,725 places filled under the permanent skilled migration program. The majority of these places were filled through the General Skilled Migration (GSM) stream, although there is an increasing trend

towards employer-sponsored visas, which now comprise 39% of the total permanent migration skill stream in 2010-11.³⁰ In 2005-06, by comparison, employer-sponsored visas made up just 15% of the skilled stream. In addition, the 457 visa scheme allows employers to bring in unlimited numbers of temporary overseas workers to meet demand in particular areas. As at 31 March 2012, the total number of 457 visa workers in Australia had increased by 22% in the last year, reaching an all-time high of 88,590.³¹ This can be an issue if employers bring in temporary labour without reference to the local labour market situation. Given the existing barriers that older Australian workers face in seeking employment, there should be an obligation on employers to recruit and train older workers to a position first where appropriate.

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?

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?

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?**

The ACTU believes that age should not be the determining factor in how the GSM points test is structured. The key issue is getting people with the appropriate skills, qualifications, and English language ability in the occupations where permanent migrants are genuinely needed.

Similarly with the employer-sponsored visas, the ACTU is not concerned primarily with the age limit, but with the conditions and protections that are in place to guard against exploitation of migrant workers and protect employment and training opportunities for Australian workers. In particular, we advocate the need for genuine labour market testing before employers can sponsor overseas workers. This could entail the promotion of the newly created Jobs Board as a vehicle to recruit and train older Australian workers for positions that employers are finding it difficult to fill.

Employers can and should be doing more to employ and train those currently under-represented or disadvantaged in the labour market, including mature aged workers. In addition to supporting the creation of a Jobs Board to test the labour market, we would also support additional training opportunities for mature age workers and others who could make a meaningful contribution to a particular industry given the opportunity.

³⁰ Department of Immigration. *Annual Report 2010-2011*. <http://www.immi.gov.au/about/reports/annual/2010-11/pdf/>

³¹ DIAC, *Subclass 457 State/Territory Summary Report 2011-12 to 31 March 2012*