GREY AREAS – AGE BARRIERS TO WORK IN COMMONWEALTH LAWS

A Trade Union Response

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ACTU
australian council of trade unions

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1. Introduction and Executive Summary

The ACTU submitted detailed comments to the Australian Law Reform Commission's (ALRC) Inquiry into Age Barriers to Work in Commonwealth Laws in June 2012.[1]

We welcome this opportunity to make some further comments in response to the specific issues raised by the subsequent Discussion Paper released by the ALRC.

As noted in our original submission, a significant number of our members fall into the category of mature aged worker, with labour force participation of Australians over 55 growing from around one quarter (24%) to one third (34%) over the past 10 years.

In this context, the ACTU is cognisant of the importance of law reform to address older Australians face particular barriers to participating in the workforce.

Whilst this supplementary submission does not intend to cover the points made in the original submission, we would like to restate the following general principles which we regard as critical to ensuring law reform will offer genuine choice and support for older workers:

1. Any law reform must acknowledge that mature workers have already contributed significantly to the workforce throughout their lives, and should have the right to choose when to retire. The Australian workforce is diverse, with many workers unable to continue working until retirement age due to the nature of their work, their health or caring commitments.

2. 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:

    a. Provide additional incentives to encourage mature aged workers to stay in the workforce, particularly those from low-income households;

[1]http://www.actu.org.au/Images/Dynamic/attachments/7662/d_36%20Submission%20in%20response%20to%20the%20ALRC%20inquiry%20into%20age%20barriers%20to%20work%20in%20Commonwealth%20laws%2020%20June%20final.pdf

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

3. The objective of any legal and policy reform should be to ensure a decent standard of living in retirement, in particular for low income workers, and be equitable to those who have worked on an irregular basis or who have had to take breaks in employment due to their caring responsibilities.

4. 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. Sadly workers who wish to work reduced hours are mostly forced into casual and ad hoc employment. Not only is insecure work a source of financial and social insecurity, it is also synonymous with weaker rights and entitlements, poorer career development opportunities and lower job satisfaction. 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. Workplace culture must be supported by legislation that provides older workers with a right to request a change in work arrangements in order to offer genuine options for older workers to reduce their hours of work and continue to have decent, quality employment.

5. Whilst educative initiatives aimed at achieving cultural change towards the employment of older workers is critical, such measures are only effective where the legal framework is reformed to reflect these objectives.

2. Recruitment and Employment Law

Proposals 2–1, 2–2, 2–3, 2–4

The ACTU supports the above proposals in relation to a code of conduct, targeted campaign and audit, awards and educational materials for the recruitment industry. The ACTU would also support additional funding for unions and employer associations to provide educational materials on workplace entitlements and the obligations of recruitment agencies and their employers. Any code of conduct will only be effective if it is appropriately regulated through monitoring and enforcement.

We would also recommend that any government procurement aimed at recruitment agencies should make it a condition of the government tender that agencies adhere to a code of conduct or industry standards where applicable.

Proposal 2–5 *The Australian Government should amend s 65 of the Fair Work Act 2009 (Cth) to extend the right to request flexible working arrangements to all employees who have caring responsibilities.*

The ACTU supports these recommendations, however notes that Proposal 2-5 does not extend the right to older workers without caring responsibilities who wish to reduce hours of work as they transition to retirement. If we are genuine about law reform aimed at encouraging and supporting older workers to continue to participate in paid employment, we must offer them a workplace that they will want to continue to work in. Such a workplace must recognise that older workers are likely to desire or need to change their work hours and arrangements as they transition into retirement and are likely to have increased caring responsibilities.

Moreover, simply extending the scope of the right to request flexible work arrangements without amending the legislation to include real, enforceable procedural rights, does not address the fact the provision, in practice, is nothing more than a right to ask for something. Anecdotal evidence collated by the ACTU and backed up by the available research material, is that employees experience ad hoc responses to their requests depending on the personal views of their manager making the provision irregular and unpredictable in operation.

The lack of obligation on employers to demonstrate they have given proper consideration to a request has severely hampered the effectiveness of s.65 of the FWA. The ACTU strongly advocates

that s.65 must be strengthened to include an obligation on employers to demonstrate they have given serious consideration to a request and for employees to be able to appeal an employer's unreasonable refusal of a request. We support the model used in s.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 to the employee against any potential effects the granting of such a request may have on the organisation.[2]

We note that the Fair Act Review Panel has recommended amending the Act to include an obligation to meet with employees who have made a request to change their work arrangements. We do not consider this recommendation sufficient to ensure that employers genuinely consider a request increased caring responsibilities. Anecdotal evidence and discrimination case law indicates that many managers are not receptive to requests for flexible hours from employees and will not give proper consideration to accommodating the employee's request without an enforceable obligation to do so.

The FWA specifically denies employees the right to appeal an employer's unreasonable refusal of their request and seek an arbitrated outcome. This must be addressed in legislative reform in order to make s.65 a genuine right for older workers to make requests for changes in work arrangements which will be treated with respect by their employers.

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 edibility 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.

Proposal 2–6 *The Fair Work Ombudsman should develop a guide to negotiating and implementing flexible working arrangements for mature age workers, in consultation with unions, employer organisations and seniors organisations.*

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

The ACTU supports this proposal, however, does not support the promulgation of Individual Flexibility Agreements (IFAs) as a means of addressing the needs of 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, and in particular, disadvantage employees in vulnerable positions such as older workers.

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 to drive down wages and conditions, and there is very little evidence that IFAs provide employees with access to genuine flexibilities that assist them to balance their work and personal needs.

Question 2–1 *In what ways, other than through changes to the Fair Work Act 2009 (Cth), should the Australian Government develop or encourage flexible working arrangements for mature age workers?*

The ACTU advocates the adoption of a provision in Commonwealth and State and Territory anti-discrimination legislation along the lines of that contained in Section 14A of the *Victorian Equal Opportunity Act (1995).* The Victorian Act 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.

Amending the Commonwealth and State and Territory anti-discrimination legislation to include an obligation on employers to reasonably accommodate 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.

Proposal 2–7 *From 2014, Fair Work Australia will conduct the first four-yearly review of modern awards. In the course of the review, the inclusion or modification of terms in the awards to encourage workforce participation of mature age workers should be considered.*

The ACTU supports this proposal. One of the main considerations that would benefit mature age workers as part of this award review process would be to allow greater access to part-time employment options and greater employee control over rosters. This would allow mature age workers transitioning to retirement to reduce their work hours while maintaining their employment and providing them with greater certainty over their hours of work. We would also support the introduction of casual conversion clauses to those modern awards that do not currently contain them as well as a more comprehensive definition of a casual employee in modern awards. This would benefit mature age workers who may retire from their full time employment but then take on casual or ad hoc work as they transition to retirement.

To provide a real benefit legislative change is required to enable limited arbitration where the employer has refused to convert a casual and FWA deems the employee to have an arguable case. Presently employees have no recourse where an employer refuses conversion, even in circumstances where FWA has recommended conversion.

Casual Conversion award provisions would provide a real safety net if legislative change brought "host" employers into the casual conversion equation. For example where an agency labour hire employee/contract workers has spent 12 months at the host site, an employee is able to request casual conversion with the host.

We strongly reject the proposal made by the Ai Group to reduce the minimum shift engagement for mature age workers from three hours to one hour. Minimum shift engagements are an acknowledgement of the often significant investments in time that workers make to travel to and from work. We would note that we have never heard from a single mature age worker requesting a reduction in the minimum shift engagement, and the Ai Group does not appear to have provided any evidence to back up their assertion that there is significant employee demand for this.

Proposal 2–8 *Section 117(3)(b) of the Fair Work Act 2009 (Cth) provides that if an employee is over 45 years of age and has completed at least two years of continuous service with the employer, then*

the minimum period of notice for termination is increased by one week. The Australian Government should consider amending this section to increase this period from one week to four weeks.

The ACTU supports this recommendation, noting that it becomes increasingly difficult for mature age workers to find employment after termination, given the rise in insecure work and the increasing trend for workers to churn in and out of the workforce, making it more difficult for older workers to find and retain employment after their employment has been terminated. An additional notice period of four weeks would go some way to countering the increased barriers to employment that mature age workers face. In addition to changes to the National Employment Standards on this matter, the ACTU would further recommend changing the legislation to allow modern awards to supplement the NES provisions on redundancy to allow for award-specific redundancy and termination provisions.

Question 2–2 *There is substantial overlap between the general protections provisions under the Fair Work Act 2009 (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, could this legislation be amended to improve or clarify their interaction in circumstances of age discrimination?*

The ACTU supported the harmonisation of a number of provisions of Commonwealth discrimination legislation with the general protection provisions of the FWA. We are pleased to note that the *Human Rights and Anti-Discrimination Bill* adopts the shared burden of proof model contained in the FWA and removes the technical requirement for a comparator. However, it remains unclear as to whether s. 351(2) of the FWA means that the general protections provision does not apply in states or territories where the action is not unlawful under any discrimination law in force where the action is taken. This section should be amended to clarify that the protection applies in all circumstances including where the action is not discriminatory under State or Territory anti-discrimination law.

Whilst the FWA protects employees with 'family or caring responsibilities' this protection remains disparate within the various Commonwealth, State and Territory anti-discrimination legislation which affords protection to employees with 'family responsibilities', 'caring responsibilities' or 'family or caring responsibilities'. This inconsistency should be remedied by adopting the FWA definition of 'family or caring responsibilities' in the *Human Rights and Anti-Discrimination Bill.*

Proposal 2–9 *A range of professional associations and industry representative groups are responsible for developing or regulating licensing or re-qualification requirements. The Australian Human Rights Commission should develop principles or guidelines to assist these bodies to review such requirements with a view to removing age-based restrictions in favour of capacity-based requirements.*

We support this recommendation. We have been made aware of particular barriers faced by mature age workers in renewing their professional qualifications. For example, requalification schemes often require workers to attend professional development training before their license can be renewed. In some industries, due to limited resources there may not be sufficient training opportunities for all staff. Older workers may therefore be denied access to career and professional development training in favour of younger workers, which can negatively affect their re-qualification. We are also aware that in certain professions, the registration and licensing profession is more onerous than in other professions; for example, it is easier for doctors to requalify after a break in employment than it is for nurses. This unfairly disadvantages nurses and makes it particularly difficult for older workers in this occupation to return to nursing duties after a career break, often taken due to caring responsibilities. The ACTU would support stronger reporting mechanisms and guidelines for licensing authorities to make it clear that such authorities have a positive obligation to base re-qualification requirements on competency rather than age. For example, if an older worker can demonstrate that they have attempted to attend refresher training but have been denied the opportunity, they should not be restricted from re-registering on this basis.

Proposals 2–10 & 2–11

The ACTU supports the above proposals in relation to reviewing the compulsory retirement age for military personnel and judicial appointments. As a general principle, we believe that appointments should be based on competency, not age, and support the principle that workers should be given a genuine choice as to when they retire and how they transition into retirement. In principle, we would therefore support the removal of compulsory retirement ages.

Question 2–3 *Should the Australian Government establish a body or reporting framework with respect to mature age workers similar to that of the Equal Opportunity for Women in the Workplace Agency or its reporting framework? If so, how should such a body or framework operate?*

The ACTU supports initiatives which encourages employers to monitor and analyse the employment patterns of older workers, any impact existing workplace policies, procedures and practices may have on older workers and the effectiveness of programs used to eliminate discrimination and promote equal employment opportunity for older workers.

We would re-state the position we took in our submission to the Review of the *Equal Opportunity for Women in the Workplace Act*, advocating that such initiatives must be based on:

- Meaningful, data collection which is focussed on outcomes;
- Ensuring employee, union and shareholder involvement in the reporting process;
- Greater accountability for the development and implementation of action plans;
- Development of appropriate minimum standards; and
- A more robust compliance framework.

Proposal 2–12 *The Australian Human Rights Commission should coordinate a national education and awareness campaign in support of the workforce participation of mature age persons.*

The ACTU supports this proposal, and would be happy to be consulted on the content of this campaign. However, we reiterate the point made earlier that whilst educative initiatives aimed at achieving cultural change towards the employment of older workers is critical, such measures are only effective where the legal framework is reformed to reflect these objectives.

3. Work Health and Safety and Workers' Compensation

Proposals 3–1, 3-2, 3-3, 3-4, 3-5, 3-6

The ACTU supports the above proposals in relation to a review of health and safety issues affecting mature age workers and the provision of awards and guidance materials. However, we believe that educative approaches alone do not go far enough, and should be supplemented by legally enforceable measures to protect older workers. Any recommendations should work to address the very real concerns as to the failure of employers to understand their legal obligations with regards to the health and safety of older workers. In particular, we have noticed a disturbing trend of employers failing to understand their duty of care to employees, and misinterpreting health and safety legislation in ways that can sometimes mask discriminatory practices and force vulnerable older workers out of their jobs. The Australian Workers Union has noticed a similar trend. They have told us that:

"Industrial officers and organisers at the AWU have noticed an emerging trend, particularly in the resource sector, where employers are using their duty of care obligations force older, less productive workers out.

The AWU is aware of instances where employers are using medical assessments to mount a case that workers are not 'fit' for work and using the 'inherent requirements' provisions to terminate workers. These activities also involve ignoring and disregarding workers medical certificates certifying the worker as fit."

The Shop, Distributive and Allied Employees Association (SDA) has also noticed this affecting older workers in the retail sector. In one case involving a major department store:

"[The] Department store was using what they referred to as Safe Work Practices (SWP) as a way of testing the physical capacity of their employees. These SWPs involved 11 tests, 3 of which are physical. Older, and in all reported cases, Part 1 employees, are often unable to complete the physical components of these tests, especially the squatting test. Upon failure of the SWP, an employee is put on restricted duties and instructed to consult their doctor. When they return to work they are re-tested. If they fail again they are sent home until they can complete a "functional assessment test" conducted by a company specialist. Whilst at home they are using annual leave or

sick leave. Where an employee failed the "functional assessment test" they are sent home and are on an indeterminate form of leave. "

The SDA further notes:
"It is important that there be a positive and explicit standalone duty on duty holders to make 'reasonable adjustments' for those in the workplace. This positive duty should be a separate type of discrimination and have specific remedies attached for a breach of this duty. This duty should be replicated in the *Fair Work Act 2009.*

Employers should have a positive duty to make reasonable accommodations and this duty should be accompanied by clearly expressed reference to the fact that an assessment regarding 'reasonable adjustments' must be made on an individual / case by case basis, which takes into consideration the circumstances and needs of the individual. It is the Associations' experience that employers like to make generic policy decisions about job descriptions, safe work practices and task analysis which fail to adapt to the needs of individuals with disabilities. This becomes a problem when an individual needs reasonable adjustments made in order to function in the workplace, yet the employer is wedded to a tasks' analysis which is inflexible and discriminatory. Employers simply send workers home or terminate their employment when they are injured rather than make reasonable accommodations to the workplace in order to facilitate the continuance of work."

The ACTU recommends that the FW Act be amended to include reference to an employer's obligation to provide 'reasonable adjustments' in the workplace to a worker with an injury.

4. Insurance

Proposals 4-1, 4-2, 4-3, 4-4

The ACTU supports the above proposals in relation to a code of practice, advisory group and guidance materials on insurance as it relates to mature age workers.

5. Social Security

Proposals 5–1 & 5-2

The ACTU supports the above proposals in relation to an evaluation of social security information available to mature age workers. However, we believe that education initiatives alone, especially those only targeted to workers, are insufficient. There should be more information targeted towards employers to ensure they are aware of their obligations towards mature age workers. In addition, there are a number of legislative changes that could be made to improve the employment services system and the taxation system to benefit mature age jobseekers and those transitioning into retirement. These suggestions are outlined below.

Question 5–1 *In what other ways, if any, could the Australian Government's employment services system be improved to provide better assistance to mature age job seekers?*

The employment services system should be thoroughly reviewed and restructured to ease barriers to employment. The present employment services system is supply-driven rather than demand-led, meaning that employment services providers are not consistently preparing jobseekers for employment through relevant training or appropriate support. This particularly affects mature age workers, who may require retraining to up-skill their qualifications to be competitive in a modern labour market. Employment service providers require access to better resources and a more targeted incentive scheme to overcome entrenched barriers to employment.

The ACTU would support further study and research into the entrenched problems faced by disadvantaged jobseekers, including those over 45. We would also like to see an official public review of the employment services system to evaluate the best approaches to achieving satisfactory employment outcomes. This could investigate demand-led employment opportunities, improvements to training and social support for disadvantaged jobseekers and purchasing relationships to encourage closer partnerships between employment services and employers. We would also support an increase to income support payments, as the current low level of the Newstart Allowance acts as a barrier for jobseekers to find work, as many jobseekers are unable to afford the necessary expenses such as public transport and appropriate business attire that can assist them to find employment.

Question 5–2 *The 'withdrawal' or 'taper' rate for an income support payment operates to reduce gradually the rate at which a payment is made as income or assets increase. What effect, if any, would changing the income test withdrawal rate for Newstart Allowance recipients aged 55 years and over have on their incentives for workforce participation?*

Although it would be possible to change the income test withdrawal rate for mature age recipients of the Newstart Allowance, on balance the ACTU would not support such a change as it could lead to an increase in the complexity of the income support system. This may negatively affect system coherence, which we note is one of the framing principles of the ALRC's inquiry. It may be a better idea to recommend a more comprehensive review of the social support system that includes all workers.

Proposals 5–3, 5-4, 5-5, 5-6

The ACTU supports the above proposals in relation to changes to the Carer Payment, Pensioner Education Supplement and Work Bonus.

6. Superannuation

Proposal 8–1 *Regulation 7.04(1) of the Superannuation Industry (Supervision) Regulations 1994 (Cth) restricts superannuation funds from accepting voluntary contributions for members of superannuation funds:*

(a) aged 75 years and over; and

(b) aged 65 years until 75 years, unless they meet a work test, that is, where they are gainfully employed on at least a part-time basis during the financial year.

The Australian Government should amend reg 7.04(1) to remove the restriction on voluntary contributions for members aged 75 years and over, and to extend the work test to these members.

The ACTU supports the above proposal in relation to removing age-based restrictions on voluntary superannuation contributions.

Question 8–1 *Regulations 7.04(1) and 7.01(3) of the Superannuation Industry (Supervision) Regulations 1994 (Cth) stipulate a work test for members of superannuation funds aged 65 years and over who wish to make voluntary superannuation contributions. Members must be gainfully employed on at least a part-time basis during the financial year, that is, for a minimum of 40 hours over a consecutive 30-day period. What changes, if any, should be made to the work test? For example, should the minimum hours of work be increased and, if so, over what period?*

Any work test should be cognisant of the changed work patterns of many Australians, particularly with respect to the rise of casual, part-time and contract employment and increased participation of women in the labour force with broken service due to caring responsibilities.

The Productivity Commission considered the impact of these emerging irregular work patterns in recommending the work test for the Paid Parental Leave (PPL) Scheme. The recommendation, subsequently adopted by the Government was that the work test require that the employee be in the paid workforce and have:

a. been engaged in work continuously for at least 10 out of the 13 months prior to the birth of the child; and

b. worked at least 330 hours in the 10 month period (an average of around one day of work per week).

The PPL work test allows for a break in service of 8 weeks (which the unions maintain should be extended to 12 weeks to accommodate seasonal workers who have a regular pattern of work but work in a sector which has significant unpaid periods such as the tertiary sector). Similar consideration should be given to amending the work test for *Regulations 7.04(1) and 7.01(3) of the Superannuation Industry (Supervision) Regulations 1994 (Cth)* to recognise the changed patterns of workforce attachment.

Proposals 8–2, 8-3, 8-4, 8-5, 8-6, 8-7

The ACTU supports the above proposals in relation to changes to transition to retirement rules, lifting age restrictions on voluntary contributions based on a work test, co-contributions and spousal contributions, and tax deductibility of voluntary contributions for the self-employed.

Question 8–2 *The Australian Government has legislated two key changes to the retirement income system: the superannuation preservation age will increase from 55 to 60 years between 2015 and 2025; and the Age Pension age will increase from 65 to 67 years between 2017 and 2023.*
Should the preservation age be increased beyond 60 years? For example, to:

(a) 62 years—maintaining the five-year gap between the Age Pension age and the preservation age; or
(b) 67 years—aligning the preservation age with the Age Pension age?

Question 8–3 *The age for tax-free access to superannuation benefits is set at 60 years. Should this age setting be increased:*

(a) to align with any further increase to superannuation preservation age (that is, beyond 60 years); or
(b) instead of any further increase to preservation age—for example, to:

(i) 62 years—maintaining the five-year gap between the Age Pension age and the tax-free superannuation access age;

(ii) 65 years—aligning the tax-free superannuation access age with the unrestricted superannuation access age; or

(iii) 67 years—aligning the tax-free superannuation access age with the Age Pension age?

The ACTU does not support any measures that would further restrict choices by making it more difficult for workers to access their entitlements to superannuation. This would be counterproductive to the needs of Australian workers, and will unfairly limit choice for older workers in relation to when they can retire. The ACTU rejects the notion that existing age settings encourage workers in meaningful paid employment to retire before they are ready to, and increasing such age settings would only serve to unfairly limit their choices, restrict individual agency, and would provide no incentive or assistance for workers who wish to remain in employment to do so.