

**ACCI Response to Grey Areas – Age Barriers to Work in Commonwealth Laws**  
**Australian Law Reform Commission (ALRC) Issues Paper 41.**

**Economic Benefits from Increased Participation**

Increasing the hiring and retention of people from those who are unemployed, underemployed or currently not participating offers considerable benefits to businesses and the economy. Business has a leading role, in conjunction with government and the broader community, in driving the policy agenda and developing new strategies to lift workforce participation rates.

The economic argument for increasing workforce participation is clear. Australians are aging. The 2010 Intergenerational Report estimates that the number of people in Australia aged from 65 to 84 more than double over the next 40 years and the number of people 85 years and older more than quadruple. Australia will need to grow its workforce in order to fill the void left by workers leaving the workforce and ensure that we have the skills and capacity to support both an older population and a growing economy.

The extent of the problem presents a stark reminder for employers seeking to fill vacancies in the future<sup>1</sup>:

- The population's median age in 2010 was 36.9 years, up from 32.1 years in 1990, and this is expected to continue to rise.
- The workforce aged over 45 is now around 31% and those under 25 only 17%.
- By 2050, nearly one-quarter of the population will be aged 65 and over, compared to 13% today.
- By 2050, there will only be 2.7 people of working age for every person 65 and over, compared to 5 people of working age today for every person 65 and over.
- Today's older workers intend to retire later, at around 64 years for men and 62 years for women, compared to 58 years for men and 47 years for women in 2007.
- increasing the participation of mature age workers by 5% in the next 40 years would increase real GDP per capita by 2.4%.<sup>2</sup>

The shortfall created by retirement of our aging workforce calls for a radical rethink in human resource strategies. Future competitiveness is likely to rest substantially on

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1. *National Seniors Australia Barriers to Labour force Participation: Interim Recommendations - Facilitating the Labour Force Participation of Older Australians* August 2011  
2. Intergenerational Report 2010

the more effective use of its potential workforce as well as on performance and productivity.

### **Older Workers**

People aged 45 and over will need to provide 85% of workforce growth in the next decade in order to meet the labour demands of employers. ACCI supports the removal of legislative barriers that discourage mature aged people from participating in the workforce.

### **Complexity of Commonwealth Laws**

Older people face competing pressures when deciding whether to remain in the workforce or to seek re-entry to the workforce. The complexity and wide array of Commonwealth laws and regulations that can impact on an older person's decision to remain in or re-enter the workforce can often tip the balance against a decision to continue working. The need for this inquiry indicates that problems do exist and need to be addressed if greater workforce participation rates by older persons are to be achieved.

Many Commonwealth programs impinge on planning decisions, particularly where there are marginal difference between the financial benefits of working and not working. This in turn affects continuity of employment and flexibility options. Both employers and employees require reasonable stability for productive employment arrangements to endure.

### **Tax and transfer system reform to encourage mature age participation**

ACCI argues that meaningful reform of Australia's tax and transfer system will further encourage labour force participation, including mature-age workers.

Australia's personal income tax system has gone through limited changes since the Howard Government's *New Tax System* in 2000. Much of the so called 'tax cuts' over the last 10 years have been the discretionary increases in the income thresholds at which the different marginal rates cut in. However, in the absence of automatic indexation of thresholds, the real benefits of these 'tax cuts' tend to be eroded away over time due to inflation.

Following the introduction of the \$23 per tonne carbon tax, the Gillard Government increases the tax free threshold from the current \$6,000 to \$18,200 from 1 July 2012. While the increase in the tax free threshold is welcomed, the Government also increased the two lowest marginal tax rates at the same time from the current 15 per cent to 19 per cent; and from 30 per cent to 32.5 per cent. From 1 July 2015, when the emissions trading scheme commences, the tax free threshold will further increase to \$19,400 and the second lowest marginal tax rate will increase from 32.5 per cent to 33 per cent.

It is important to note that the above changes to tax-free threshold were introduced on the back of a new tax – i.e. the carbon tax and to assist household with rising living costs following its implementation. While increasing the tax free threshold is a

step in the right direction, ACCI is disappointed that the reform in personal income tax is not driven by the aim to encourage greater workforce participation.

Moreover, the simplicity and transparency of the headline income tax rates and thresholds have been compromised by the *Low Income Tax Offset* (LITO) and other selective income tax offsets that are withdrawn above specified income levels. These tax offset mechanisms are not widely understood, add to complexity and detract from the transparency of the tax system. Australia's personal income tax scales over the last decade have been characterised by high marginal tax rates and the operation of LITO and other tax offsets have created greater complexity.

High marginal tax rates create pressure for selective tax relief in the form of deductions, offsets and concessions, which erode the income tax base. Selective tax relief also makes the system more complex and opaque, which has contributed to the present situation in which more than 80 per cent of personal income tax returns were lodged through accountants or tax agents.

High personal income tax rates distort work incentives and constitute a barrier to higher rates of workforce participation, including mature-age workers. Disincentives to paid employment cause employees to elect to stay out of workforce, reduce their working hours, forego investment in human capital and devote more of their income to consumption and less to saving and investment.

ACCI argues that reducing marginal tax rates for middle and high income earners and reducing the number of thresholds where different marginal rates cut in will encourage greater labour force participation. Studies have shown that high income earners have more opportunities to adjust their behaviour in response to rates of taxation.

Removal of various tax offsets would facilitate lower personal income tax rates which is more effective in encouraging mature-age participation than offsets specifically targeted to increase work incentives for older Australians, e.g. the *Mature Age Worker Tax Offset* (MAWTO). The rebate offered by these tax offsets is not indexed, and they phase out completely when income reaches a certain threshold and furthermore the benefit is only received at the end of financial year when the tax is assessed. Thus, these tax offsets mask the real reward of participating in workforce, especially at lower income levels. Instead of these tax offsets, lower personal income tax rates will provide a greater incentive for older Australians to be involved in paid employment and give a clearer indication of net income after tax in the usual PAYG statement.

Therefore, to encourage mature-age workers to stay longer in labour force, the interaction between tax and transfer system should ensure that mature age workers take home more income after tax. Thus, the Government should:

- Ensure the elimination of bracket creep via the annual indexation of personal income tax thresholds;
- Gradually reduce the top marginal rates to the same level as the corporate tax rate; and
- Commit to reducing the number of thresholds and marginal income tax rates.

## Responses to Questions Raised in the Issues Paper

**Framing principles.** *Grey Areas—Age Barriers to Work in Commonwealth Laws*

**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?*

ACCI comment: Independence should include a person's capacity to understand the impact of Commonwealth laws on their preferred style of living. Changes to the system, particularly in relation to superannuation, make it more difficult for the mature aged to understand the regulations that may influence decisions about the future.

### Age Pension

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

ACCI comment: ACCI supports the encouragement of Service pensioners to return to work to contribute their valuable skills but does not advocate any changes to current Service Pension arrangements to require the recipient to seek productive remunerated employment.

**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?*

ACCI comment: Once eligible for an aged pension and associated benefits recipients become reluctant to seek higher remuneration from paid employment, even on a part-time or casual basis. The introduction of more flexibility and the capacity to quickly revert to pension status on cessation of employment would to consider employment. Associated benefits could be suspended (not cancelled) during employment phases and be subject to prompt re-instatement on cessation of employment.

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

ACCI comment: A re-opening of the scheme would be beneficial as it provides an incentive to defer the claiming of a pension where there are opportunities to continue in paid employment.

**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?*

ACCI comment: The Work Bonus generally does not lead to substantial periods of employment or a significant employment role in a manner suitable to employers for age pensioners willing to seek a return to work.

## **Income tax**

**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?*

ACCI comment: Lessen reliance on DIY involvement. More promotion of seminars and programs to mature aged understand the range of tax benefits available.

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

ACCI comment: Intending return-to-work social security recipients require specialised advice to assess the merits of flexible re-employment opportunities.

**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?*

ACCI comment: The impact of these offsets is generally experienced in an ex-post manner – well after the event and beyond the time for implementing remedies or adjustments from a tax planning perspective. Mature aged taxpayers require specialised advice to assess the merits of flexible re-employment opportunities.

**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?*

No specific ACCI comment: see earlier section on **Tax and transfer system reform to encourage mature age participation.**

## **Superannuation**

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

ACCI comment: There should be no impediments to either employers or over 70 employees to negotiate flexible work arrangements. An increase in the age limit for Superannuation Guarantee contributions is likely to be of little benefit to employees of that age cohort, who are more likely to seek to exercise personal choice in relation to what they do with salary or wage income. The key factor is the employee's capacity to negotiate voluntary superannuation contributions with their employers.

**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?*

ACCI comment: These limitations can form impediments to over 65 workers when making a decision whether to participate in employment or the extent of that employment (hours or duration). The removal of such limitations would provide older workers with more choice and enhance the likelihood of them returning to work or extending their involvement in paid work. An appropriate requirement may take the form of voluntary contributions having to be sourced from income from salaries or wages derived by the employee.

**Question 12.** *The Superannuation Industry (Supervision) Regulations 1994 (Cth) prescribe age-based restrictions in relation to members splitting contributions with a spouse and making contributions to a spouse's fund. Members cannot:*  
(a) *split contributions for a spouse aged 65 and over;*  
(b) *split contributions for a retired spouse of preservation age and over;*  
(c) *make spouse contributions for a spouse aged 70 and over; or*  
(d) *make contributions for a spouse aged 65 but under 70 unless the spouse meets a work test.*

*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?*

ACCI comment: The removal of such limitations would provide older workers with more choice and enhance the likelihood of them returning to work or extending their involvement in paid work. As in the case of contributions on behalf of the employee an appropriate requirement may take the form of voluntary contributions for a spouse having to be sourced from income from salaries or wages derived by the employee.

**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?*

No ACCI comment:

**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?*

ACCI comment: The timing of limitations to concessional superannuation contributions is unfortunate since they inhibit the incentive for mature age workers to make additional contributions when fund balances are still being negatively affected by past and ongoing global and local financial market conditions.

**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?*

ACCI comment: Some small business owners may be encouraged to sell their businesses and invest part of the proceeds in superannuation by virtue of this opportunity. This in turn may encourage the former owners to return to the workforce in order to build up assets but may prevent them from making further contributions. Penalties applying to breaching of the cap limit detrimentally impacts on income payments to which the superannuation guarantee applies and this can affect any worker seeking to utilise a bring forward process to boost superannuation fund balances.

**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?*

ACCI comment: If the preservation age was to be gradually raised to 67 in alignment with the increase in the pension age it may have the effect of encouraging more older workers to remain employed however the timeframe for the increase in the pension age is incremental over many years and is unlikely to have a significant impact on workers intending to retire within the next 5 years.

**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?*

ACCI comment: The 'transition to retirement' rules enable pre-retirees to take advantage of arrangements for making additional tax-effective contributions to superannuation in conjunction with the commencement of a pension stream. This can provide an incentive to remain in the workforce while seeking to achieve net additions to their superannuation balances. The reduction in the concessional contribution cap is likely to reduce the appeal of 'transition to retirement' rules as the ensuing taxation benefits will be reduced. The increase in the general tax free threshold will also have an impact on decisions made by pre-retirees on lower incomes.

**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?*

No ACCI comment:

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

ACCI comment: The combined effects of increased longevity, increasing health care costs and uncertainty surrounding financial markets is likely to influence pre-retirees and retirees to seek to maintain adequate superannuation balances where possible. However any changes made to the taxation of superannuation benefits are likely to add complexity unless it can be demonstrated that mature age workers will benefit financially.

**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?*

ACCI comment: Some defined benefit schemes may influence premature retirement of mature age workers and indirectly result in problems encountered by pension recipients seeking to re-enter the workforce. More research needs to be conducted on this issue to determine whether this type of scheme creates barriers to re-engagement with the workforce. The adequacy of the actual pension may be the determinant.

## **Social security**

**Question 21.** *A number of social security payments and entitlements may affect mature age persons' participation in the workforce or other productive work. In practice, how accessible to mature age persons is information about eligibility for such social security payments and entitlements?*

ACCI comment: There are generally no problems with accessibility to information but the areas of concern involve the complexity of eligibility arrangements and the consequences of altered circumstances.



**Question 22.** *Several tools and processes are in place to determine a person's capacity to work and to recommend the content of a person's activity test or participation requirements. In what ways, if any, should these tools and processes be changed to assist mature age participation in the workforce?*

No specific ACCI comment. Note ACCI policy statement "Employ Outside the Box" which addresses the need to encourage the employment of people currently outside the workforce.

**Question 23.** *Different activity test and Employment Pathway Plan requirements apply for mature age job seekers. In what ways, if any, should they be changed to assist mature age participation in the workforce?*

ACCI comment: Emphasis should be placed on encouragement for mature age workers to seek to participate in the workforce. Current exemptions can have a reverse effect.

**Question 24.** *Do the 2012 changes to the Disability Support Pension present a barrier to mature age participation in the workforce or other productive work? In what ways, if any, should the Disability Support Pension be changed to remove barriers to participation in the workforce or other productive work for mature age persons with disability?*

ACCI comment: ACCI recently released a business guide – Employ Outside the Box – The Business Case for Employing People with Disability.

**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?*

No specific ACCI comment. ACCI welcomes policies that encourage carers and volunteers to consider re-entering the workforce.

**Question 26.** *What changes, if any, to Working Credit should be made to remove barriers to mature age participation in the workforce or other productive work?*

No ACCI comment. See previous comment.

**Question 27.** *Do the rules concerning the retention of concession cards act as a barrier to mature age participation in the workforce or other productive work? In what ways, if any, could these rules be improved?*

ACCI comment. Concession cards are important to many mature aged people and any threat to eligibility for the retention of such cards can affect a decision to participate in the workforce above and beyond a certain level of involvement.

**Question 28.** *In practice, how effective is the operation of the 'employment income nil rate period' in removing barriers to mature age participation in the workforce or other productive work? In what ways, if any, could this be improved?*

No ACCI comment.

**Question 29.** *In what ways, if any, should the eligibility requirements for Austudy, ABSTUDY and Pensioner Education Supplement be changed to address barriers to mature age participation in the workforce or other productive work?*

ACCI comment. An outcome of the "Employ Outside the Box" policy initiative is to seek ongoing skills development to increase the productive capacity of a diverse workforce. The Corporate Champions program emphasises the need to assess skills of mature age workers and to promote additional training to prolong productive careers. ACCI welcomes the lessening of barriers that may limit the attainment of additional skills by mature age workers.

**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?*

ACCI comment. Continue the theme of making it easier for mature age people to return to workforce participation, with minimal disruption to valued support schemes, and to achieve a net benefit (i.e. not be worse off by foregoing previous benefits).

### **Family assistance**

**Question 31.** *What changes, if any, should be made to family assistance laws and the Family Assistance Guide to remove barriers to mature age participation in the workforce and other productive work?*

No ACCI comment.

**Question 32.** *When grandparents and mature age carers raise children:*  
*(a) does Child Care Benefit meet its objective to provide recipients with incentives to participate in the workforce; and*  
*(b) does the Child Care Rebate meet its objectives to provide recipients with incentives for community participation, insofar as this includes work or voluntary work?*  
*What changes, if any, should be made?*

No ACCI comment.

### **Child support**

**Question 33.** *What changes, if any, should be made to child support laws and The Guide—CSA's Online Guide to the Administration of the New Child Support Scheme to remove barriers to mature age participation in the workforce and other productive work?*

No ACCI comment.

## **Employment**

**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?*

ACCI comment: ACCI notes that paragraph [219] of the Issues Paper indicates that “[*]indeed, unlawful age discrimination in recruitment has been described as ‘rampant, systematic and the area of employment decision-making where managers use age to differentiate between people most extensively’*”. The reference is attributed to a report published by the AHRC “*Age Discrimination – Exposing the Hidden Barrier for Mature Age Workers*” (2010) at p.2. It is important to note the distinction between allegations of unlawful discrimination, proven cases of unlawful discrimination and perceptions of unlawful discrimination. Each category should not be conflated and to do so, would distort the true and correct incidence of unlawful discrimination on the basis of age. Surveys or perceptions of discrimination are not akin to proven cases of discrimination (whether that may be under federal, state or other laws prohibiting discrimination).

**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?*

ACCI comment: The *Fair Work Act 2009* was the result of extensive consultations between government, unions, employer representatives and peak groups, as part of the National Workplace Relations Consultative Committee and its various sub-committees, including the Committee on Industrial Legislation (COIL) and the International Affairs Committee (ILAC). This was in addition to an extensive Senate Committee Inquiry into the new laws. As a result of those consultations and inquiries the Act was enacted in its current form.

In relation to suggestions made in the IP, ACCI would not support any changes at this stage which would provide new rights for employees or obligations on employers under the National Employment Standards, particularly given the lack of evidence as to why that would be warranted given that the laws only commenced recently. This is not to say that ACCI believes that all of the laws are currently operating as intended and will not require amendment in the future. Clearly there are areas that are already a concern to employers and will require review and possible amendment in the future.

However, none of those areas of concern to business would result in the creation of new or additional rights for employees, particularly when the previous five minimum standards prior to the *Fair Work Act 2009* was significantly expanded by the NES and the new modern award system.

The Act does provide minimum terms and conditions which affect all workers, including mature age workers. This includes new provisions in the National

Employment Standards (including, maximum number of ordinary hours for employees, paid and unpaid leave entitlements, requests for flexible working arrangements), minimum wages and conditions in modern awards which is in addition to the NES, as well as protections against unfair dismissal and adverse action.

Employers, particularly smaller businesses, that were previously in the state industrial relations system, are still trying to understand how some of these new laws apply. There is also a need to review the legislation against the key stated Government objectives and expectations to ensure that they are delivering for both employees and employers as promised.

Government and Parliament has consulted extensively with all relevant stakeholders, both privately (as part of confidential policy discussions on the draft legislation with the members of the NWRCC, which includes unions) and publicly (as part of Parliamentary committee inquiry and a dedicated Departmental inquiry into the draft NES) and has decided that the existing framework under the NES, including s.65, is appropriate, balanced and meets the 2007 pre-election commitments of the Government (as outlined in the Forward with Fairness Policy documents).

Industrial Tribunals and Parliaments have a long history of creating a limited number of minimum employment standards of general application. When Tribunals and Parliaments decide to create rights on the basis of defined attributes, there would be a long queue of interest groups and individuals that would want their particular attribute or characteristic recognised.

Both paid and unpaid leave entitlements are governed by the *Fair Work Act 2009*, common law contracts or enterprise agreements. There may also be formal or informal policies which provide contractual obligations on employers to provide certain additional entitlements.

It is important for the ALRC to note that employers often provide paid and unpaid leave where employees need to take time off work for a variety of reasons.

The concept of allowing an employee who possess or has an attribute of an "age" is different to the existing s 65 provisions and would be a significant step, for the reason that age is ubiquitous. All employees possess the attribute. This would, by definition, allow every employee the ability make a request under s 65 and would render the other categories redundant. The rationale for s 65 is to allow employees who have particular care responsibilities the ability to request changes to their working arrangements. This can be achieved with or without using s 65 of the Act.

Section 65 of the *Fair Work Act* should not be amended to include age as a basis upon which an employee may request flexible working arrangements.

ACCI will consider whether any parts of the NES are particularly impacting the participation of mature age persons.

**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?*

ACCI comment: There should be changes to the existing requirements for enterprise agreements to contain an Individual Flexibility Arrangement (IFA) clause which must be at least as flexible as the model clause as contained in modern awards and the regulations (the model clause will apply to an enterprise agreement, in the absence of such a clause). ACCI has previously raised a concern that certain trade unions have engaged in an industrial strategy of limiting the use of Individual Flexibility Arrangements (IFA) in enterprise agreements and opposing agreements where they contain an IFA that is as flexible as the default regulation model clause or the model clause in modern awards. A union has no power to reduce the flexibility in a modern award (absent a successful application to vary it before Fair Work Australia). There are also union IFA clauses that require a majority of the workforce to agree to changing the application of certain conditions in an agreement. This is equally offensive to the principle that IFAs were supposed to be available to individual employees and their employer. It reaffirms why ACCI continues to support both collective and individual enterprise agreements in the workplace.

The Government and Parliament (through the Explanatory Memorandum) indicated that IFAs were to deliver a level of individual flexibility and could accommodate employees with tailored conditions. IFAs have sufficient safeguards, can be terminated at short notice and an employer cannot force an employee to sign one or make it a condition of employment. They are not AWAs by another name as some unions would misrepresent them.

The *Fair Work Act 2009* provides:

#### Division 5—Mandatory terms of enterprise agreements

202 Enterprise agreements to include a flexibility term etc. Flexibility term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a flexibility term) that:

(a) enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and

(b) complies with section 203.

#### Effect of an individual flexibility arrangement

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:

(a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and

(b) the arrangement is taken to be a term of the agreement.

(3) To avoid doubt, the individual flexibility arrangement:

(a) does not change the effect the agreement has in relation to the employer and any other employee; and

(b) does not have any effect other than as a term of the agreement.

## Model flexibility term

(4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.

(5) The regulations must prescribe the model flexibility term for enterprise agreements.

The model (default) IFA term for agreements can be found in Schedule 2.2 of the Fair Work Regulations 2009:

### Schedule 2.2 Model flexibility term

(regulation 2.08)

## Model flexibility term

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the agreement deals with 1 or more of the following matters:

- (i) arrangements about when work is performed;
- (ii) overtime rates;
- (iii) penalty rates;
- (iv) allowances;
- (v) leave loading; and

(b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and

(c) the arrangement is genuinely agreed to by the employer and employee.

(2) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the *Fair Work Act* 2009; and

(b) are not unlawful terms under section 194 of the *Fair Work Act* 2009; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.

(3) The employer must ensure that the individual flexibility arrangement:

(a) is in writing; and

(b) includes the name of the employer and employee; and

(c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and

(d) includes details of:

- (i) the terms of the enterprise agreement that will be varied by the arrangement; and
- (ii) how the arrangement will vary the effect of the terms; and
- (iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

- (e) states the day on which the arrangement commences.
- (4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.
- (5) The employer or employee may terminate the individual flexibility arrangement:
  - (a) by giving no more than 28 days written notice to the other party to the arrangement; or
  - (b) if the employer and employee agree in writing — at any time.

Unions at present are limiting an IFA to only deal with shifting a tea break for example. This means that mature age employees, as other employees, cannot utilise to the fullest extent possible, the ability to enter into an IFA that deals with all terms and conditions.

ACCI recommends that changes must be made to the *Fair Work Act 2009* which requires, at a minimum, that the terms in an IFA are no less favourable as compared to the model modern award clause/regulation. This is not creating a new right, but is giving effect to an existing law which is not working as the Government, nor Parliament, had intended. Unions are limiting the number of matters an IFA can deal with in bargaining and rendering it fundamentally ineffective as a vehicle for promised flexibility. One trade union leader indicated publicly that he “*would be seeking to have the capacity for individual bargaining prohibited at other companies*” following a large manufacturer agreeing to water down the Government’s own default IFA clause.<sup>3</sup>

ACCI’s submission to the Review of the *Fair Work Act 2009* provides further comments in relation to IFAs and suggested amendments.<sup>4</sup>

**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?*

ACCI comment: The general protection provisions under Part 3-1 of the Act are significant. They carry a reverse onus of proof, uncapped damages and ability to obtain injunctions, and are increasingly being used by employees to challenge a range of employer actions.

ACCI has made recommendations about the general protections regime in its submission to the Review of the *Fair Work Act 2009*.<sup>5</sup>

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<sup>3</sup> Australian Mines And Metals Association Individual Flexibility Arrangements (under the *Fair Work Act 2009*) - The Great Illusion, Research Paper, 2010.  
[http://www.amma.org.au/home/publications/AMMA\\_Paper\\_IFAs.pdf](http://www.amma.org.au/home/publications/AMMA_Paper_IFAs.pdf); Hannan, E., ‘New workplace laws failing Julia Gillard’s flexibility test’, *The Australian* (17 September 2009).

<sup>4</sup> ACCI submission to Review of Fair Work Act 2009, February 2012, pp. 11 – 12; chapter 7 (pp. 94 – 101),  
<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/AustralianChamberofCommerceandIndustry.pdf>

<sup>5</sup> *Ibid*, at pp. 18-19; Chapter 13, “*General Protections*”.

**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?*

ACCI comment: There are provisions of modern awards which can negatively impact particular cohorts of employees. One example is the impact of a former three hour minimum shift requirement in the *General Retail Modern Award 2010* for school age employees. ACCI would refer the ALRC to the issues raised by ACCI in its written submission to the Review of the *Fair Work Act 2009*.<sup>6</sup> Minimum shift clauses can equally impact mature age employees, who wish to work for less than the required minimum shift requirement (i.e. only want to work as a casual for 1 hour on certain days and not for 3 hours for each shift – the employer must pay for three hours, regardless of the amount of work available and whether the employer only operates at certain hours).

The Productivity Commission (PC) should conduct research or be specifically requested to inquire, into the effects of certain award terms and conditions on mature age workers, including the impact of minimum wages. This would consider whether there are any barriers within the modern award system (including minimum wages) which limit workforce participation of mature age workers, or particular cohorts of workers.<sup>7</sup>

**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?*

ACCI comment: (responses still to be provided).

**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?*

ACCI comment: ACCI was part of the development of the Safe Work Australia - Australian WHS Strategy Plan. The Strategy is underpinned by the principles that all workers, regardless of their occupation or how they are engaged, have 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.

The Strategy also supports Australian organisations and workers to improve Work Health and Safety by supporting operations:

reduce injuries and illnesses and associated costs

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<sup>6</sup> Ibid, at p.78. “Case Study – Terang Hardware and Minimum Engagement Clauses”.

<sup>7</sup> Ibid, at pp.9 – 10.



- improve worker morale
- foster innovation and improving quality and efficiency, and
- enhance corporate reputation and improving staff recruitment and retention.

Hence includes consideration of all workers such as any mature age workers.

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

ACCI comment: Raising community awareness of the application of WHS to all workers including mature aged workers may be most appropriate.

However ACCI would query that WHS is a deterrent to mature aged participation and retention in the workplace.

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

ACCI comment: Some, but not all, volunteers will be workers under the WHS Act. Work Health and Safety (WHS) duties apply when volunteers are engaged in work for a business or undertaking. So a volunteer is a worker if he or she carries out work in any capacity for a Person Conducting a Business or Undertaking (PCBU).

This means that in circumstances where workers (including volunteer workers) are not in an employment relationship but work under the direction and requirements of the volunteer organisation, the organisation will still owe them health and safety duties. In other words, where the PCBU or his/her representative is aware of, and has some control over the work to be undertaken. There does not have to be any agreement in writing but the arrangement might be indicated by factors such as providing the person with instruction, equipment, training or assistance, or controlling or supervising the work.

Volunteer officers such as directors/committee of management members have a duty to apply due diligence, however the Model WHS Act deliberately excludes them from prosecution. (see section 34(1) WHS Act). A volunteer officer can be prosecuted in their capacity as a 'worker' if they fail to meet their duties as a 'worker'.

The WHS obligations should not be a deterrent to mature aged workers.

**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?*

ACCI comment: ACCI believes that making workplaces safer starts with the workplace culture and attitude, not with regulation. Involving regulation or monitoring in this area would be counterproductive.

Existing requirements already support the needs of mature aged employees and employers. ACCI advocates that any legislative tools should be thoroughly justified and non-prescriptive, in line with COAG principles.

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

ACCI comment: The Corporate Champions project involves documenting case studies of successful employers that have implemented notable diversity programs with emphasis on mature age retention.

**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?*

ACCI comment: The Employ Outside the Box initiative introduced by ACCI, together with a series of business guides is aimed at achieving greater awareness amongst employers of the benefits of employing workers from a range of underutilised cohorts. The business guides seek to provide advice on measures to overcome barriers to retention and recruitment of workers within those cohorts.

**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?*

No ACCI comment.

## **Workers compensation and insurance**

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

ACCI comment: Only to the extent the Commonwealth needs to mirror any existing provisions which may be absent.

In general the current situation is sufficient – the Act allows regulations to be made that extend coverage to prescribed classes of volunteers doing prescribed classes of work. In fact new regulations have just been made expanding coverage so it will now include CFS, SES, marine rescue etc. Most if not all volunteer bodies are State &

Territory organisations.

**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?*

ACCI comment: Retirement provisions in workers comp should be legislatively tied to the pension age as defined in the Commonwealth Social Security legislation so there is no gap or overlap. South Australia currently has a Bill in Parliament for this.

This topic has been considered by Safe Work Australia.

- Describe age limits on entitlements, age discrimination and implications of C'th pension being raised to 67.
- Consider alignment of age limits within current applicable WC legislation.
- Propose options for national consistency including assessment of options for national consistency without actuarial costings.
- Identify main issues with the application of these options, including unintended consequences.
- Recommended option for actuarial costings to include where efficiencies could be gained and linkages between projects by packaging actuarial costings.

A discussion paper on options on Retirement Age is being considered on 26 June 2012.

Also need to get a balance here and recognise the need to keep older workers in the workforce and the concern of employers that older workers may have some WHS considerations. Imposing a time limit on all claims is likely to have the biggest cost impact but if that is too hard then a time limit on claims post retirement e.g. weekly benefits for a year that would also mean when a worker is injured in the year before normal retirement the benefits would be for a year. This does not include catastrophic injuries.

**Question 49.** *What other changes, if any, should be made to the Commonwealth workers compensation scheme to remove barriers to mature age participation in the workforce or other productive work?*

ACCI comment: The key is retirement age and its impact on access to benefits how that is seen by retirees and most importantly employers.

There is also a question of incentives rather than barrier removal – things like excluding some or all wages paid to people over a certain age from remuneration

for premium calculation purposes, or at least excluding the costs of their injuries from experience rating calculations, much as is done for apprentices and trainees in some schemes. There are many incentives available for taking on apprentices and trainees – why should these not be mirrored for older workers?

**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?*

ACCI comment: Older people are prone to more degenerative-related injuries and general health risks and compensation schemes have to address that in premium terms if they are to provide any form of incentive to employ older workers.

**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?*

ACCI comment: This is not applicable in any jurisdiction. Workers comp coverage is defined in the legislation and cannot be modified by any sort of policy terms. The second part of the question seems to imply there are inappropriate practices and ACCI would seek references and clear data to support that.

**Question 52.** *What other changes, if any, should be made to insurance laws to remove barriers to mature age participation in the workforce or other productive work?*

ACCI comment: This is not applicable in any jurisdiction. Workers comp coverage is defined in the legislation.

## **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?*

ACCI comment: ACCI notes that a reform included in a 2011 review of the permanent employer-sponsored visa program was to raise the upper age limit from 45 to 50 years. ACCI further notes that a new skilled migration selection process, commencing on 1 July 2012, will align the best available prospective skilled

migration candidates with the fluctuating demands of the labour market and considers that this process meets the criteria of 'the best person for the job'.

ACCI believes that the ability of the applicant to perform in the occupation stream under which they are applying and their ability to maintain an longer term commitment to participating in the workforce should be the main determinant, not the age of the applicant. To this end, ACCI supports the removal of age based restrictions where there is a condition placed on the visa holder to remain in employment for a set period of up to 15 years.

**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?*

ACCI comment: ACCI believes that points should be allocated up to the age of 55. At 45, an applicant potentially has more than 20 years future contribution to the Australian economy and as such, should not be discouraged from applying.

**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?*

ACCI Comment: ACCI believes that there does need to be an increase in the age limit to reflect societal standards for what is considered to be prime working age. As such there should be an increase to the age limit to sixty, where the applicants fall into a high skill occupational stream and commits to working for a set period of up to 15 years.

ACCI believes that there does need to be exemptions in place where there is:

- A critical demand for the occupation/skills of the applicant;
- A commitment from applicant to maintain employment for a set period of up to 15 years;
- Passing a Job Capacity Assessment.