

**INTERIM SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION IN RELATION TO THE GREY AREAS – AGE BARRIERS TO WORK IN COMMONWEALTH LAWS ISSUES PAPER**

**Introduction**

1. The Employment Law Centre of WA (**ELC**) is a community legal centre (**CLC**) that has provided free, confidential employment law advice, education, representation and referrals to many thousands of vulnerable, non-unionised employees in Western Australia since 2001. ELC focuses on issues such as unfair dismissal, unlawful termination, adverse action, underpayment of entitlements, breach of contract, equal opportunity and occupational safety and health.
2. Between 1 July 2010 and 30 June 2011, ELC assisted 589 callers over 45 years of age. Three hundred and eighty of those were aged between 46 and 55 years, 168 were aged between 56 and 65 years, 35 were aged between 66 and 75 years and 6 were over 76 years of age. Most required advice and assistance in relation to termination of employment and underpayment of entitlements including long service leave, notice of termination and redundancy.

**Summary of submissions**

3. ELC provides this interim submission to the Australian Law Reform Commission as a preliminary response to the Grey Areas – Age Barriers to Work in Commonwealth Laws issues paper. ELC intends to provide a more comprehensive submission in response to the Australian Law Reform Commission discussion paper due for release later in 2012.
4. ELC provides comments only in relation to the questions in the issues paper identified below and not to the issues paper in its entirety.

**ELC's response to the issues paper**

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

5. ELC supports the amendment of the National Employment Standards (**NES**)<sup>1</sup> to include carer's responsibilities, rather than age, as a basis upon which an employee may request flexible working arrangements.

*Question 36 – In practice, do mature age employees negotiate individual flexibility arrangements made under s 202 of the FW Act? Are such arrangements a useful and appropriate flexibility mechanism for mature age employees?*

6. ELC does not collect statistical data in relation to individual flexibility arrangements made under s 202 of the FW Act (**IFA**). In ELC's view, whether an IFA would provide a useful and appropriate flexibility mechanism for a mature age employee would likely depend on the individual, their skill set and their bargaining power relative to the employer.

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<sup>1</sup> Fair Work Act 2009 (Cth), Part 2-2

*Question 37 – In practice, how effective are the general protections provisions under the FW Act where a mature age employee, or prospective employee, has been discriminated against on the basis of age?*

7. ELC submits that aspects of the general protections provisions under the FW Act are potentially effective in relation to a mature age employee, or prospective employee, who has been discriminated against on the basis of age. In particular, the following features of the general protections provisions may increase the effectiveness of the provisions for such an employee:
  - the reverse onus of proof in a general protections claim under s 361 of the FW Act;
  - the limitation on costs that may be awarded in relation to a general protections claim under s 570 of the FW Act;
  - potential involvement of the Fair Work Ombudsman in assisting with a general protections claim under Part 5-2 of the FW Act;<sup>2</sup> and
  - the availability of injunctive relief under s 545 of the FW Act.
8. However, for vulnerable, low income mature workers, the general protections provisions may be of limited assistance due to the significant difficulties associated with running a matter in the Federal Magistrates Court (**FMC**) or Federal Court (**FC**) as a self-represented litigant and the cost of other fees associated with a FMC or FC claim. In particular:
  - FC and FMC claims involve procedural requirements that are likely to be daunting to a self-represented litigant;
  - the lower filing fee applicable to general protections claims<sup>3</sup> applies only to claims involving a dismissal, with general protections claims not involving a dismissal attracting general court filing fees;<sup>4</sup>
  - further fees, including mediation and videoconferencing fees, may apply in particular circumstances.
9. ELC's experience is that clients generally find a discrimination claim under the *Equal Opportunity Act 1984* (WA) (**EO Act**) through the Equal Opportunity Commission (WA) more manageable than a general protections discrimination claim.

#### **Further comments on age barriers to work for mature age workers**

10. ELC's position is that the existing legal protections and federal government incentives provide reasonable protection to mature age workers in relation to employment and job-seeking.
11. ELC supports law reform that aims to prolong the retention of mature age workers in the workforce and preserve choice and dignity for older workers. ELC submits the following comments in relation to law reform initiatives that may benefit such an objective.

#### *Notice period*

12. Currently, a worker over 45 years of age is entitled to an additional one week's notice upon termination of their employment by their employer provided that they have completed the

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<sup>2</sup> in particular, s 682 and Part 5-2 Division 3(C) of the FW Act.

<sup>3</sup> Currently \$62.40.

<sup>4</sup> Currently \$426 in the FMC.

necessary minimum period of employment with the employer.<sup>5</sup> ELC proposes that this minimum additional entitlement to notice for older employees be increased to reflect the greater difficulty that an older worker may encounter in finding alternative employment.

13. ELC also proposes removing the requirement that a worker over the age of 45 years complete a minimum period of service prior to qualifying for this additional notice entitlement.

*Age of employee as mandatory relevant consideration in assessment of an unfair dismissal claim*

14. ELC proposes that the age of an employee at the time of dismissal be included in the FW Act at s 387 as a mandatory relevant consideration in assessing whether the employee's dismissal has been harsh, unjust or unreasonable, to reflect the greater harshness that may be encountered by a worker dismissed after many years of service and/or the difficulty that an older employee may encounter in finding alternative employment.

*Conciliation conferences in relation to general protections claims*

15. Currently, conciliation conferences in relation to general protections claims under the FW Act are only compulsory where the claim relates to a dismissal from employment.<sup>6</sup> ELC's experience is that conciliation conferences are effective in assisting vulnerable, self-represented litigants to successfully resolve claims.
16. ELC proposes that s 374 of the FW Act be amended so that conciliation conferences become mandatory for all general protections claims. This will have the effect of preventing employers from avoiding conciliation by exercising their current right to not consent to a conciliation conference under s 374 of the FW Act.

*Increasing limitation period for unfair dismissal claims*

17. Currently, an unfair dismissal application must be lodged within 14 days of the date of dismissal becoming effective.<sup>7</sup> While an application may be made out-of-time, late applications may only be accepted in exceptional circumstances.<sup>8</sup> ELC's experience is that the limitation period is strictly applied by Fair Work Australia and out-of-time applications are not often successful.
18. The short limitation period for unfair dismissal claims presents difficulties for vulnerable, low-income workers who may be unaware of legal remedies available to them in relation to unfair dismissal, who do not have immediate access to legal advice. Further, the strict criteria applied to out-of-time applications limits the opportunities available to such applicants to exercise their right to unfair dismissal remedies.
19. ELC proposes that the limitation period for unfair dismissal claims as set out in s 394(2) of the FW Act be increased.
20. Further, ELC proposes that the requirement of exceptional circumstances in the consideration of out-of-time unfair dismissal applications as set out in s 394(3) of the FW Act be removed in recognition of the difficulty that the short limitation period provides for vulnerable, low-income earners who may be unaware of their rights and unable to readily access prompt legal advice.

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<sup>5</sup> Currently 2 years' continuous service.

<sup>6</sup> FW Act, ss 365, 374.

<sup>7</sup> FW Act, s 394.

<sup>8</sup> FW Act, s 394.

### *Long Service Leave*

21. ELC proposes decreasing the length of service required by older workers before entitlement to access long service leave arises. Such reform is intended to reflect the increased difficulty that an older worker who has changed employers at a later stage in their career, or returned to the workforce as a mature age worker, may have in meeting the length of service requirements necessary to accessing long service leave.
22. Further, ELC broadly supports the extension of portable long service leave schemes to a wider range of industries.

### *Reverse onus of proof for unfair dismissal and EO Act discrimination claims*

23. ELC's experience is that the onus of proving unfair dismissal or discrimination under the EO Act can create barriers to vulnerable, low-income employees.
24. ELC proposes reform to Part 3-2 of the FW Act (unfair dismissal) to create a presumption of the employer's reasons for dismissal as alleged unless proved otherwise, similar to the protection provided to employees under s 361 of the FW Act in relation to general protections claims.
25. ELC proposes similar reforms to the EO Act to create a presumption of prohibited discrimination by the employer unless proven otherwise.

### *Costs orders immunity in the Federal Court and Federal Magistrates Court*

26. Currently, persons claiming discrimination under the *Age Discrimination Act 2004* (Cth) (**AD Act**) are potentially liable for general costs orders should their claim progress from the Australian Human Rights Commission to the FC or FMC.
27. ELC proposes limiting costs orders that may be made against a person alleging discrimination under the AD Act in the FC or FMC, similar to the protections afforded to persons alleging discrimination under the EO Act or FW Act.

### *Increasing compensation that may be awarded*

28. Currently, compensation under the EO Act, FW Act and *Industrial Relations Act 1979* (WA) (**IR Act**) is capped. As a result, an older worker who has completed a significant length of service prior to dismissal or discrimination may not have access to compensation adequately reflecting such service (and the difficulty of securing alternative employment) under EO Act, FW Act or IR Act.
29. ELC proposes increasing the compensation that may be awarded under the EO Act, FW Act and IR Act, to allow for adequate compensation of persons unfairly dismissed or discriminated against following a significant period of service.

### **Conclusion**

30. ELC broadly supports law reform initiatives designed to prolong the participation of mature age workers in the paid workforce and to preserve choice and dignity for older workers.
31. ELC looks forward to further participation in the Grey Areas – Age Barriers to Work in Commonwealth Laws reform process through its anticipated response to the discussion paper to be released by the Australian Law Reform Commission later in 2012.