

AGE DISCRIMINATION and WORKERS' COMPENSATION

By Robert Guthrie

Age-based limitations on workers' compensation payments apply in almost all states and territories in Australia, despite anti-age discrimination legislation.



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Provisions in most states and territories require that workers' compensation payments either cease or reduce at age 65, or a notional retirement age. These provisions conflict either directly or indirectly with state, territory and federal anti-discrimination laws, which prevent employers from discriminating against workers on the grounds of age. Other than as prescribed by these laws, it is unlawful to discriminate on the grounds of age in a host of employment-related areas.

Compensation payments have traditionally been linked to a notional retirement age; however, the rationale for an age-based cessation of payments is now out of step with prevailing economic pressures that encourage workers to remain in the workforce for as long as possible. The lack of income protection for injured older workers sits very uneasily with the policy drives to lengthen our working lives.

HUMAN RESOURCE ISSUES ARISING FROM AN AGEING WORKFORCE

The phenomenon of an ageing population is worldwide. The Australian Bureau of Statistics, in its review, *Australian Social Trends 1999 Population Projections: Our Ageing Population*, projects that, for 1997 to 2051, demographic changes will require considerable policy adjustment and planning.¹ The data show that the number of people over 65 will more than double in the next half century; by 2031, more than 25 per cent of the Australian population is estimated to be over 65. At the same time, the relative number of people under 65 will reduce. In this context, the question of age and age discrimination is a significant issue.

Ageing is very often viewed negatively.² Australian and British research has shown that ageist views exist not only within the general community, but also among healthcare professionals.³ Unfortunately, the *Age Discrimination Act 2004 (Cth) (ADA)*, and similar state legislation that attempts to counter these attitudes, are usually reactive – they are complaints-based and address discrimination only after the event.

In a report published in June 2005 into Australia's policies on ageing, *Ageing and Employment Policies*, the Organisation for Economic Cooperation and Development (OECD) urged that older Australians must be encouraged to work longer. The OECD report recommended that the Australian government should move to facilitate later retirement and remove incentives to early retirement,⁴ remove disability benefits as a pathway to retirement, enhance age discrimination legislation and strengthen workers' employability by providing greater training and job search assistance to older workers.⁵ Older workers have been disadvantaged in the Australian labour market, finding it more difficult to gain employment, and access to training and promotion, than comparatively younger people.⁶ This is due largely to the dramatic restructuring of the labour force in terms of age, gender, hours of work and the degree of casualisation that took place in the 1980s. Recently, the Australian National Occupational Health and Safety Commission found that, as people grow older and their

Ceasing workers' compensation payments on the basis of age conflicts with economic imperatives to encourage older people to stay in the workforce.

health status changes, they tend to change to jobs for which they are physically better suited, or leave the workforce. Given the increasing need to keep older workers in the workforce, the Commission aimed to develop strategies to minimise age-related problems, beginning with young workers and continuing throughout their working lives.⁷

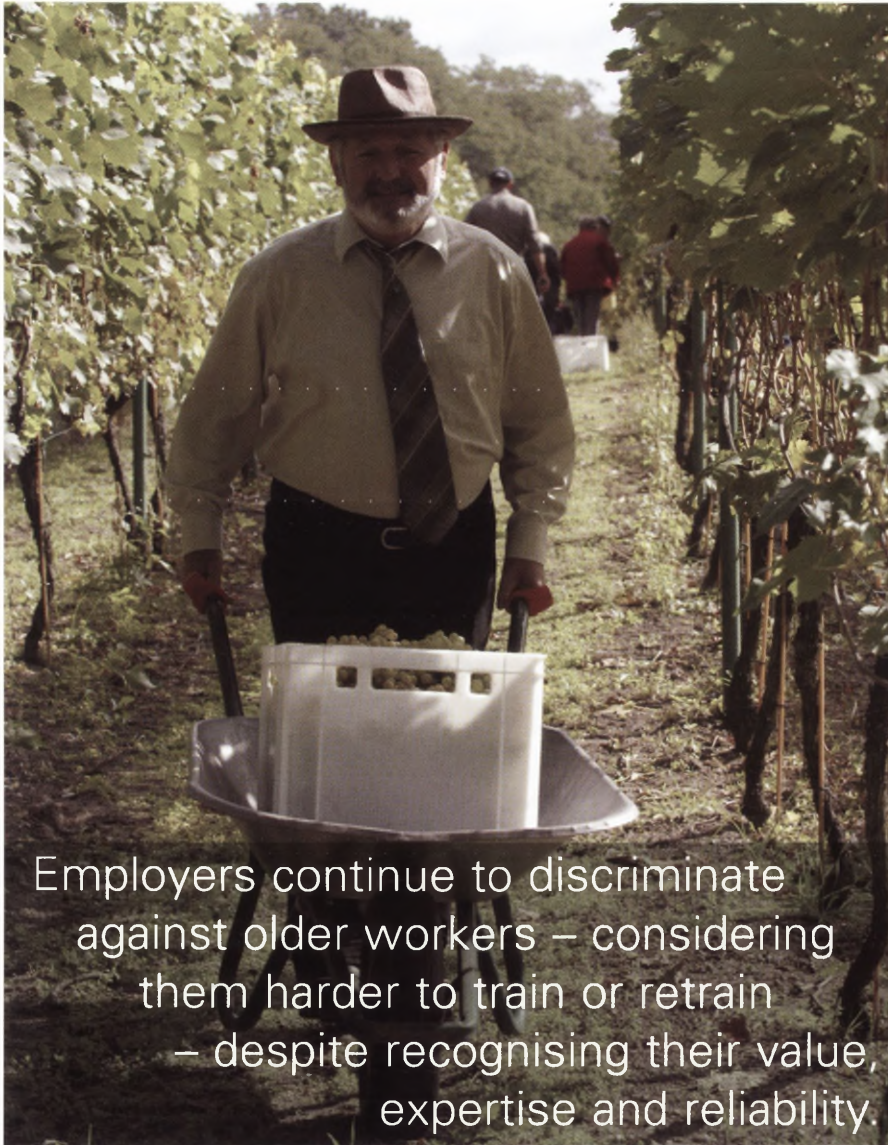
INJURY FREQUENCY BY REFERENCE TO AGE

In WA in 2002/2003, 25 to 34 year olds accounted for 25.3 per cent of all 'lost-time' claims, with the 34 to 44 age group accounting for 25 per cent of claims and the 45 to 54 age group for 20.7 per cent of those claims. Lost-time claims are those claims where the worker is absent from work, as opposed to no-lost-time claims where only medical expenses are claimed. The average duration for lost-time claims was highest in the age group 45 to 54, averaging about 93 days per claim. Overall, the duration of lost-time claims increases with age up until 54, after which the average duration decreases.

In 2002/2003, for male workers, the highest incidence of injury rate was recorded in the age groups 20 to 24 and 25 to 35. For female workers, the highest incidence rate was recorded in the age groups 60 to 64 and 55 to 59. Data collected for workers over 65 showed them as having the lowest incidence of injury rates of all age groups, and a duration rate of only 51.5 days lost, which compares favourably with the 25 to 35 age group, which had a duration rate of 58.1 days lost per claim.⁸ The longer duration might be explained, as some commentators suggest, by a possible economic advantage obtained by older workers who prolong the rehabilitation process until an early retirement option becomes available.⁹ Australian statistics for the period 2001/2002 are similar, showing that workers in the 25 to 34 group account for 27.7 per cent of lost-time claims; the 35 to 44 group, 29.4 per cent of claims; the 45 to 54 group, 29.3 per cent; and the over-55 group 14.2 per cent of all lost-time claims.¹⁰

Given the relatively low incidence of workplace injury, and days lost due to injury, in the older population, one might think that employers would value their older workers. However, in his research on age, Encel concluded that employers continue to discriminate against older workers, despite recognising their value, expertise and reliability.¹¹ He observed that the jointly undertaken review, *Age Limits*:

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Employers continue to discriminate against older workers – considering them harder to train or retrain – despite recognising their value, expertise and reliability.

Report of the Equal Opportunity Commissions in Victoria, South Australia and Western Australia, found that employers considered older workers to be more difficult to train or retrain, and were not worth investing in for this reason. In addition, the review found that age discrimination legislation had done little to improve job opportunities for older workers.¹²

WORKERS’ COMPENSATION PROVISIONS AND AGE DISCRIMINATION

Section 56 of the *Workers’ Compensation and Injury Management Act 1981* (WA) is typical of most workers’ compensation provisions in Australian jurisdictions (see below), in directing that workers’ weekly payments will cease at age 65. Section 56 is read with s198, which provides for certain payments once a worker turns 64. One should also consider Schedule 5 of the Act, which provides (in clauses 1 and 2) that a worker will be entitled to receive payments after attaining the age of 65 where it can be shown to the

satisfaction of the employer – or, in the case of dispute, to the dispute resolution body – that the worker would have continued to work after attaining the age of 65. However, the payments mandatorily cease when the worker turns 70. In any event, payments to workers in these circumstances are only a supplementary amount, a fraction of the payment that s/he would have received before reaching 65.¹³

WA is not alone in limiting workers’ compensation payments on the basis of age. In Victoria, s93E of the *Accident Compensation Act 1985* (Vic) provides that a worker’s payments will cease once s/he reaches retirement age. Retirement age is defined in s5 as being the normal retiring age for the worker’s occupation at the time of the injury, or at age of 65, whichever is earlier. A worker is not entitled to weekly payments after retirement age. It follows that, for most workers, compensation payments in Victoria will cease at age 65.¹⁴

In NSW, s52 of the *Workers Compensation Act 1987* provides that a worker’s entitlement to weekly compensation continues only until one year after the age at which the worker would become eligible to receive an age pension under the *Social Security Act 1947* (Cth).¹⁵

In SA, payments cease at normal retirement age under s35 of the *Worker’s Rehabilitation and Compensation Act 1986*. Normal retirement age is

defined as the normal retiring age for workers engaged in the kind of employment for which the worker’s disability arose, or at 65 years of age, whichever is earlier.¹⁶ Section 35(5A) states that workers who are within six months of retirement age and are still in employment are entitled to weekly payments for a period of up to six months.¹⁷ No weekly payments are payable after the worker reaches 70 years of age.¹⁸

In Tasmania, s87(1) of the *Worker’s Compensation Act 1988* provides that payments of compensation stop when the worker reaches 65. However, there is provision under s87(2) for compensation payments to continue beyond this point, where workers can establish that the terms and conditions of their employment permit them to continue working beyond the age of 65. Nevertheless, workers must apply to the Compensation Tribunal to receive payments after turning 65.¹⁹ In the Northern Territory, s65 of the *Work Health Act 1986* provides that payments shall cease when the worker attains the age of 65 or, if the normal retiring age for workers

in the industry or occupation in which s/he was employed is greater than 65 years, the normal retirement age for that industry or occupation. It is noteworthy that payments under the *Work Health Act 1986* (NT) are set at only 75 per cent of loss of the worker's earnings, whereas in most states and territories, the rate of weekly payments is usually set at average weekly payments, at least for certain periods. In the ACT, payments cease when the worker reaches 'pension' age or, if the injury is within two years of pension age, the payments continue for two years from the date of injury.²⁰

Queensland is the only Australian jurisdiction that does not cease payments on the basis of age.²¹ Payments continue until either the worker has been in receipt of payments for five years, the incapacity from injury ceases, the worker reaches the statutory maximum payment (similar to WA),²² or the claim is settled by a lump-sum payment. Interestingly, the statistical and annual reports of the Queensland workers' compensation authority do not provide data on the claim and incident rates by age.²³

In the HREOC report, *Age Matters: A Report on Age Discrimination*, the Commission noted that denying older workers compensation payments would be an unjust anomaly, implying that an injury was less devastating for the older worker than the younger. It might also suggest that the older worker should not be in the workforce at all. HREOC also observed, however, that to allow compensation to continue until the worker's death could impose prohibitive costs on compensation schemes.²⁴

AGE DISCRIMINATION LAWS IN AUSTRALIA

Age discrimination in employment is unlawful in various states,²⁵ but was not covered by federal anti-discrimination legislation until 2004. ADA²⁶ defines age to include an age group. This means that discrimination under the ADA need not be linked to a specific age, but can be related to the age group of a person or a characteristic of, or imputed to, that age group.²⁷ Both direct and indirect discrimination on the grounds of age are covered by the ADA.²⁸ Section 16 provides that, if an act is done for two or more reasons, then, for the purposes of the ADA, the act is taken to be done on the basis of age if a person's age is the *dominant reason*. Importantly, s39 of the ADA does not make unlawful anything done in compliance with a state or territory Act. Therefore, age discriminatory provisions in state and territory workers' compensation schemes are not invalidated by the ADA. In addition, it is not unlawful to comply with commonwealth Acts that contain provisions apparently contrary to the ADA. The commonwealth workers' compensation legislation is specifically referred to in Schedule 1 of the ADA as being exempt from its operations.

Section 66V of the *Equal Opportunity Act 1984* (WA) is typical of provisions relating to age discrimination in the states and territories.²⁹ It prevents discrimination on the grounds of age in relation to the following employment situations:

1. deciding who should get a job, and the terms or conditions on which the employment is offered;
2. promotion, training, and the transfer of other benefits;

3. retrenchment or dismissal; and
4. subjecting an employee to any other detriment (for example, humiliation or insults because of a person's age).

However, similar to the ADA and other state and territory legislation, the *Equal Opportunity Act 1984* (WA) does not make unlawful things done in compliance with state Acts.³⁰ Therefore, provisions relating to ceasing or reducing workers' compensation payments on the basis of age in workers' compensation legislation around Australia are not unlawful because they conflict with federal legislation or state or territories provisions.

It follows that workers' compensation laws that contain an age-limit are discriminatory (but not unlawful) in a direct sense in three respects. First, payments for compensation stop once a certain age is reached (generally around 65) unlike other age groups for whom payments do not cease because of age. Second, payments to workers who reach 65 are generally less in most states and territories than for those under 65. Third, a worker who has reached an age-limit in their particular jurisdiction usually has to apply to a tribunal to seek continuation of payments after the age of 65, and satisfy additional criteria that are not applied to other, younger workers.

CONCLUSION

The Australian workforce is ageing, and there are strong internal and external pressures on workers to remain in the workforce for as long as possible. The Australian government has developed policies to encourage them to do so. These include the enactment of the ADA in 2004. Despite this legislative safeguard, most Australians who continue to work beyond the age of 65 are treated differently to younger workers as regards workers' compensation payments. Compensation payments either cease or are reduced. Workers' compensation legislation in Australia almost uniformly discriminates against older workers. It is anomalous that, while the direction of policy on the one hand aims to encourage older workers to remain in the workforce, it is on the other hand failing to provide adequate compensation protection for these workers.

The rationale for imposing age-limits on workers' compensation, which was based on workers retiring at age 65, no longer makes sense given age discrimination laws that make it unlawful to set mandatory retirement dates, and the policy reasons for extending work beyond 65. Consequently, there is a strong case to be made for removing age-limits in workers' compensation legislation.

The argument for removing age-limits is strongest in states such as Queensland and WA, where payments are limited by a maximum weekly payment or a prescribed amount. If the age-limit were lifted in WA, workers' payments would eventually cease once they reached the prescribed amount. This is already the case in Queensland, which is the only state that does not set an age-limit on weekly payments.

In other states and territories, particularly NSW and SA, pension-based schemes do not set maximum limits on weekly payments, or the limits are substantially higher than >>

in WA and Queensland. Pension-based schemes present particular challenges to legislators, as removing age-limits may simply increase already long-duration claims. In these jurisdictions, research is needed into the effects of removing age-limits. Data obtained from the Queensland experience might be a useful guide here. Again, setting time-limits on how long compensation can be paid must be carefully considered – as this might arguably impact more heavily on younger workers. Restricting the period for which a worker can be paid, as in Queensland, indirectly discriminates against younger workers who may be unable to access commonwealth age pension payments or other benefits once their workers' compensation payments cease.

Clearly, this is an area requiring further research. However, despite these barriers to removing age-limits, this issue concerns fundamental human rights: the disparate treatment of workers should be seen as a breach of human rights and, as such, is intolerable. Raising actuarial and financial cost arguments is a smokescreen that should not be permitted to deny older workers the equitable treatment that they deserve. ■

This paper was originally delivered to the NHMRC Symposium, *Ageing Well*, Perth Convention Centre, 29 - 30 September 2005, and an extended version was published as R Guthrie (2006) 'Workers' Compensation and Age Discrimination in Australia', *International Journal of Discrimination and Law*, Vol. 8, pp145 – 68.

Notes: **1** *Australian Social Trends 1999, Population Projections: Our Ageing Population*, ABS, Canberra, 2000, <http://www.abs.gov.au/Ausstats/abs@.nsf/Lookup/B7760619C3973594CA25699F0005D60F> **2** R Ranjin (2005) 'Discrimination against older workers; psychology and economics', *Of Working Age Seminar on Age Discrimination in the Workplace*, HREOC website http://www.hreoc.gov.au/sex_discrimination/workingage/speeches/ranzijn.html; ACCIRT, (1996) *Productivity of Mature and Mature Age Workers; Employers Attitudes and Experiences*, University of Sydney. See, also, L M Woolf, *Ageism*, in P Roberts (Eds), *Ageing*, Salem Press Pasadena, California, 2000. **3** National Ageing Research Institute, *The wellness project: promoting older peoples' sexual health*, Melbourne: Victorian Department of Human Services, 2002, http://www.mednwh.unimelb.edu.au/downloads/publications_2002/wellness_project.pdf. See, also, K Benjamin and S Wilson, *Facts and Misconceptions about Age, Health Status and Employability*, Health and Safety Laboratory Derbyshire, Report No. HSL/2005/20 2005. **4** By lifting the age for assessment for superannuation to 65, in line with age pensions. **5** S Wright, 'Fed: Age discrimination and super policies need major work: OECD', *AAP General News Wire*: 21 June 2005, p1. See, also, V Marsh, 'Australia urged to improve lot of older workers', *Financial Times*, (UK), 23 June 2005, p3. **6** M Patrickson and L Hartmann (1995) 'Australia's Ageing Population: Implications for Human Resource Management', *International Journal of Manpower*, 16, (pp5, 6) 34; see also J Heywood, L Ho and X Wei (1999), 'The determinants of hiring older workers: Evidence from Hong Kong', *Industrial & Labor Relations Review*, 52(3) p444. **7** *Surveillance Alert OHS and the Ageing Workforce*, May 2005, NOHSC. **8** *WorkCover Statistical Report 1999/2000 – 2002/2003*, pp40-2. Between 2001 and 2004, the over-65 age group suffered 109 reported cases – a very small number of claims. Email, WorkCover, 9 September 2005. **9** M Patrickson and L Hartmann, *Op.Cit.*, see Note 7 above. **10** National Occupational Health and Safety Commission, *Compensation of Workers' Compensation Statistics Australian 2001-2002*, December 2003 p34. **11** S Encel, 'Age Discrimination in Law and in Practice', *Elder Law Review*, (2004), (3), p1. **12** *Ibid*, p8. **13** Workers below the

age of 65 at the time of injury are entitled to their average weekly payments for the first 13 weeks and thereafter at the rate of about 85% of the average weekly earnings. **14** A worker injured within 52 weeks of attaining retirement age is entitled to weekly payments for not more than 104 weeks (whether consecutive or not) or until the incapacity for work resolves. **15** The NSW provisions were noted by HREOC in its report, *Age Matters: A Report on Age Discrimination*. Other payments, such as hospital, medical and rehabilitation costs, continue irrespective of age. **16** Similar to the NSW provisions. Until 1995, the SA provisions allowed in some cases for compensation payments to carry on until the worker is 70, or the age at which the worker was entitled to an age pension under the *Social Security Act 1947* (Cth). This latter provision contained an inherently discriminatory provision because, in some cases, payments would cease because the worker had attained the age where s/he is eligible to receive an aged pension under the *Social Security Act 1947* (Cth). Under that Act, women were entitled to receive the aged pension on attaining 60 years. Men, however, would be entitled to an aged pension only at 65 years. Note, however, that recent amendments to the *Social Security Act 1991* provide that the age distinction between men and women will be 'rectified' so that women will need to reach 65 years in order to obtain an aged pension. In *Workcover Corporation of South Australia v Piller* [1995] SAWCAT 137, it was held that s35(5) was invalid as being contrary to the *Sex Discrimination Act 1984* (Cth) on the grounds of the differential treatment of woman and men. **17** This does not apply to working directors or to contractors covered by the Act. **18** Other payments, such as hospital, medical and rehabilitation costs, continue irrespective of age. **19** In that sense, the provision is discriminatory because it establishes an additional burden upon a worker who has attained 65 years in requiring an application for continuation of payment. **20** Similarly, in New Zealand, payments cease when the applicant reaches New Zealand Superannuation Qualifying Age (NZSQA) – which is currently 65, but was, prior to 1994, 60. **21** In HREOC, *Age Matters: A Report on Age Discrimination*, it was suggested that the ACT does not have age criteria, but this does not appear to be correct. **22** This provision is similar to the WA provisions, which cease payments at the prescribed amount. In Queensland, the prescribed amount at the time of writing is \$174,625. **23** See <http://www.qcomp.com.au/utilities/publications/htm/index.htm> (accessed 9 September 2005). **24** *Age Matters: A Report on Age Discrimination*, HREOC, p22. **25** Section 12 of the ADA does not displace or limit the operation of state and territory laws, which can operate concurrently with the ADA. The ADA provides that where complainants have a choice as to jurisdiction, they are required to elect whether to make their complaint under federal or state/territory legislation. **26** There were also consequential amendments to the *Workplace Relations Act 1996* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1977* (Cth). **27** See s5 of the ADA. The definition of age does not cover the age that might be imputed to a person; however, the definition of direct age discrimination includes less favourable treatment because of 'a characteristic that is generally imputed to persons of the age of the aggrieved person'. **28** See, generally, *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Kemp v Minister for Education and Others* (1991) EOC 92-340; the ADA, ss14-15. **29** *Anti-Discrimination Act 1977* (NSW), s49ZU, which makes retirement on the basis of age unlawful, and ss49ZYA-ZYW, which deal with age discrimination generally; *Equal Opportunity Act 1984* (SA), Part VA and the *Equal Opportunity Act 1995* (Vic) s6; *Anti-Discrimination Act 1991* (Qld), s7; *Anti-Discrimination Act 1998* (Tas), s16; *Discrimination Act 1991* (ACT), s7; and the *Discrimination Act 1991* (NT), s19; which all list age as an attribute protected against discrimination. **30** *Anti-Discrimination Act 1977* (NSW), s54; *Equal Opportunity Act 1984* (SA), s85; *Equal Opportunity Act 1995* (Vic), s69; *Anti-Discrimination Act 1991* (Qld), s106; *Anti-Discrimination Act 1998* (Tas), s24; *Discrimination Act 1991* (ACT), s30; *Discrimination Act 1991* (NT), s53.

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