

AGE DISCRIMINATION

An overview of the *Age Discrimination Act 2004*

By Elizabeth Broderick



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John was 55 years old when he applied for a graduate information technology position with a large government department through a private employment agency. Despite having worked for the department for 10 years and having over 30 years' relevant experience, John's

application was rejected. John claimed that the employment agency told him that he 'should not be applying for graduate positions'. John alleged that he had been discriminated against because of his age and complained to the Human Rights and Equal Opportunity Commission (HREOC).

When HREOC contacted the government department to investigate the complaint, the department denied discriminating against John. It claimed that it was unaware of his application, as it had only become involved in the recruitment process once candidates had been shortlisted by the employment agency. In this case, John had not reached the interview stage of the recruitment process. The employment agency in turn denied discriminating against John on the basis of his age, arguing that age was not considered relevant to his application; rather, John's application had been rejected in the mistaken belief that he was already employed with the department at the time he made the application.

In 2006/2007, HREOC received 106 complaints under the *Age Discrimination Act 2004 (Cth)* (ADA), including John's complaint. In terms of gender breakdown, 67 per cent of complainants were men and 33 per cent women. Each year, almost one-third of complaints received under the ADA are conciliated by HREOC, and of these, close to 80 per cent are resolved by conciliation.¹ John's case is one such example. In this case, the conciliation process resulted in the employment agency agreeing to pay John \$2,000 in general damages, and to contribute \$4,500 towards John's legal costs in relation to his complaint.

John's complaint and the 105 other complaints received by HREOC in 2006/2007 were made under the ADA, the federal legislation that prohibits direct and indirect discrimination on the basis of age in various areas of public life (see below). The ADA also makes it an offence to publish an advertisement or notice (including in a newspaper, magazine, television or radio) with the intention of unlawfully discriminating against someone on the basis of age² or to victimise someone for making a complaint of age discrimination to HREOC.³

THE ADA – AN OVERVIEW

The ADA took effect in June 2004 and has two purposes. Firstly, it provides an enforceable federal mechanism for dealing with individual cases of age discrimination. Secondly, it is intended to be a driver of broader attitudinal change.

The objects of the ADA are to ensure, as far as practicable, that people of all ages have the same fundamental rights and equality before the law, as well as to 'respond to

demographic change and Australia's ageing population by removing barriers to older people participating in society, particularly in the workforce, and changing negative stereotypes about older people'.⁴

This is particularly significant considering statistical data that show the accelerated pace at which Australia's population is ageing. As at June 2006, 2.7 million Australians were aged 65 years and over, and this is expected to more than double over the next 30 years. With the exception of Indigenous peoples, we are also living much longer, with Australians enjoying one of the highest life expectancies in the world.⁵ As we live and work for longer, it is crucial that older Australians of all ages are able to fully participate in society, and it is in this area that the ADA has an important role to play.

APPLICATION OF THE ADA

The ADA is a federal law and so applies throughout Australia. The circumstances in which the ADA applies are set out in s10 of the Act. Its application is limited so that it does not overstep the power granted to the federal parliament under s51 of the Constitution.

The ADA does not purport to displace or limit the operation of state and territory laws capable of operating concurrently with the ADA. The ADA deals with potential inconsistency between jurisdictions by allowing >>



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Prohibiting discrimination on the basis of age, the ADA is also intended to drive broader attitudinal change.

complainants to choose the jurisdiction where they lodge their complaint – either under the federal ADA or under state/territory legislation.⁶

To date, no cases under the ADA have proceeded to hearing in the Federal Court or the Federal Magistrates Court. However, HREOC's conciliation process has settled a high proportion of complaints. The *Human Rights and Equal Opportunity Commission Act 1984* (Cth) (HREOCA) sets out the procedure for making a complaint to HREOC. HREOC's complaint-handling process is free, impartial and informal, and there are practical reference tools to guide parties on the complaint-handling process that are freely available on the HREOC website.⁷

WHAT AGE DISCRIMINATION IS PROHIBITED BY THE ADA?

The ADA makes it unlawful for a person to discriminate against another person 'on the ground of the other person's age' in certain circumstances. The Act provides that a person is taken to do an act on the ground of a person's age if they do it either directly ('direct discrimination') or indirectly ('indirect discrimination').⁸ 'Age' is defined in s5 of the ADA as including 'age group'. While the definition does not cover the age that might be *imputed* to a person, the definition of direct discrimination under the ADA does attempt to redress negative stereotypes that are generally attributed to persons of a particular age or age group. Direct discrimination under the ADA covers both less favourable treatment on the basis of the age of the aggrieved person; and on the basis of 'a characteristic that is generally imputed to persons of the age of the aggrieved person'.⁹ An example of unlawful age discrimination on the basis of an imputed characteristic may be treating a mature-age worker less favourably by denying a promotion on the basis of a generally held assumption that workers over 40 years of age have poor IT skills and are unable to adapt to new technology. To make a claim of unlawful age discrimination on the basis of an imputed characteristic, it is not necessary to establish that the characteristic exists in every case, only that it generally exists or operates.¹⁰

THE 'DOMINANT REASON' TEST

The threshold test for direct age discrimination under the ADA is the 'dominant reason' test. This test states that where

an act is done for two or more reasons, the act will be discriminatory under the ADA only if the person's age was the *dominant reason* for doing the act.¹¹ The introduction of the dominant reason test in the ADA was a departure from the position in other federal anti-discrimination law. For example, under the *Race Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth),¹² a complainant need show only that their race or sex, respectively, was *one* reason for their less favourable treatment. Their race or sex does not need to be the dominant or substantial reason.

The practical effect of the dominant reason test was examined by the House of Representatives' Legal and Constitutional Affairs Committee's Inquiry into Older People and the Law. The Committee's report in September 2007 noted the evidence before it suggesting that the dominant reason test makes it more difficult for people to successfully prove age-based discrimination, in comparison with other forms of unlawful discrimination.¹³ The Committee therefore endorsed HREOC's submissions, which recommended that the dominant reason test be removed from the ADA to bring it into line with other anti-discrimination legislation.¹⁴

INDIRECT DISCRIMINATION

'Indirect' discrimination is dealt with under s15 of the ADA, which provides:

- (1) For the purposes of this Act, a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the age of the aggrieved person if:
- (a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and
 - (b) the condition, requirement or practice is not reasonable in the circumstances; and
 - (c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.¹⁵

An example might be imposing a seemingly neutral requirement for 10 years' experience in a job advertisement, when this level of experience is not necessary to perform the job properly. This could disproportionately disadvantage younger jobseekers with appropriate skills who are not considered for the position, or who do not apply, because of the requirement.

AGE DISCRIMINATION AND DISABILITY DISCRIMINATION

Not only is the ADA the only piece of federal anti-discrimination legislation to contain the dominant reason test, but it is also unique in the way that it deals expressly with possible intersectional discrimination. Under s6 of the ADA, complaints of age discrimination are taken to expressly exclude complaints of disability discrimination. The rationale behind this provision is to address 'overlap ... where a person has a disability that is or could be related to their age (such as impaired hearing or mobility)'.¹⁶ People's experiences of discrimination are often 'multi-dimensional and complex'¹⁷ and, while a person with a disability can still bring an age discrimination complaint under the ADA, where age was the dominant reason for the discrimination,

complaints of disability discrimination must be dealt with under the *Disability Discrimination Act 1992*.

DISCRIMINATION AGAINST A RELATIVE OR ASSOCIATE ON THE BASIS OF AGE

Unlike the *Race Discrimination Act 1975* and the *Disability Discrimination Act 1992*, the ADA does not prohibit discrimination on the basis of the age of a person's relative or associate. In its submission to the Older People and the Law Inquiry, HREOC recommended extending the protections under the ADA to relatives and associates. It noted that making anti-discrimination protections available to relatives and associates under the other federal anti-discrimination legislation had not resulted in a large number of complaints being made on this basis, and had ultimately been largely uncontroversial. HREOC was especially concerned with protecting older people with carers' responsibilities. This is particularly significant considering the recent statistical data on Australia's changing demography, which show that older spouses represent 43 per cent of primary carers of older people with a disability or poor health. Further, in 2005, grandparents were the main informal child-carers, providing care for 60 per cent of children receiving informal child care.¹⁸

PROSCRIBED AREAS OF AGE DISCRIMINATION

The ADA makes discrimination on the basis of age unlawful in various areas of public life: employment, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information.¹⁹

However, the majority of complaints received by HREOC under the ADA relate to alleged discrimination in employment. Of the 106 complaints received by HREOC under the ADA in 2006/2007, 68 per cent related to discrimination in employment and almost half (46 per cent) of complaints received were from people in the 45-54 years and 55-64 years age groups. This article therefore focuses on age discrimination in employment.²⁰

AGE DISCRIMINATION IN EMPLOYMENT

The ADA extends the prohibition on age discrimination in employment to discrimination against employees, commission agents and contract workers.²¹ It applies in relation to recruitment and offers of employment, as well as the actual terms and conditions of employment, access to promotion and training, and dismissal or any other detriment. However, the Act does not extend to voluntary work²² or domestic duties performed in private households.²³

The ADA also prohibits discrimination in employment on the basis of age in partnerships consisting of more than six partners.²⁴ This includes discrimination in decisions about who can become a partner, and the terms and conditions upon which a partnership is offered. Further, the ADA extends the prohibition on age discrimination in employment to qualifying bodies and registered organisations under the *Workplace Relations Act 1996* (Cth) and in the context of employment agencies.²⁵

Section 32 of the ADA relates to requests for information. This provision makes it unlawful to request or require another person to provide information if persons of a different age would not be requested or required to provide that information in circumstances that are the same or not materially different. In this regard, the ADA encourages employers to think carefully about how they write job advertisements and selection criteria, and to be aware that using descriptors such as 'energetic', 'young', 'lively' or 'dynamic' could possibly expose them to allegations of age discrimination.²⁶

EXEMPTION WHERE PERSON UNABLE TO CARRY OUT INHERENT REQUIREMENTS OF THE POSITION

The ADA offers a statutory defence to an allegation of age discrimination where a person is unable to carry out the inherent requirements of the particular position or employment because of their age.²⁷ Practitioners of discrimination law will be only too familiar with the 'inherent requirements' concept; suffice it to say that the inherent requirements of a particular employment means 'something essential' to, or an 'essential element' of, a particular position.²⁸

GENERAL EXEMPTIONS

As with other pieces of federal anti-discrimination legislation, there are a number of general exemptions >>

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to the substantive provisions. However, the ADA is unique in anti-discrimination law in terms of both the number and breadth of its exemptions.

Positive discrimination

The ADA provides a general exemption allowing positive measures to be taken (or positive discrimination) on the basis of age, where the action:

- provides a *bona fide* benefit to a person of a particular age (such as a hairdresser giving a discount to a person holding a Seniors Card);
- is intended to meet a need that arises for persons of a particular age (such as additional provision of welfare services for young homeless people); or
- is intended to reduce disadvantage experienced by persons of a particular age (such as the additional notice periods that are commonly given to mature-age workers to reduce the historical disadvantage these workers experience upon retrenchment).²⁹

Essentially, the positive discrimination exemption under the ADA seeks to redress historical disadvantage that has been experienced by persons of a particular age or age group by recognising that there are some circumstances in which different treatment based on age are 'legitimate, broadly socially accepted, or justified by other strong policy interests'.³⁰

Other general exemptions

The ADA also contains several other general exemptions in relation to unlawful age discrimination, as set out in part 4, division 4.³¹ These include an exemption in relation to youth wages,³² and an exemption in the terms and conditions on which an annuity, insurance policy or membership of a superannuation scheme is offered or refused, provided that it is reasonable for the discriminator to rely upon the actuarial or statistical data which forms the basis of their decision,³³ as well as exemptions for charities and religious bodies.³⁴

In its submissions to the Older People and the Law Inquiry, HREOC recommended either removing or modifying some of the general exemptions contained in the ADA,³⁵ such as the exemption in relation to voluntary bodies (which is not contained in the *Racial Discrimination Act* 1975 or the *Disability Discrimination Act* 1992). The broad scope of the exemption limits the ability for people to make complaints of alleged acts of unlawful discrimination in an important area of public life.

CONCLUSION

The ADA brought age discrimination into the federal jurisdiction. It seeks to raise awareness of age-based stereotypes, and to act as a catalyst for social change.

As Commissioner responsible for Age Discrimination, I have a particular role in redefining how we think about our own age and our perceptions about remaining in the paid workforce, as well as the transition to retirement. We also need to revisit the negative stereotypes that impede mature-age employment.

The ADA has a very important role to play here. The legislation came into effect in June 2004 and, since then, there have been repeated calls for reform. The report of the Older People and the Law Inquiry recommended that an independent review of the ADA be undertaken in 2009 to evaluate its effectiveness.

As Australia's population is ageing rapidly, and we are all living and working longer, the issue of age discrimination is perhaps one of the most significant social policy issues facing current and future generations, and will be a very important aspect of my work during my five-year term as Commissioner. ■

The HREOC has produced a suite of products to assist employers in understanding their obligations under the ADA which are all available on the HREOC website http://www.humanrights.gov.au/info_for_employers/index.html

Notes: **1** Of those matters where conciliation was attempted, 76% were resolved – see HREOC, *Annual Report 2006-2007*. **2** ADA, s50. **3** ADA, s51. **4** ADA, s3. **5** Australian Institute of Health and Welfare, Department of Health and Ageing, *Older Australia at A Glance* (4th edn), November 2007 available at <http://www.aihw.gov.au/publications/age/oag04/oag04.pdf>. **6** ADA, s12(5). **7** See http://www.humanrights.gov.au/complaints_information/index.html. **8** For a more detailed outline of 'direct' and 'indirect' discrimination, see HREOC, *Federal Discrimination Law 2005*, Chapter 2. **9** ADA, s14. **10** *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191, 207 (in the context of the *Sex Discrimination Act* 1984 (Cth)). **11** ADA, s16. **12** See s18 of the *Race Discrimination Act* 1975 (Cth) and s8 of the *Sex Discrimination Act* 1984 (Cth). **13** Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, September 2007, (see generally, paras 6.29-6.36 for discussion of the 'dominant reason' test under the ADA). **14** See Recommendation 43 of *Older People and the Law*. **15** ADA, s15(1)(a)-(c). **16** Explanatory memorandum to the Age Discrimination Bill 2003. **17** J Hemingway, HREOC, 'Roadmap to ADA: *The Age Discrimination Act* 2004', available at http://www.humanrights.gov.au/age/roadmap_ADA.html. **18** See Note 5 above. **19** ADA, Part 4, divisions 1-3. **20** For a more comprehensive analysis of the proscribed areas of age discrimination under the ADA, see HREOC, *Federal Discrimination Law* (2005) Chapter 2, available for download at HREOC's website at <http://www.humanrights.gov.au/legal>. **21** ADA, ss8, 19 and 20. **22** ADA, s36. **23** ADA, s18(3). **24** ADA, s21. **25** ADA, ss22,23 and 24. **26** See P Thew, 'Discrimination in Employment' in P Thew, K Eastman and J Bourke, *Age Discrimination: Mitigating Risk in the Workplace*, 1998; and, generally, Chapter 4, 'Age Discrimination and Human Resource Management in Practice', pp11-136. **27** ADA, ss18(4), 19(3) and 20(2). **28** For a discussion of the 'inherent requirements of the position' exemption see the High Court decision in *Qantas Airways Limited v Christie* (1998) 193 CLR 280. **29** ADA, s33. **30** ADA, revised Explanatory Memorandum, 5-10. **31** For a full discussion of the exemptions available under part 4, div 4 of the ADA see HREOC, *Federal Discrimination Law 2005*, (2005) Chapter 2. **32** ADA, s25. **33** ADA, ss37 and 38. **34** ADA, ss34 and 35. **35** See HREOC, *Submission No. 92*, available at http://www.humanrights.gov.au/legal/submissions/2007/older_people_and_the%20law_dec06.html.

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