



Australian
Human Rights
Commission

The Road So Far – the *Age Discrimination Act 2004* (Cth)

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Table of Contents

1	Introduction.....	3
2	The Age Discrimination Act	3
3	Subsequent strengthening of the Act	4
4	Complaints and Temporary Exemption Applications made under the Act5	
4.1	<i>Making age discrimination complaints</i>	5
4.2	<i>Seeking temporary exemptions</i>	9
5	Conclusion	12

1 Introduction

When the *Age Discrimination Act 2004 (Cth)* (the Age Discrimination Act or the Act) was introduced in 2004 it heralded a new era in the recognition of age discrimination in Australia. Subsequently, the Australian Human Rights Commission published a paper 'Roadmap to the Age Discrimination Act' which provided an analysis of the Act as it was conceived in 2004.¹

Increased awareness of the right to be free from unlawful age discrimination actively permeates many areas of public life such as our workplaces and raises expectations of fair treatment and equality. The Act sets up important protections as well as processes that empower individuals with the ability to make a complaint about age discriminatory treatment. Other processes such as exemption applications test what is and is not acceptable age-specific treatment within our community. Since the introduction of the Act, the Act itself has been amended to further strengthen protections.

This paper replaces the previous Commission paper - 'Roadmap to the Age Discrimination Act'. It includes an update on subsequent changes made to the Act. The paper will also look at the ways in which the Act is used by members of the public in exercising their rights, specifically in relation to making complaints and seeking temporary exemptions.

The structure of the paper will be in three sections as follows:

1. Synopsis of the Age Discrimination Act
2. Subsequent strengthening of the Act
3. Complaints and Temporary Exemption Applications made under the Act

2 The Age Discrimination Act

The Age Discrimination Bill (the Bill) was introduced into parliament in January 2003. This followed extensive government consultations with a wide range of organisations including the Australian Human Rights Commission,² business and employee groups, financial services and health services organisations as well as social welfare, youth and older people's groups. After considerable parliamentary debate the Bill was enacted and came into force on 23 June 2004. The Act in part was a response to Australia's international human rights obligations to avoid and eliminate age discrimination.³

The Act introduced important protections against age discrimination at the federal level for the first time in Australia; though state and territory-based protections against unlawful age discrimination had existed for some time.⁴ The aim of the Act is to act as a catalyst for attitudinal change and to provide individuals with an avenue to make complaints of discrimination.⁵ A primary purpose of the Act is to raise awareness that people of all ages have the same fundamental rights to equality before the law regardless of age and to eliminate unlawful age discrimination within our community.⁶ The Act also contains the specific objective of responding to 'demographic change by removing barriers to older people participating in society, particularly in the workforce; and changing negative stereotypes about older people'.⁷

The Act makes it unlawful in certain circumstances to discriminate against people on the basis of their age. It covers discrimination against people at any age – including discrimination against older people and young people.

The key features of the Age Discrimination Act are similar to those of the other federal anti-discrimination Acts (the *Race Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*). It protects against age discrimination in certain areas of public life (for example in employment) and covers both direct⁸ and indirect⁹ discrimination. Also as with other federal anti-discrimination legislation, the Act contains certain permanent exemptions.¹⁰ The effect of a permanent exemption is that conduct or behaviour that would otherwise amount to age discrimination will not be unlawful where a permanent exemption applies.¹¹ Different kinds of permanent exemptions exist within the Act, for example in respect of youth wages;¹² positive discrimination; charities; religious bodies; voluntary bodies; superannuation, insurance and credit; superannuation legislation; direct compliance with laws, orders etc.; taxation laws; pensions, allowances and benefits etc.; Commonwealth employment programs; health; migration and citizenship.¹³ The Act also provides the Commission with specific functions including promoting understanding of age discrimination and compliance with the Act through education.¹⁴

One key feature of the Act as introduced in 2004 was the inclusion of a ‘dominant reason test’. This test required a person to prove that age was the dominant reason rather than simply ‘a’ reason for unfavourable treatment (as was the case with the other Acts).¹⁵ The dominant reason test imposed on the individual a more difficult standard to prove age discrimination. The subsequent removal of this test is discussed in section 3 below.

The Act is limited in terms of the people it covers. Unlike other federal anti-discrimination legislation, it does not prohibit discrimination on the basis of the age of a person’s relative or associate.¹⁶ For example, a person seeking to lease premises but who is discriminated against because they have dependant elderly parents living with them who are not seen as desirable to a particular establishment would not be covered by the protections of the Act.¹⁷

Compared to other federal anti-discrimination legislation the Age Discrimination Act contains the broadest permanent exemptions to the protections offered by the Act. While the Act provides the Commission generally with functions to investigate and educate on age discrimination, unlike the other federal anti-discrimination Acts it did not initially set up the office of a full-time age-specific discrimination commissioner.¹⁸

Since the introduction of the Age Discrimination Act, reform has occurred to address two key gaps, resulting in a strengthened Act.

3 Subsequent strengthening of the Act

On 1 October 2008, the International Day of Older Persons,¹⁹ the Australian government announced its intention to remove the ‘dominant reason test’ from the Act.²⁰ The Act was subsequently amended in 2009 to remove this requirement so that people simply needed to establish that age was ‘a reason’ for the less favourable treatment they received.²¹ This amendment brought the Act into line with the other federal anti-discrimination laws and strengthened the protections under the Act.

The other key reform occurred in September 2010 with the Australian government's introduction of legislation into parliament to create the statutory office of a full-time, dedicated Age Discrimination Commissioner.²²

The creation of a special purpose Age Discrimination Commissioner provides important structural support for ensuring the protection of the rights of vulnerable age groups (both older and younger) through targeted education and advocacy and in combating broader ageist attitudes within our community.²³ It facilitates the specialist development of a full policy program of work in the area of age discrimination across areas of public life.²⁴ This includes educating the community about age discrimination and increasing awareness about access to the Commission's complaints process.²⁵

The creation of the position of Age Discrimination Commissioner brings the Age Discrimination Act into line with the other federal anti-discrimination Acts and is crucial to ensuring that age does not lose its place in discussions about human rights in Australia. It is a critical step toward achieving meaningful age equality within our community.

On 30 July 2011 the Australian government announced the appointment of the Hon. Susan Ryan AO as the inaugural Australian Age Discrimination Commissioner.²⁶

4 Complaints and Temporary Exemption Applications made under the Act

Apart from recognising and protecting important rights, the Act sets up a number of key processes within the age discrimination framework. Since the introduction of the Age Discrimination Act such processes have been and continue to be actively used by members of the community. Such processes provide people with an avenue to use their rights, for example, to, make a complaint or to test through exemption processes what is considered to be acceptable age-specific treatment. This paper will consider how two processes have been used from 2004 up until now to:

- a) make age discrimination complaints; and
- b) seek temporary exemptions.

4.1 Making age discrimination complaints

The Age Discrimination Act provides individuals with the right to make a complaint of unlawful age discrimination. A key function of the Australian Human Rights Commission is to investigate complaints of discrimination. Complaints made to the Commission are subject to a process of conciliation where, with the assistance of an impartial person, people attempt to settle the matter on their own terms. It is a free, accessible and informal service. Where the person is unable to conciliate the complaint with the Commission they have the option to apply to the Federal Magistrates Court or the Federal Court of Australia for a determination of the complaint.

Since the introduction of the Act in 2004,²⁷ complaints under the Age Discrimination Act have averaged 6.6% of the total complaints received per year. The number of complaints received under the Act increased from 78 in 2004/05 to 174 in 2009/10, in

line with an increasing number of complaints received by the Commission overall. The average number of age discrimination complaints made for the period 2004/05 to 2009/10 numbered 129 complaints per year. Age discrimination complaints have enjoyed a relatively high level of successfully conciliated complaints averaging 41.5% for this period. Recently, in comparison with the same period in the previous reporting year, the complaint figures for the period 1 July 2011 – 31 October 2011 demonstrated further growth with enquiries about age discrimination up 65%. Complaints received regarding age discrimination have increased by 44% and the majority of enquiries about discrimination were on the basis of being too old (up 78%).

The areas in which people can make complaints

Age-based discrimination will only be unlawful if it falls within one of the protected areas of public life outlined in the Age Discrimination Act.²⁸ The areas of public life in which discrimination on the basis of age is prohibited include:

- employment;²⁹
- education;
- access to goods, services and facilities;
- accommodation;
- access to premises; and
- the administration of Commonwealth laws and programs.

Potential examples of discrimination in these areas are: a club that restricts entrance to people of a certain age (access to premises and the provision of goods and services); or an organisation that restricts access to student discounts to people below a certain age (access to goods and services).

Of the complaints people have made under the Act, the majority of complaints were in the area of employment (an average of 69.2% of Age Discrimination Act complaints between 2004/05 and 2009/10). Of these the majority of complaints related to discrimination in employment on the basis of being 'too old'.

Protections against age discrimination in employment cover all types of workers including full-time, part-time and casual employees, as well as commission agents and contract workers.³⁰ Protections against discrimination also extend to recruitment practices (including offers of employment), as well as to the terms and conditions of employment, access to promotion and training opportunities and dismissal from a job.³¹

There are many examples of successfully conciliated outcomes achieved for people who have made a complaint to the Commission about discrimination in employment on the basis of age. Some examples are:

- 1) The complainant was 72 years old and employed as an English teacher with a private college. The complainant claimed that the owner of the college told him he should retire because of his age. The complainant said he felt he had no choice but to resign. The complaint was resolved by conciliation with the college agreeing that it would pay the complainant \$7500 compensation.

- 2) The complainant was over 50 years of age and had applied for a position on the internet and was told he did not have enough industry experience. He was then mistakenly sent an internal email from the company about his job application which said 'sounds good...but I think a bit old. Need to get back to him with a result though'. The complaint was resolved when the company agreed to pay \$10,000 and provided him with an apology.
- 3) The complainant was 43 years of age and had applied for a hospitality traineeship with a club. He alleged he was told that he was too old for the traineeship as it was for school leavers. The complaint was resolved with the club agreeing to arrange for the complainant to attend two of its hospitality courses free of charge and providing a statement of regret.
- 4) The complainant who was over 65 years of age was employed in a managerial position with a mining company. The complainant was asked to move to a consultancy position (an option which he felt he had no choice but to accept). Within a matter of days a younger person was subsequently placed in his original position and the complainant's new position was made redundant. The company agreed to pay the complainant \$50,000 compensation.
- 5) The complainant was 50 years of age and alleged he was excluded from applying for an advertised position with a company because its job advertisement said it was looking for 'young' individuals. The complaint was resolved with the company providing the complainant with an apology.
- 6) The complainant was 49 years old and was employed with a manufacturing company as a sales representative. She claimed she had been refused training opportunities and denied opportunities to travel overseas because of her age. The complaint was resolved with the company agreeing to provide a written apology and review its management practices.

The Commission also receives complaints of discrimination in employment on the basis of being 'too young'. Some examples of those complaints include:

- 1) The complainant's 15 year old daughter applied for a paid position at a summer school run by the respondent music society. The complainant claimed the respondent told her daughter her interview for the position was outstanding, but later informed her that it had decided all paid staff for the summer school had to be 'going into Year 12 as a minimum age'. The complaint was resolved by conciliation with the music society agreeing to contact the complainant's daughter regarding future opportunities. It also agreed to develop and implement anti-discrimination policies and procedures to use as the basis for any future recruitment opportunities.
- 2) The complainant's son was working at a fast food outlet and alleges that he was not provided with his regular shift on Saturday as it fell on a public holiday. He had worked this shift for the previous 12 months but alleges he was told that 'we get the younger ones to work on the public holidays as it's cheaper'. The company agreed to paid the complainant the amount of money that would have been earned on the day in question.

The Commission also received a number of complaints of unlawful discrimination on the ground of age in relation to access to goods, services and facilities (an average of approximately 20.7% of complaints between 2004/5 and 2009/10). Of the other areas of public life in which age discrimination is unlawful, an average of 2.7% of complaints were about superannuation and insurance and an average of 2.5% about the administration of Commonwealth laws and programs. Other areas of prohibited discrimination, including accommodation, education and advertisements, have attracted a small number of complaints since the introduction of the Act.

A recent example of a conciliated complaint of age discrimination in the provision of goods (here an insurance product) is as follows:

The complainant booked an interstate holiday for himself and his wife through an airline website and paid an additional amount for travel insurance. Eight weeks before the proposed date of travel the complainant was diagnosed with cancer and was told that he would need a long course of treatment. The complainant stated he was too ill to travel and made an insurance claim. The complainant stated the claim was rejected because he was over 70 years of age. The complaint was resolved by conciliation with the insurance company agreeing to pay approximately \$1400 in compensation for the cost of the flight.

These examples show how individuals have used the Commission's complaints process in very different circumstances to successfully conciliate their matters with access to a broad range of solutions.

The areas people cannot make complaints

As mentioned in Part 2 of this paper, the Age Discrimination Act contains a number of permanent exemptions.³² The effect of an exemption is that conduct or behaviour that would otherwise amount to age discrimination will not be unlawful if it falls within one of these exemptions. The reasoning behind this differs between exemptions. The logic behind certain permanent exemptions is that they allow for otherwise discriminatory actions to occur because they are seen as necessary or leading to a good outcome for certain social purposes. For example, the Age Discrimination Act provides that it is not unlawful to provide health services only to people of a particular age if evidence shows that such a service would be effective for those people.³³

Other exemptions can, in certain circumstances, protect entire institutions from the reach of anti-discrimination laws. For example, the 'religious bodies' exemption in the Age Discrimination Act allows religious bodies, such as church institutions, to discriminate against people on the basis of their age if it 'conforms to the doctrine, tenets or beliefs of that religion' or 'is necessary to avoid injury to the religious sensitivities of adherents of that religion'.³⁴

The Age Discrimination Act also includes exemptions for youth wages; acts done in direct compliance with certain federal and State/Territory laws; the administration of migration and citizenship laws and superannuation and insurance (where discriminatory action is based on actuarial or statistical data and is reasonable).³⁵

The following example illustrates the effect of the permanent exemption provisions. A person makes a complaint to the Commission on the basis that an employer has stopped making voluntary deductible superannuation contributions to the person

because they are over the age of 75. The person would not be able to proceed with their complaint because an exemption applies – specifically section 38 of the Age Discrimination Act which exempts age-based discrimination where it is undertaken in compliance with a federal Act relating to superannuation.

It should be noted that in September 2011, the Australian Government introduced a Bill into Parliament that will abolish the age limit on the payment of the superannuation guarantee to older workers. This measure is likely to come into effect on 1st July 2013.³⁶

The Age Discrimination Act also allows for positive measures to be taken on the basis of age.³⁷ This means, for example, that it would not be unlawful to provide welfare services to young homeless people because such services are intended to meet a need that arises from the often greater need young people have for welfare services (including information, support and referral) than other people. Some types of Seniors rebates could also be examples of positive measures for older people.

4.2 Seeking temporary exemptions

Apart from enabling individuals to make complaints, another important process the Age Discrimination Act provides for is the ability of individuals and organisations to seek temporary exemptions.

Distinct from the permanent exemptions that exist in the Act³⁸ (described in 4.1 above) a person or group of people may apply to the Commission to grant temporary exemptions from some parts of the Age Discrimination Act.³⁹ This process requires certain age-specific requirements, schemes and services to be tested against the requirements of the Act (including weighing it up against other competing policy objectives). Temporary exemptions may be granted for a period of no more than five years.⁴⁰

The Age Discrimination Act does not set out how the Commission should exercise the power to grant exemptions. The Commission has developed guidelines which explain the criteria the Commission applies in deciding whether to grant an exemption and the procedure the Commission follows in considering an exemption application. The Commission guidelines are available at: http://humanrights.gov.au/legal/exemptions/ada_exemption/ada_exemp_info_app.html).

In considering an application, the Commission will consider whether the exemption is necessary and whether the exemption is consistent with the objectives of the Act. In granting the exemption, the Commission can impose terms or conditions or limit the exemption to particular circumstances and activities. The Commission seeks to make decisions in a transparent manner and generally seeks public comment on exemption applications before making a decision.

Over the period 2004 to 2011 eight temporary exemption applications have been made to the Commission under the Age Discrimination Act. These have all been made by organisations (as opposed to individuals). Of the six applications that been decided, the commission has declined to grant the exemption sought in four cases. Three of those four applications were declined because the Commission found that

the proposed age-specific programs were most likely a 'positive discrimination' measure and were not, therefore, unlawfully discriminatory. The Age Discrimination Act exempts positive discrimination measures as part of recognising that there are times when people need to be treated differently in order to remedy disadvantage they experience because of their age (such as being older or younger). These measures attempt to 'level the playing field' (e.g. access to the Age Pension). As such, the proposed age-specific programs did not require a temporary exemption to be in place.

Examples of temporary exemption applications that have been declined by the Commission because the age-specific program was considered to be a 'positive measure' are as follows:

- a) Plus 40 was a new web-based employment and training service established specifically to service the needs of unemployed and employed people who were over 40 years of age. Plus 40's aim was to provide services intended to promote the employment prospects of people over 40 years as it claimed there was a shortage of effective employment and training services for this market disadvantaged age group. Plus 40 sought a temporary exemption as it intended to establish 40 years of age as the minimum age required to utilise its services. The Commission was of the view that the activities of Plus 40 were intended to meet an age related need and reduce disadvantage experienced by people over 40. Accordingly, the Commission found that the activities fell within the permanent 'positive discrimination' exemption and a temporary exemption was unnecessary.⁴¹
- b) The University of Western Sydney sought a temporary exemption to allow it to offer three 'end of career transitioning schemes' to permanent academic staff. Expressions of interest in the schemes were to be accepted or rejected on the basis of age. The Commission was of the view that the proposed schemes were all 'positive discrimination' measures because they provided a genuine benefit to older academic staff, provided financial benefits to older staff who wished to transition from work to retirement and would not operate to perpetuate negative stereotypes about older people. As such, the Commission found the proposed schemes were 'positive discrimination' measures and a temporary exemption was unnecessary.⁴²
- c) Youth Connect was a not for profit organisation which had been contracted by the Department for Victorian Communities to provide training and job-search assistance to young people between 15 and 24 years of age. Youth Connect applied for a temporary exemption to allow it to advertise employment vacancies specifically for young people between 15 and 24 years of age. The Commission found that the program provided a genuine benefit to young people, assisted young people in making a transition from school or training to employment and reduced disadvantage experienced by young people between 15 and 24 years of age. As such, the Commission found the proposed schemes were 'positive discrimination' measures and a temporary exemption was unnecessary.⁴³

One temporary exemption application received by the Commission was granted (and subsequently extended) subject to certain conditions:

- d) A government Continence Aids Assistance Scheme provided assistance in reducing the costs of continence aids to people between the ages of 16 and 65 years. The aim of the scheme was to assist eligible clients with a permanent disability to overcome disability specific costs that create barriers to seeking and obtaining employment and participating in the community. People over the age of 65 years were able to access the scheme if they could establish that they worked in paid employment of at least eight hours per week. A temporary exemption was sought to enable the scheme to continue while a review of the scheme was conducted.

The Commission found that the scheme would likely constitute unlawful discrimination in the provision of goods or services or in the administration of Commonwealth laws and programs. The Commission also found that the Government had undertaken a national review of community care programs and that the Government required more time to develop an effective longer term strategy for simplifying and streamlining arrangements.

The Commission granted the temporary exemption (and a subsequent 12 month extension) subject to the condition that the department advise the Commission by certain specified dates of:

- the status of the review and;
- the changes the department proposed to make to the age related restrictions before the expiration of the temporary exemption.⁴⁴

The Commission declined to grant one temporary exemption application because the program was considered disproportionate and inconsistent with the objects of the Age Discrimination Act:

- e) Carnival Australia was a cruise company that applied for a temporary exemption to restrict the ability of people under 21 to take part in its cruises between 1 November and 30 January each year unless they were accompanied by a parent or guardian. Carnival Australia submitted that the policy would enable it to ensure the security, comfort, health and safety of its passengers aboard its ships. The Commission declined the application for the following reasons:

Firstly, the Commission was not satisfied that unaccompanied under-21's presented a serious risk to the security, comfort, health and safety of passengers.

Secondly, the Commission did not consider the proposed exclusion of all unaccompanied under-21's to be a proportionate measure and considered the effect of the application to be broader than its intended purpose because it affected all persons under the age of 21, regardless of whether they were school leavers, university students or in full-time employment.

Finally, the Commission considered that granting the exemption would be inconsistent with the objects of the Age Discrimination Act.⁴⁵

Carnival Australia subsequently amended its policy and made a new application to the Commission for a temporary exemption.

- f) Carnival Australia applied for a temporary exemption to permit it to impose certain restrictions based on age, including requiring passengers under the age of 19 to be accompanied by a responsible adult on cruises departing between 1 November and 7 January each year and limiting to 60 the number of passengers under the age of 19 who travel without an adult on cruises departing between 8 and 31 January of each year.

The Commission granted the application based on a number of factors including that the amended policy pursued a legitimate public policy goal (health, safety and security) and was appropriately targeted in its approach (the age limit was reduced from 21 to 19 years of age).⁴⁶

5 Conclusion

The introduction of the Age Discrimination Act in 2004 represented a significant expansion of people's rights and sent a clear signal to the Australian community that in certain areas of public life, age discrimination was unacceptable and unlawful. The Age Discrimination Act remains the primary source of federal protection offered against unlawful age discrimination in Australia. It gives people the right to make individual complaints of age discrimination and provides for an informal and effective conciliation process to resolve complaints. It is an important tool for raising awareness of unfair practices and for dismantling age-based stereotypes that continue to exist within our community.

With improved protections and the creation of the office of a full-time federal Age Discrimination Commissioner, the road ahead will more likely reach the required destination. That destination is to meet the key purpose of the Act - to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights. It is through this recognition and acceptance that we will ensure that everyone's human rights are respected and protected in a community that is inclusive of us all.

If you believe that you or someone that you know has been subject to age discrimination we encourage you to consider making a complaint to the Australian Human Rights Commission. You can contact the Complaints Infoline on 1300 656 419 or visit the Complaints section of the Commission website at:

http://humanrights.gov.au/complaints_information/index.html

¹ J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007).

² The Australian Human Rights Commission was then called the 'Human Rights and Equal Opportunity Commission'.

³ See articles 1.1(a) and 1.1 (b) of the *Discrimination (Employment and Occupation) Convention* 'ILO 111' (opened for signature on 25 June 1958, [1974] ATS 12 - entered into force on 15 June 1974). At <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111> (viewed 5 December 2011). In exercising 1.1(b) the Australian Government added a number of grounds including 'age' to the *Human Rights and Equal Opportunity Regulations 1989* (Cth), r 4. See Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) (opened for signature on 23 March 1976, [1980] ATS 23 – entered into force on 28 January 1983). At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 21 October 2011). While neither Article specifically mentions 'age' as a ground of discrimination, the UN Human Rights Committee has held that in Article 26 of the ICCPR 'other status' includes age – see *Love v Australia*, Communication No 983/2001, UN Doc CCPR/C/72/D/885/1999 and *Schmitz-de-Jong v Netherlands*, Communication No 885/1999, UN Doc CCPR/C/72/D/855/1999. See also Article 2 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (opened for signature on 19 December 1966, [1976] ATS 5 – entered into force on 10 March 1976). At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 21 October 2011) which refers to 'other status' which, based on the UN Committee's comments in relation to Article 26 of the ICCPR, would arguably include the ground of age. See also the *Convention on the Rights of the Child* (opened for signature on 20 November 1989, [1991] ATS 4 – entered into force on 16 January 1991). At <http://www2.ohchr.org/english/law/crc.htm> (viewed 21 October 2011) which contains many social, economic and cultural rights for the benefit of people under 18. Australia also made commitments under the *Political Declaration and Madrid International Plan of Action 2002* adopted at the Second World Assembly on Ageing 2002 (a record of proceedings and links to the Declaration are available at <http://social.un.org/index/Ageing/Resources/UNReportsandResolutions/SecondAssemblyonAgeing.aspx> (viewed 21 October 2011)). Commitments made by Australia under a declaration are not binding on Australia in international law in the same manner as a Convention – for detailed commentary please see J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), pp 3-5.

⁴ See for example the *Equal Opportunity Act 1984* (WA) and the *Anti-Discrimination Act 1996* (NT).

⁵ See *Age Discrimination Act 2004* (Cth), s 3 (Act as of 2007 and 2011); J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), p1.

⁶ See *Age Discrimination Act 2004* (Cth), ss 3(b) & (d) (Act as of 2007 and 2011); J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), p1.

⁷ See *Age Discrimination Act 2004* (Cth), s 3(e) (Act as of 2007 and 2011); J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), p1.

⁸ Direct discrimination occurs when a person is treated a person less favourably on the basis of the person's age, a characteristic that appertains generally or is generally imputed to persons of that age: s 14 of the *Age Discrimination Act 2004* (Cth).

⁹ Indirect discrimination occurs when a condition, requirement or practice applies generally but has the effect of disadvantaging a person because of their age and is unreasonable in all the circumstances: s15 of the *Age Discrimination Act 2004* (Cth).

¹⁰ *Age Discrimination Act 2004* (Cth), ss 25, 33-43.

¹¹ For commentary please see Australian Human Rights Commission, *Age discrimination – exposing the hidden barrier for mature age workers* (2010), p10. At <http://humanrights.gov.au/age/hiddenbarrier/index.html> (viewed 5 December 2011).

¹² *Age Discrimination Act 2004* (Cth), s 25.

¹³ *Age Discrimination Act 2004* (Cth), ss 25, 33-43. See also J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), pp 15-23.

¹⁴ *Age Discrimination Act 2004* (Cth), s53. Note. Originally the Act made reference to inquiries into complaints of discrimination and conciliation of those complaints under the s 53 but this has been subsequently amended and included in Part IIB of the *Australian Human Rights Commission Act 1986* (Cth), ss 46P - 46PN.

¹⁵ For example see *Age Discrimination Act 2004* (Cth), s16, Act No. 68 of 2004 as amended as of 10 July 2009. At <http://www.comlaw.gov.au/Series/C2004A01302> (viewed 5 December 2011). The

current Age Discrimination Act does not contain this section. For commentary see J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), pp 10-11.

¹⁶ J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), p 12.

¹⁷ See Senate Legal and Constitutional Committee, *Committee Hansard*, 9 September 2003, p 19. For commentary see J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), p 12.

¹⁸ For example see *Age Discrimination Act 2004* (Cth), s16, Act No. 68 of 2004 as amended as of 28 July 2009. At <http://www.comlaw.gov.au/Details/C2011C00581> (viewed 25 October 2011) which does not make provision for an Age Discrimination Commissioner. The current *Age Discrimination Act 2004* (Cth) at <http://www.comlaw.gov.au/Details/C2011C00583> (viewed 25 October 2011) was amended by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) to make provision for an Age Discrimination Commissioner – see Part 6A ss 48-50. For commentary see J Hemingway, *Roadmap to the Age Discrimination Act 2004*, Australian Human Rights Commission, (2007), pp 24-25.

¹⁹ 1 October is the designated International Day of Older Persons. On 14 December 1990, by UN General Assembly resolution 45/106, 1 October was designated International Day of Older Persons. At <http://www.un.org/en/events/olderpersonsday/> (viewed 2 December 2011).

²⁰ See: Attorney-General for Australia, 'Government Strengthens Protection for Older Australians' (Media Release, 1 October 2008). At http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_FourthQuarter_1October2008-GovernmentStrengthensProtectionforOlderAustralians (viewed 25 October 2011).

²¹ *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Schedule 1. For example see *Age Discrimination Act 2004* (Cth), s16, Act No. 68 of 2004 as of 10 July 2009. At <http://www.comlaw.gov.au/Details/C2009C00321> (viewed 25 October 2011) which incorporates the dominant reason test. The *Age Discrimination Act 2004* (Cth) as amended as of 5 August 2009 at <http://www.comlaw.gov.au/Details/C2009C00377> (viewed 25 October 2011) does not contain the dominant reason test (a position which is reflected in the current Act).

²² See: Attorney-General for Australia, 'Tackling age discrimination' (Media Release, 30 September 2010). At http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_ThirdQuarter_30September2010-Tacklingagediscrimination (viewed 25 October 2011). See also the amending legislation: *Sex and Age Discrimination Legislation Amendment Act 2011*(Cth), Schedule 2, Part 1. At <http://www.comlaw.gov.au/Details/C2011A00040> (viewed 25 October 2011).

²³ Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010 (2010), para 6.1 (30). At http://humanrights.gov.au/legal/submissions/2010/20101103_inquiry_SDA.html (viewed 25 October 2011).

²⁴ Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010 (2010), para 6.1 (30). At http://humanrights.gov.au/legal/submissions/2010/20101103_inquiry_SDA.html (viewed 25 October 2011).

²⁵ Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010 (2010), para 6.1 (31). At http://humanrights.gov.au/legal/submissions/2010/20101103_inquiry_SDA.html (viewed 25 October 2011).

²⁶ See: Attorney-General for Australia, 'Appointment of Australia's first Age Discrimination Commissioner' (Media Release, 30 July 2011). At http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_ThirdQuarter_30July2011-AppointmentofAustraliasfirstAgeDiscriminationCommissioner (viewed 25 October 2011).

²⁷ Complaints for 2003 – 2004 have not been included in this data as the Age Discrimination Act came into force on 23 June 2004 and only one complaint was received during this year see: Human Rights and Equal Opportunity Commission, *Annual Report 2003 – 2004*, p 69. At http://www.humanrights.gov.au/about/publications/annual_reports/2003_2004/ar2003_2004_full.pdf (viewed 5 December 2011).

²⁸ *Age Discrimination Act 2004* (Cth), Part 4, Divisions 1-3.

²⁹ Note that discrimination will not be unlawful where a person is unable to carry out the inherent requirements of the particular position or employment because of their age. See *Age Discrimination Act 2004 (Cth)*, s18(4).

³⁰ *Age Discrimination Act 2004 (Cth)*, ss 18-20.

³¹ *Age Discrimination Act 2004 (Cth)*, s18.

³² For further commentary please see Australian Human Rights Commission, *Age discrimination – exposing the hidden barrier for mature age workers* (2010), pp 10-11. At

<http://humanrights.gov.au/age/hiddenbarrier/index.html> (viewed 5 December 2011).

³³ See the example given in the *Age Discrimination Act 2004 (Cth)*, s 42(1).

³⁴ *Age Discrimination Act 2004 (Cth)*, s 35.

³⁵ *Age Discrimination Act 2004 (Cth)*, ss 25, 33-43.

³⁶ Commonwealth, Parliamentary Debates, House of Representatives, 2 November 2011, pp. 6-10 (The Hon Bill Shorten MP, Assistant Treasurer and Minister for Financial Services & Superannuation).

³⁷ *Age Discrimination Act 2004 (Cth)*, s 33.

³⁸ For an explanation of permanent exemptions please see Australian Human Rights Commission, *Age discrimination – exposing the hidden barrier for mature age workers* (2010), pp 10-11. At

<http://humanrights.gov.au/age/hiddenbarrier/index.html> (viewed 5 December 2011).

³⁹ *Age Discrimination Act 2004 (Cth)*, s 44.

⁴⁰ *Age Discrimination Act 2004 (Cth)*, s 44(3)(c).

⁴¹ Full application and decision available at:

http://www.humanrights.gov.au/legal/exemptions/ada_exemption/plus40_Pty_Ltd.htm (viewed 5 December 2011).

⁴² Full application and decision available at:

http://humanrights.gov.au/legal/exemptions/ada_exemption/20071126_uws.html (viewed 5 December 2011).

⁴³ Full application and decision available at:

http://humanrights.gov.au/legal/exemptions/ada_exemption/20070214_youth_connect.html (viewed 5 December 2011).

⁴⁴ Full application and decision available at:

http://www.humanrights.gov.au/legal/exemptions/ada_exemption/dept_health07.html (viewed 5 December 2011).

⁴⁵ Full application and decision available at:

http://www.humanrights.gov.au/legal/exemptions/ada_exemption/carnival20091103.html. (viewed 5 December 2011).

⁴⁶ Full application and decision available at:

http://humanrights.gov.au/legal/exemptions/ada_exemption/20101221_carnival.html. (viewed 5 December 2011).