

THE ELEPHANT IN THE ROOM

Report on age discrimination in employment

Presented to National Seniors Productive Ageing Centre

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A Study of Age Discrimination in Employment

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EXECUTIVE SUMMARY

Age discrimination, although widespread, is “the elephant in the room” – palpable but unmentionable. Australia loses incalculable talent and energy through age discrimination. Numerous studies stress the positive qualities of older workers, but the dice remain loaded against them. The federal government is currently encouraging people to remain in the workforce well past the once-mandatory retirement ages of 60 or 65, yet many older workers find themselves rejected. Interviewees in this study have experienced discriminatory practices in recruitment and promotion, as well as harassment, bullying and pressure to retire. Retrenchments and restructure programs frequently target older workers. However, employers are aware of the requirements of the law, and avoid mentioning age as the deciding factor. The resultant difficulty of proving age discrimination discourages many people from making formal complaints under anti-discrimination or human rights legislation.

Some of our interviewees identified employment agencies as particularly likely to create a profile of the ideal employee that tends to exclude older applicants. Several reported being interviewed by much younger recruiters, and some suggested there is great intergenerational rivalry for promotion within companies.

When asked, employers will concede that older workers have many good features such as stability, responsibility, low rates of absenteeism and the like, but in the event they almost invariably give preference to younger people. These contradictory attitudes emerged clearly in a British study by Taylor and Walker (1994). In the United States, successive surveys of employers by the American Association of Retired Persons (AARP) have found that resistance to recruitment, training and promotion of older employees has hardly changed over a period of more than 20 years (AARP, 2000). More recently, Taylor has reviewed the evidence concerning discrimination and concludes that older workers are not only over-represented among those targeted for redundancy, but also that they have great difficulties in re-entering the paid work force (Taylor, 2009). An OECD study of nine European countries found that the share of older workers among recently hired employees was 13 per cent less than so-called “prime age” individuals (OECD, 1998)

In Australia, similar attitudes have been recorded in a series of studies dating back to the 1980s (Encel, 1999).

Retrenched workers face huge psychological and financial penalties, seldom gaining work at their previous skill levels or salaries. They often face a choice between retiring early or taking on casual, part-time work. Several of our contributors suggested that the familiar maxim of “last on, first off” is being transformed into “first on, first off”.

Women are particularly vulnerable to age discrimination. An American review in the 1980s drew attention to the double standard imposed on women. Middle-aged women attempting to enter the paid labour force after an absence due to family responsibilities are rejected on the grounds of lack of experience, whereas age is the actual determining

factor. On the other hand, older women can be eliminated on the grounds of being “over-qualified”. Age and gender thus interact to create a subclass of highly vulnerable workers, subject simultaneously to ageing and sexism, sometimes called “gendered ageism”. An Australian study in 1997, which elicited responses from 90 older women, found that a high proportion had experienced gendered ageism (Encel and Studencki, 1997)

This study includes summaries of age discrimination complaints lodged with the Human Rights Commission (HEREOC) and the NSW Anti-Discrimination Board (ADB). It also contains numerous first-hand accounts of unfavourable treatment in the workforce from informants who did not make formal complaints. There is a striking difference between the two sets of data. Complaints to the two statutory bodies are overwhelmingly concerned with difficulties encountered in the workplace itself. On the other hand, almost one half of contributed accounts were concerned with lack of success in applying for jobs. Since discrimination is very difficult to prove in the absence of overt acts, it may be assumed that the people concerned did not pursue the matter, but it is clear that they have been deeply affected by the shock of rejection.

Table 1 indicates the numbers of cases received from each source, and the range of issues involved. Because of the small number of cases we were able to obtain from the ADB, we have included the results of an earlier study also based on ADB files.

TABLE 1

Comparative Results from the Data Sources

ADB 1998 (n=22)

Overlooked in favour of younger people	9
Pressed to retire	8
Unfair treatment at redundancy	2
Other	3
Perceived discrimination when applying for job	2

ADB 2009 (n=-10)

Stigmatisation	1
Unfair treatment at redundancy	1
Harassment	1
Victimisation	1
Coerced reduction of hours worked	2
Social exclusion	1
Bullying	1

HREOC (n==14)

Perceived discrimination when applying for job	3
Unfair treatment at redundancy	5
Discrimination and harassment at workplace	6

CONTRIBUTED ACCOUNTS (n=50)

Perceived discrimination when applying for job	24
Unfair treatment at redundancy/retrenchment	8
Gendered ageism	4
Stigmatisation	3
Victim of restructuring	2
Pressed to retire	2
Other (bullying, victimisation, denial of promotion, denial of training opportunities, discouragement by superiors, misled by government schemes, difficulties with younger staff)	1 each

A prosperous, cohesive society cannot afford to overlook the ability of all age groups to make a contribution. Eliminating age discrimination in the workforce remains a challenge for governments, legislators, human resource specialists, employers and individuals. Australians pride themselves on a sense of fairness, which implies that a good work record will be rewarded by equitable treatment on the part of employers. The unrivalled economic prosperity of the half-century following the end of World War II also generated a sense of security. For many of our respondents, accustomed to a buoyant labour market, it has been difficult and painful to acknowledge that age is the effective reason for retrenchment and subsequent prolonged unemployment.

On the management side, there is an understandable reluctance to admit that age is the major reason for refusal of employment. These difficulties are perfectly encapsulated by our contributor, “Melanie”, aged 45, who used the expression “the elephant in the room” to convey her reaction when she realised the true purport of the perplexing questions fired at her by an interviewing board. “There are so many innuendoes and things not being said, because they can’t (legally) be said, but you know it’s there – it’s the elephant in the room! ... Going over my interview performance it came as a shock to realise OH! **That’s** why they were asking those questions! It was my **AGE!** Now it makes sense!”

INTRODUCTION AND LITERATURE REVIEW

The Elephant in the Room

Age discrimination, although widespread, is “the elephant in the room” – palpable but unmentionable. One of the contributors to our section on Personal Responses (no. 7, “Melanie”, aged 45), used the expression to convey her reaction when she realised the true purport of the perplexing questions fired at her by an interviewing board. “There are so many innuendos and things not being said because they can’t (legally) be said, but you know it’s there - it’s the elephant in the room! ...Going over my interview performance it came as a shock to realise OH! **That’s** why they were asking those questions! It was my **AGE!** Now it makes sense!”

Background

The existence of active discrimination against older workers has attracted attention for many years. Despite numerous studies stressing the positive qualities of older workers, the dice remain loaded against them. As far back as the 1950s, a longitudinal study based at Cambridge University noted that resistance to the employment of older workers was based on stereotypes which were demonstrably false. The same study also observed that older workers had proved their worth during the 1914-18 war, when they had been recruited in large numbers to take over the jobs of younger men performing military service (Welford, 1958). In the 1960s, studies published by the OECD emphasised the value of retaining older workers, and demonstrated that it was indeed possible to “teach old dogs new tricks” (Le Gros Clark, 1966).

The topic attracted little attention in the ensuing decades, mainly because of the large-scale entry of members of the baby boom generation into the labour force. With the end of the postwar economic boom, the issue of age discrimination acquired new salience. In 1994 a World Bank report criticised the use of so-called “early retirement” as a painless remedy for unemployment. “Rather than being painless, early retirement is a costly solution to the unemployment problem and an expensive way to restructure enterprises.” (World Bank, 1994) Similarly, the ILO deplored the way in which older workers were “pushed or pulled” out of the active labour force, so that they were often the first victims of enterprise restructuring or government measures to reduce labour supply (ILO, 1995).

Reduction in labour costs through “downsizing” has hit older workers particularly hard. Reviewing the effects of large-scale downsizing in the United States, the economist Lester Thurow remarked that many downsized older workers would lose more than 50 per cent of their previous wage if they were forced to move to other jobs, and added that “those over 55 are simply thrown out of the workforce” (Thurow, 1996:28). Australian studies confirm that vulnerability to downsizing increases with age, and also makes re-entry to employment extremely difficult (Encel, 1997; Encel and Ranzijn, 2007). Several of our contributors suggested that the familiar maxim of “last on, first off” was being transformed into “first on, first off”.

The overwhelming consensus of the literature on age discrimination in employment identifies the attitudes of employers as the overriding reason for the difficulties faced by older workers. When asked, employers will concede that older workers have many virtues such as stability, responsibility, low rates of absenteeism and the like, but in the event they almost invariably give preference to younger people. These contradictory attitudes emerged clearly in a British study by Taylor and Walker (1994). In the United States, successive surveys of employers by the American Association of Retired Persons (AARP) have found that resistance to recruitment, training and promotion of older employees has hardly changed over a period of more than 20 years (AARP, 2000). More recently, Taylor has reviewed the evidence concerning discrimination and concludes that older workers are not only over-represented among those targeted for redundancy, but also that they have great difficulties in re-entering the paid work force (Taylor, 2009). An OECD study of nine European countries found that the share of older workers among recently hired employees was 13 per cent less than so-called “prime age” individuals (OECD, 1998).

In Australia, similar attitudes have been recorded in a series of studies dating back to the 1980s (Encel, 1999).

Women are particularly vulnerable to age discrimination. An American review in the 1980s drew attention to the double standard imposed on women. Middle-aged women attempting to enter the paid labour force after an absence due to family responsibilities are rejected on the grounds of lack of experience, whereas age is the actual determining factor. There may be pressure to look young and attractive. On the other hand, older women can be eliminated on the grounds of being “over-qualified”. Age and gender thus interact to create a subclass of highly vulnerable workers, subject simultaneously to ageing and sexism (Nuccio, 1989). More succinctly, two British sociologists have summed up the problem as “gendered ageism” (Arber and Ginn, 1995: 7). An Australian study in 1997, which elicited responses from 90 older women, found that a high proportion had experienced gendered ageism (Encel and Studencki, 1997)

Complaints about age discrimination have increased significantly in recent years. In 2004, a large-scale survey was conducted in the UK by Age Concern, the largest charity connected with population ageing. They received 3403 responses from people aged over 50, the great majority of whom (85 per cent) believed they had been discriminated against because of their age. The largest single obstacle was identified as the negative attitude of employers (47 per cent of the sample). When asked if promotion prospects were limited above a certain age, almost 90 per cent agreed, and 58 per cent felt this started before the age of 50 (Age Concern, 2004).

Perhaps the largest inquiry of this kind was conducted by the American consulting firm, Kelly Services Inc, in 2006. Their survey covered 28 countries, and asked respondents to identify instances of discrimination in hiring, based on gender, disability and racial origin as well as age, during the preceding five years. The authors concluded that age had grown significantly as a basis for discrimination, and that it was taking newer and subtler forms.

Rates of age discrimination ranged from 30 per cent in Hungary and Mexico to a low of 10 per cent in Indonesia, Luxembourg and Sweden. Australia was ranked ninth with approximately 20 per cent. The survey also inquired about the incidence of discrimination in the workplace. Results indicated that this was less marked than discrimination in hiring, although the authors suggested that this may be due to the fact that workplace discrimination is less identifiable and is also less reported. They concluded that most people saw little value in pursuing the matter with formal complaints, while those who did were largely unsatisfied with the outcome and did not dwell on it.

The Kelly report concludes that age discrimination is on the rise, paradoxically at a time when the skill and experience of older workers are increasingly in demand. "Organisations that don't address discrimination in the workplace can suffer a range of costs....Many economies are facing skill shortages associated with labour conditions and ageing populations, which places greater importance on sourcing recruits from the widest possible pool of talent" (Kelly Services, 2006).

Similar findings have been reported in Australia over a number of years. In 1994, a survey of the unemployed by the Australian Bureau of Statistics found that 44 per cent of respondents aged 45 and over identified age as the most important single obstacle to re-employment, a figure which jumped to 64 per cent among respondents aged 55 and over (ABS, 1994). A more recent survey of "discouraged job seekers" by the ABS found that the most important reason reported for not actively looking for work (36 per cent of the sample) was "considered too old by employers". Among the characteristics of discouraged job seekers, the most salient was age: 52 per cent of the sample were aged 55 and over. Similar proportions were found in a study of older workers who were registered with various employment agencies. Out of 163, 90 (55 per cent) nominated age as the most important obstacle to obtaining employment (Encel and Studencki, 2004).

Commenting on the ABS survey just quoted, the director of a job agency, Shane Higgins, told the *Sydney Morning Herald* that thousands of discouraged job seekers were victims of age discrimination. "There is a large number of highly competent, highly qualified potential workers out there who cannot get work because employers don't want to hire people over the age of 55" (*SMH*, 25/6/10). The chairman of National Seniors Australia, Mr Everaldo Compton, took this further in a speech to a business conference in Western Australia in October 2009. The business world, he said, still had the antiquated view that older workers were no good. He argued that companies which forced people to retire in their 60s should be penalised (*Australian*, 13/10/2009).

Another indication of the extent of age discrimination was given by Julie Sloan, director of JSM Management Services, in a speech at the Public Libraries Conference in Adelaide in August 2007. In the previous 12 months, she reported, research in five JSM client groups, representing more than 2000 workers, found that five per cent of workers participating in workforce planning projects had personally experienced ageism, and a further sixteen per cent reported witnessing ageism at work.

These statistics and survey results support the proposition that age discrimination in employment is widespread. In this report, we have examined the matter from the point of view of the persons who experience age discrimination - a qualitative rather than a quantitative approach.

RESEARCH DESIGN

In an earlier study by Encel and Studencki (1998), access was permitted to the files of the NSW Anti-Discrimination Board (ADB). With the co-operation of Board staff, the researchers were able to inspect the records of cases which had been dealt with under the provisions of the Anti-Discrimination Act and were no longer active. Twenty-two cases became available, on condition of anonymity. However, five of the original complainants agreed to personal interviews which provided interesting corroborative detail.

Law reports of cases which had been dealt with by tribunals and courts, numbering sixteen in all, were also used as an important source of data, including judicial opinions and obiter dicta concerning the meaning of discrimination and the criteria for dealing with complaints.

As the report observes, reliance on documented cases gives only limited insight into the problem of discrimination, since most complaints are not proceeded with. The records of the ADB for the four-year period covered by the research indicated that only ten per cent of complaints were pursued to obtain a conciliated outcome or a tribunal hearing. More recent statistics, cited later in this report, suggest that the situation has not changed significantly.

On this occasion, ADB cases were again examined on a similar basis, with results described in the relevant section of this report. Unfortunately, access to ADB records was much more difficult to obtain, partly because of legal changes since the 1990s. In the end, we obtained records of only ten completed and de-identified cases. Details are given in a separate section of this report. We were also able to obtain access to conciliated cases dealt with by the Human Rights Commission, a Commonwealth body which was given the power to deal with complaints under the Age Discrimination Act of 2004. These are also described in a separate section of this report.

In order to increase our coverage, the research design provided for the collection of information from occupational associations, including professional bodies, trade unions and women's groups. Where feasible, requests were placed in the newsletters of these organisations to promote the research and find participants. Several informants made contact as a result of this publicity. Interviews were also sought with individuals who had contacted these bodies in reference to age discrimination in employment. This approach did not, however, prove to be fruitful and led to a very small number of contacts. We found the Internet to be very useful, providing a source of data not available at the time of the earlier research. Social networking sites, media comment sites and blogs provided a volume of uncensored comment on the experiences of a wide range of individuals. The

reliability of these accounts is, of course, open to question, and we examine this issue in our analysis of the cyber-data.

A list of Internet sites used, their target populations, and membership where known, is provided in the Appendix. Existing blog comments were accessed from four websites, and new messages were placed on another four social networking websites.

Interviews were conducted with people who contacted us by mail, telephone or email, including those who were responding to advertising. Details are given in the Appendix. Altogether, 36 interviews were conducted, mainly by phone, of which 14 came from NSW. Twenty-five were women, compared with eleven men.

We contacted a number of occupational associations and unions, as follows:

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- Australian Federation of University Women
- Business and Professional Women's Association
- Women Lawyers Association
- Flight Attendants Association
- Australian Education Union (and affiliated State bodies)
- National Tertiary Education Union
- Media and Arts Alliance
- Australian Nurses Association
- Australian Library Association
- Finance Sector Union
- Public Service Association (NSW)
- Construction, Forestry, Mining and Energy Union (CFMEU)
- Independent Education Union of Australia
- Liquor, Hospitality and Miscellaneous Workers Union (the Missoes)

Rates of Return

The comparative significance of our various sources, analysed by age group, geographic distribution, and gender, is shown in Tables 2, 3, and 4. Because of the small number of cases provided by the NSW Anti-Discrimination Board on this occasion, we have included columns showing the figures derived from the 1996 study by Encel and Studencki. Table 3 gives figures relating to interviews. Numbers are, of course, insufficient for statistical comparisons, but some differences in rates of return are suggestive. In particular, the figures do not support the popular belief that women complain more than men. The annual reports of the Anti-Discrimination Board and of the Human Rights Commission (HREOC) indicate fluctuations but no consistent pattern in relation to the gender of complainants, although HREOC's annual reports show interesting differences in relation to the private and public sectors of employment (examined in detail in that section of this report).

TABLE 2**Origin of Interviews**

State		Gender	
NSW	14	Male	11
Victoria	6	Female	25
Queensland	5		
S. Australia	1		
W. Australia	1		
Not stated	12		
Total	36		36

TABLE 3**Age Groups (Various Sources)**

Age	Personal Account	HREOC Cases	ADB 1998	ADB 2009
35—44	1	1	2	2
45---54	17	2	11	4
55---64	25	8	8	3
65 plus	7	3	8	1
Total	50	14	22	10

TABLE 4**Analysis by gender**

Personal Account	HREOC Cases	ADB 1998	ADB 2009
Male	35	8	10	6
Female	15	6	12	4
Total	50	14	22	22

From the tables, it is evident that the peak period when a person is likely to complain about age discrimination is in their early 50s. This applies not only to formal complaints to the Anti-Discrimination Board and the Human Rights Commission, but also to our contributors who have responded to the invitation to tell their own story. From their accounts, it would appear that most of them have decided not to claim discrimination, but to tell their story to a sympathetic listener. In other words, as we suggest elsewhere, much of the discrimination is indirect in character, and unlikely to yield to the legalistic remedies which are available.

Different sources, different results

This study draws upon three different sources of information:

- Literature review, focused mainly on cases dealt with by courts and tribunals.
- Complaints to the statutory bodies, ADB and HREOC.
- Individual accounts, received in response to requests for personal stories.

It is evident that different pictures emerge from these different sources. The literature review suggests that law and practice are increasingly concerned with discrimination. In the case of Australia, there has been a move away from restrictive judicial interpretation of discrimination, and some complaints (as in the Virgin Blue case) have secured favourable outcomes. However, there is considerable room for improvement in this area, as shown by a case in Queensland in 2000. The claimant took the case through a series of appeals, the last of which was before a full bench of the Queensland Supreme Court. The court found in favour of the company, on the grounds that no offer of work had actually been made. As it was only a hypothetical situation, the making of a hurtful or unfortunate statement did not create an entitlement to compensation (Encel, 2001). The information from ADB and HREOC, on the other hand, indicates that the everyday experience of workplace discrimination remains difficult to prove, and even when proven, gives little satisfaction to the claimant.

The individual accounts reflect the shock and feelings of betrayal which are the result of unexpected loss of employment, coupled with the painful realisation that age is the effective reason for lack of success. This is an area where formal remedies have so far been of little use, and any improvement will require much more effort from government and from voluntary organisations.

Banning Age Discrimination -- Legislation and Practice

The development of legal instruments to ban or reduce age discrimination represents a stage in a process dating back to the English philosophers of the 17th century, such as John Locke, who saw government as the guarantor of individual rights. Locke's ideas were central to the American Declaration of Independence, which was also based on the concept of "inalienable" rights, picked up a few years later in the French Declaration of the Rights of Man and the Citizen. A century and a half later, similar principles were incorporated, in much greater detail, in the Universal Declaration of Human Rights. The terminology of "human rights" and "human rights abuses" has since become part of the common stock of public discourse.

Moves towards the banning of age discrimination and its corollary, mandatory retirement, have been justified on several grounds, especially given the ageing of the population and recognition of the need to retain the skills and experience of older workers. Reviewing these arguments, Dharmananda and Williams argue that human rights considerations have been at least as important as economic or demographic concerns. As they observe,

The intrinsic dignity of a person is questioned when a person's chronological age has been or is seen as an indicator of specific characteristics that he or she lacks. The use of stereotypes when dealing with the ageing and the aged denies them the opportunity to participate as they choose in society. Legislation, in making unlawful discrimination on the grounds of age, can serve also to alter or modify the perceptions of the ageing and the aged (Dharmananda and Williams, 1991: 37-39).

In this section, we examine the progress of legislation and practice in relation to age discrimination, especially in employment, in a number of countries.

1. The United States

The United States has been well ahead of the rest of the world in legislating to ban age discrimination (and more recently, to abolish compulsory retirement). Action at the state level dates back to the 1930s. By 1960, eight states had enacted Fair Employment Practices statutes, which included the banning of age discrimination, and provided for the establishment of commissions to administer the law. The commissions operated by initially seeking to conciliate complaints. If conciliation failed, a commission had the power to hold hearings, publish findings, and seek court orders to require employers to refrain from discriminatory behaviour ((Neumark and Stock, 1999).

The first major step towards national legislation came with the Age Discrimination in Employment Act of 1967 (generally known by its initials, ADEA). Earlier actions by the federal government included the banning of age discrimination in the United States Civil Service by the Civil Service Commission in 1956, and the extension of this rule to federal contractors in 1964. The Older Americans Act of 1965 also included provisions to

encourage employment opportunities for older people. ADEA was much more comprehensive, and was followed by a series of further statutes. Initially, ADEA prohibited discrimination against persons aged 40 to 65. Amendments in 1978 extended the age range to 70, which incidentally raised the age of compulsory retirement to 70. The amendments also eliminated compulsory retirement for most federal government employees. In 1986, further amendments eliminated compulsory retirement altogether, with very limited exemptions.

The ADEA currently covers all private employers with 20 or more employees, state and local government employees, federal government employees and employment agencies. The Act was originally administered by the US Department of Labor, but in 1979 it became the responsibility of the Equal Employment Opportunity Commission, established in 1965 by the Civil Rights Act.

The operation of ADEA has been the subject of a number of court decisions concerning burden of proof and “disparate treatment”. Of particular interest is a court decision in 1987 (*Metz v. Transit Mix Inc*) where the court ruled that a company was prohibited from replacing an older employee on the grounds of higher cost. This practice has elicited numerous complaints in Australia, as described below. Reviewing the impact of ADEA on labour relations in the US, Neumark observes that the operation of the Act has highlighted the extent of age discrimination in relation to recruitment, promotion, and training. He concludes that “the predominant effect of age discrimination legislation has been to reduce the likelihood that employers renege on long-term commitments to older, higher-paid workers, and consequently to strengthen long-term relationships between workers and firms” (Neumark, 2001: 62)

2. Australia

Legislation to ban discrimination on a variety of grounds—gender, race, disability, marital status, religion, age and so on—has developed in Australia since the 1970s. The introduction of age as a ground for complaint came relatively late, and continues to have a much lower public profile than gender discrimination, which attracts many more complaints than those based on age. The recognition of gender discrimination, especially in employment, occurred considerably earlier than action against age discrimination.

The first general piece of legislation to ban discrimination in employment and other areas was passed by the NSW state parliament in 1977. The original Bill, which included age as a prohibited ground of discrimination, passed the lower house of parliament, but an amendment in the upper house (where the government did not have a majority) removed this provision. Age discrimination was not prohibited until 1994. In the meantime, age discrimination was banned in a series of laws enacted in the other states and the two Territories between 1991 and 1999. The Commonwealth Parliament finally legislated in 2004. Legislation banning compulsory retirement was also enacted during this period

Administration of the legislation varies between states. In NSW, the relevant body is the Anti-Discrimination Board, and in Queensland and Tasmania, the Anti-Discrimination

Commission. Victoria, South Australia and Western Australia have established Equal Opportunity Commissions. In NSW, disputed cases were examined by an Equal Opportunity Tribunal set up in 1981. The tribunal was abolished in 1997 and incorporated into a new body, the Administrative Decisions Tribunal, which has an Equal Opportunity Division. Victoria also has an Equal Opportunity Tribunal.

It may be noted in passing that New Zealand, which had no legislation prohibiting age discrimination in employment until 1994, chose to incorporate the banning of age discrimination in its Human Rights Act of 1994. (In Australia, by contrast, attempts to enact a Bill of Rights have so far been unsuccessful).

National anti-discrimination legislation has followed a tortuous path since 1974, when the Commonwealth Government acceded to ILO Convention 111, which outlaws discrimination in “employment and occupation”. To fulfil Australia’s obligations under the ILO convention, the government established national and state committees on discrimination. The committees were abolished in 1986 and not replaced until 1991, when the Human Rights and Equal Opportunity Commission was given jurisdiction in relation to age discrimination. However, its powers were limited, and a report by the Commission in 1999 recommended the enactment of national legislation with enforceable remedies against age discrimination in employment. The report, entitled *Age Matters*, criticised the failure of successive national governments to deal with the issue. Federal law, the report observed, was weak and inadequate compared with legislation in the states and Territories. (Encel, 2001)

The Commission’s recommendations were finally implemented with the passage of the Federal Age Discrimination Act in 2004. The Act (commonly referred to as the ADA) makes it unlawful to discriminate on the grounds of age, with special reference to employment, education, accommodation, availability of services, and access to premises. It also applies to laws or programs administered by the Commonwealth Government. Like State anti-discrimination laws, the ADA contains a number of exemptions. In the area of employment, the most important relate to the payment of youth wages, and the application of industrial awards. The ADA also provides that it is not unlawful to provide programs and support that meet an identified need of people in different age groups.

The ADA has attracted criticism because of its use of the term “inherent requirement”. According to the Act, it is not unlawful to refuse an application for employment if the applicant cannot perform the inherent requirements of the job (ADA 2004, part 4, Division 2, section 18(4)). This term was at the centre of several important court cases in the decades preceding the introduction of anti-discrimination legislation, a notable example being cases involving airline pilots (Encel and Studencki, 1998). The use of this provision was buttressed by the requirement (Section 16) that a complainant had to demonstrate that age was the “dominant reason” for discrimination. This requirement was abolished with the passage of the Disability Discrimination and other Human Rights Legislation Act 2009, which amended Section 16.

State-based laws against discrimination continue to operate, and a complaint may be taken either to the Human Rights Commission or the corresponding State body. In the section **The Experience of Discrimination**, we examine the effectiveness (or lack of effectiveness) of the various laws in combating age discrimination.

The European Union

In 2000, the Council of the EU issued a directive requiring member states to introduce laws providing for equal treatment in employment and occupation. This was to be done within three years, with a possible extension to six.

A number of European countries have a history of legislating to ban discrimination in employment (Finland, Irish Republic, Spain, the Netherlands, and Sweden). The EU directive covers a wider range and should ultimately replace the existing legislation. It includes religion or belief, disability, age, and sexual orientation as grounds for complaint. It applies to all persons in employment or seeking employment and training, to providers of vocational guidance or training, to organisations of employees and employers, to professional associations and public bodies.

The directive follows standard practice in prohibiting both direct and indirect discrimination, harassment, and adverse action by an employer as a reaction to a complaint. An instruction to discriminate is also treated as an act of discrimination.

The directive also follows standard practice in providing that differences of treatment by age do not constitute discrimination where age is a genuine and determining occupational qualification (GOQ). The use of GOQ in such cases corresponds to the use of “inherent requirement” in Australia. Other exemptions relate to conditions attached to labour market programs and the fixing of maximum ages for recruitment based on the training requirements of the post.

The directive also skirts the issue of compulsory retirement by stating that its provisions shall be “without prejudice to national provisions laying down retirement age” (Preamble, paragraph 14). Member states retain the freedom to fix ages of entitlement to retirement or invalidity benefits. By contrast, discrimination on grounds of gender is not permitted (Article 6, paragraph 2).

The directive also contains requirements concerning enforcement, expressed in very general terms because of national variations in law and administration. A universal requirement, however, places the burden of proof on the respondent to show that there has been no breach of the principle of equal treatment, except in criminal procedures or in an investigation by a competent body (Hornstein, 2001).

Anti-discrimination Legislation in Practice

Reviewing progress in the EU countries since 2000, Taylor notes that the introduction of equal treatment has been uneven and that the goals set by the EU directive and other agreements are far from being realised. Paradoxically, policies aimed at extending working life may coexist with schemes to encourage early retirement (Taylor, 2009: 9-10).

Taylor's observation is consistent with the findings of a series of OECD reports between 2002 and 2005, covering 21 countries. The reports quote survey evidence that employers have "negative perceptions" about the capacity of older workers to adapt to technological and organisational change. Retention rates and hiring rates were found to decline steeply after age 50 (OECD, 2002—2006). Commenting on these findings, the German minister for labour and social affairs, Franz Muntefering, noted that half of companies in Germany had no employees over age 50, and that only 42 per cent of those over 55 still had a job. In the past, he observed, older workers had options, whereas today they were sent into early retirement or dismissed (Muntefering, 2006: 119).

Legislation in the EU countries is too recent for detailed evaluation. However, there is substantial evidence in Australia, and some examples are cited in the following pages.

THE DEVELOPMENT OF CASE LAW IN AUSTRALIA

Economic turbulence in the years since 1970 has had particularly negative effects on older workers. A number of studies in Australia and elsewhere have noted the irony that corporate downsizing and large-scale redundancies have their greatest impact on older, experienced workers. In the past, a typical form of discrimination was practised through the policy of “last on—first off”. In a curious inversion of this policy, age discrimination in the restructured workplace takes the form of “first on—first off”. A British study by Roberts notes that this form of discrimination is rationalised by the argument that older workers lack imagination and ambition. These assumptions endlessly circulate so that they eventually acquire the status of truth (Roberts, 2006). Another rationalisation used by employers is that retraining of older workers is not worthwhile, as the investment will not pay off before they retire (Encel, 1998).

It is notoriously difficult to prove that discrimination is due to age as against other factors. Before the introduction of anti-discrimination legislation, the most widely accepted legal doctrine was the so-called *Briginshaw* test, enunciated in the High Court by Dixon J in 1938. Dixon ruled that a charge of discrimination required the complainant to prove it to the “reasonable satisfaction” of the court (*Briginshaw vs Briginshaw*, 1938). Although there are some indications of a shift in judicial attitudes, the *Briginshaw* test remains influential (Gaze, 2002; de Plevitz, 2003).

A shift in judicial attitudes became apparent in a series of cases involving airline pilots and defence force personnel during the 1990s. Perhaps by coincidence, this was also the period when legislation banning age discrimination was passing through State parliaments. The leading case in the area was that of John Christie, who flew with Qantas Airways on international routes. He lost his job at age 60 because of international aviation rules which prevented a pilot over 60 from being in charge of an aircraft. Christie took the matter to the Australian Industrial Relations Court, using a provision in the Industrial Relations Act which prohibited an employer from terminating employment on the grounds of race, colour, sex, sexual preference, age, and other matters, unless the employee in question was unable to fulfil the inherent requirements of the particular position. These prohibitions derive from ILO Convention 111, which was incorporated into the 1988 Act and remains part of the Workplace Relations Act of 1996 which replaced the earlier legislation.

Christie’s case came before Wilcox CJ, who upheld the inherent requirement rule. Christie then appealed to the Full Court, and obtained a majority verdict in his favour. Qantas was granted leave to appeal to the High Court, where a majority accepted the argument that the age limit was an inherent requirement of the position. However, Brennan CJ observed that there was room for argument about the means by which the inherent nature of a requirement should be determined. The dissenting judge, Kirby J, went further and argued that it was not a sound legal principle to expand unduly the criterion of inherent requirements (*Qantas Airways vs Christie*, 1998).

Coincidentally, there was a different outcome in the case of another Qantas pilot, Allman, which came before the Industrial Relations Court at the same time as the Christie case. Allman, unlike Christie, was a pilot on domestic flights, and Wilcox CJ found in his favour. Qantas again appealed to the Full Court, which upheld Chief Justice Wilcox's ruling. Qantas did not appeal this decision, and Allman was re-employed by the airline (Allman vs Australia Airlines, 1995).

Since the Allman case, Qantas has adopted non-discriminatory policies based on health and fitness tests. The international "Rule of 60" has also been modified.

Qantas was also involved in a case where its counsel used the argument, referred to above, that it is uneconomic to retrain employees in middle age because the cost of the investment will not be recovered. Richard Blatchford, a commercial pilot aged 46 at the time of the complaint, was denied admission to a Qantas training course for pilots. He claimed that this was solely because of his age, and took the case to the NSW Anti-Discrimination Board. In due course, the case came before the Equal Opportunity Tribunal. An economist called by Qantas as an expert witness argued that "a preference for younger trainees is properly and reasonably explained as a rational economic reason for preferring to hire applicants who have a longer expected tenure or working life". The Tribunal rejected this argument, observing rather sharply that the principles of equal opportunity were enshrined in the legislation, unlike the principles of economic rationalism.

Blatchford won his case and was awarded costs against Qantas (Blatchford vs Qantas Airways Ltd, Equal Opportunity Tribunal, 1997).

The Australian Defence Forces have attracted a number of complaints concerning age discrimination. Most complainants have been unsuccessful, but in one case the court rejected arguments based on "inherent requirements" and found in favour of the applicant. Robert Bradley, a helicopter pilot aged 37 at the time, was rejected for entry to the Specialist Service Officer scheme, which provides an advanced pilot training course. He was denied entry on the grounds that the upper age limit was 28. The case came before the Federal Court, where a full bench ruled in Bradley's favour. In his judgment, Black CJ rejected the argument of the Defence Forces that there was a "logical link" between age and fitness. This argument, said His Honour, would ultimately defeat the purpose of the human rights legislation under which Bradley had brought his case. Any argument that relied on a logical connection between age and fitness must be seen in context. The exclusion of a job applicant on the basis of an arbitrary age limit, rather than an individual assessment of skill and capability, was an overt form of discrimination and could not be justified on the grounds of the inherent requirements of the job (Commonwealth of Australia vs Human Rights Commission and Bradley, 1998).

The connections between age, experience and capacity were dramatically illustrated in 2009 when a commercial flight headed for New York crash-landed on the frozen Hudson River after colliding with a flock of geese. Remarkably, no one was hurt. The captain, Chesley Sullenberger, was aged 58 and had 40 years of flying experience, including the

Vietnam war. The incident is described in detail by a well-known aviation writer, William Langewiesche, who emphasises that Sullenberger's experience gave him the ability to handle the situation in a manner which would have been impossible for a less experienced pilot (Langewiesche, 2009).

Langewiesche also notes that the three flight attendants, who behaved in an exemplary manner, were women in their fifties. This may be contrasted with the treatment of female flight attendants in Australia until comparatively recent times. When the Airline Hostesses Association became involved in an industrial dispute for the first time in 1975, they were described by Sir Reginald Ansett, head of Ansett Transport Industries, as "a batch of old boilers". The mandatory retiring age of 35 was lifted to 55 shortly afterwards (Encel and Campbell, 1991: 85).

Use of coercion by employers

The use of coercion by employers, whether obvious or camouflaged, is evident in many of the experiences recorded in the research undertaken for this project, and also in a number of cases dealt with by courts and tribunals, reported in this section. It reflects, among other things, the widespread stereotype which equates age with disability, illness or loss of capacity, and youth with health, energy and ability. The American sociologist, Talcott Parsons, noted many years ago that these assumptions were built into the culture of a modern industrial society (Parsons, 1946). They also underlie much of government policy, despite the simultaneous promotion of policies intended to encourage mature age workers to remain in the workforce longer, to "reinvent" themselves through the pursuit of multiple careers, and to remain fit and healthy. (Measures adopted by the Commonwealth governments in the 1980s to induce older employees to retire early were described as a policy of "enlivenment" (Bunn, 1995).

Older workers also suffer disproportionately because the skills and experience acquired at an earlier period are regarded, rightly or wrongly, as less relevant to the new workplace. In this way, the demeaning label of "redundancy" has particular salience for workers who may not be sufficiently flexible to adapt to the new economy. Mature age workers who are made redundant often drift in and out of the workforce (Encel and Ranzijn, 2007).

The abolition of compulsory retirement, which took place side by side with the prohibition of age discrimination in the 1990s, has created uncertainties which have been the subject of a few court cases. One particular area of uncertainty relates to medical specialists with hospital appointments. In 1994, the NSW Court of Appeal upheld a decision by a leading private hospital in Sydney to terminate the appointment of a visiting specialist medical anaesthetist on his 65th birthday because he was found by the hospital administration not to be an employee. Two judges found that the complainant had not been forced to retire, but had been denied accreditation and the use of hospital facilities, which was not contrary to the NSW Anti-Discrimination Act. The president of the Court, Justice Kirby, dissented, dismissing what he called narrow legalism. He observed that it was unrealistic to suggest that an anaesthetist could practise outside a hospital. In effect,

the hospital had constrained the complainant to retire, and the intention was made clear in a letter which wished him “a long and happy retirement” (Lorang vs Mater Misericordiae Hospital, 1994). Justice Kirby’s dissent in one of the airline pilots’ cases was noted above. Similar cases involving doctors with hospital appointments were described by Encel and Studencki (1998).

The use of coercion by employers has been alleged by a number of complainants, but such complaints are rarely successful. Complainants maintain that the first sign of disability in an older worker may lead to pressure to retire on the grounds that the age of the person will preclude full recovery. An example was the allegation made by a police officer in NSW that he was pressured to resign because his disabilities meant that he would have to take excessive amounts of sick leave (Mooney vs Commissioner of Police, 2003).

Admission to training courses

As noted above, research in the UK and the US demonstrates the popularity of the argument used by employers that investment in training and retraining for older workers is unprofitable because there would be insufficient return on the investment. Research in Australia reveals similar attitudes on the part of employers, which have occasionally been exposed in legal proceedings. In a case in Western Australia, a 60-year-old stock controller was offered a redundancy on the grounds that he was too old to be retrained for an expanded role in the company, for which he had worked for 23 years. The employer gave evidence before the tribunal that training for the new methods of supply chain management would take some years to complete and the company would be unable to recover on its investment. The complainant argued that he was willing and able to undergo the training program (WA Industrial Relations Commission, 2005).

A rare instance of a successful case involving training came before the Queensland Anti-Discrimination Commission in 2003. Two employees, both in their late 50s, were dismissed after only three months with the company. The employer’s justification was that they were “insufficiently ambitious”, and also that there had been a downturn in trade. However, it transpired that, within a week, the company had hired two younger men to do the same work. The complainants won the case, but the employer then appealed to the Supreme Court. The Court upheld the decision of the tribunal. The employer acknowledged the belief that younger men would be easier to train and could also be employed as sales representatives (Lightning Bolt vs Skinner, 2003).

Youth versus Age

Everyday experience indicates the profound influence of the “cult of youth” or “youthism” in making life difficult for older workers, and this is confirmed in detail in a number of Australian studies (Encel, 1998; Steinberg et al, 1998). With the introduction of legislation banning age discrimination, the pervasiveness of “youthism” in the labour market has become well documented. Some complaints involve the promotion of younger

employees at the expense of older and more experienced people in the same organisation. In a rapidly changing economy, the traditional pattern of a linear employment history, in which work and life stages correspond, the growth of part-time and casual work results in fragmented careers and job insecurity. The effects of temporary employment combined with older age can be devastating. In 2002, a case in NSW demonstrated the vulnerability of older employees in the face of staff cuts. The complainant was employed at an inquiry centre run by the NSW Department of Industrial Relations –in other words, the very department responsible for maintaining workplace standards. His position was temporary, and had been the subject of 14 short-term contracts over a period of more than five years. The tribunal rejected the claim, although it recognised that the complainant had been victimised because he had lodged a complaint under the official grievance procedure (Kennedy vs Director General, NSW Dept of Industrial Relations, 2002).

Job insecurity and the cult of youth are particularly significant in the IT industry, where careers become increasingly difficult for people over 30. This was spelt out by a senior staff member at the Nestlé Corporation, giving advice to a graphic designer who had inquired about employment prospects. He was told: “At 24 you are a master of your skills, at 26 you are a mid-weight graphic designer, at 28 you are a creative director and at 30 you are looking for outplacement and possibly trying to set up your own business.” He was not offered a job (Retallick vs Nestle Australia, 2006).

Organisational change can also create situations where older workers find themselves under the supervision of younger managers. In a case involving the Telstra corporation, a 58-year-old man was asked whether he thought he could “fit in” with a sales group of younger people (Drummond vs Telstra Corporation Ltd, 2008).

Advertising of vacancies

One effect of anti-discrimination laws is to change the nature of advertising for applicants. Employers are now forbidden to use age categories in advertising or in selection interviews. Before legislation, age preferences were commonly stated, sometimes with surprising results. In one case, a woman aged in her early fifties responded by telephone to an advertisement which asked for a “mature person”. Having stated her age, she was informed that “mature” meant someone in their 20s, and the interview was abruptly terminated (Encel and Studencki, 1996). In another case, a man aged 55 answered a job advertisement by telephone and was told that the position was already taken. Suspecting age discrimination, he called again and gave his age as 26. He was then invited to an interview. However, he did not proceed with the complaint (Encel, 2001).

Another example of an about-face by an employer occurred in the case of a male chef, aged 46, who responded to an advertisement inviting applications to work as part of a “young team” at a restaurant. The complainant claimed that when he rang about the position, he was asked his age, to which he replied “over 21”. When he called at the restaurant with his resumé, he admitted to age 46. The owner, a woman, offered him a trial period, but he never heard from her again. Giving evidence, the owner maintained that many older persons did not like working with young people, hence the use of the

term “young team”. She denied meeting the complainant in person, and also denied the offer of a trial period. The tribunal found her evidence to be “evasive and unhelpful”.

In the event, the complainant was unsuccessful in obtaining compensation for lost wages, but was awarded \$2500 for “hurt and humiliation” (Gardner vs Northcott, 2004, QADT 39).

Advertisers can, of course, use phrases whose implicit bias towards youth is obvious. Bennington made a study of job advertisements and found a variety of terms which were clearly aimed at people under 30, including *buzzy, fast-paced, go-getter, high-flyer, can-do, switched-on, on the ball*. Another device was to ask for years of experience or the date of graduation (Bennington, 2004).

Occasionally, employers overstep the mark and are required to compensate. One employee who succeeded in proving age discrimination was Patricia Alcock, who worked for 12 years as a part-time receptionist at a hotel in Port Macquarie, on the NSW central coast. At age 60, she was told by her employer that she should retire and her employment was terminated. She complained to the NSW Anti-Discrimination Board and asked for compensation in the amount of pay which she would otherwise have received. After the employer refused to conciliate, she took the case to the tribunal, despite legal advice that her complaint would not succeed. In the event, the tribunal found in her favour and awarded the full amount of her claim (Encel, 2001).

Gendered Ageism

In an earlier study, we found that older women who attempt to return to the work force have less difficulty than men, mainly because they are more prepared to accept jobs at lower pay and lower status than they received in their previous occupation. Also, although women suffer from age discrimination at an earlier age than men, they are less likely to use the official channels of complaint. Similar findings are reported from research in the UK and US (Encel and Studencki, 1998: 5-6). A study of women working in the retail industry, carried out at about the same time, concluded that there was a hierarchy of direct and indirect discrimination based on a combination of racial origin, gender and age which limited progression out of the ranks of sales assistance, even for the tertiary educated (Reed, 1996).

This combination of factors makes it extremely difficult for women to succeed in bringing complaints. In a recent case, a 37-year-old woman who had worked as a casual bar attendant for six years unexpectedly lost her regular shift arrangements. She allegedly overheard a conversation in which the owner of the hotel remarked that he wanted to replace some of the older employees with “young glammers”. She preferred the day shifts because they complemented her childcare arrangements, and believed that the proposed changes were an attempt to force her to resign. Evidence was presented in which the owner of the hotel had said that some of the staff, like the complainant, were

“tired in appearance and attitudes”, and should be replaced. The complaint was unsuccessful (Thompson vs Big Bert P/L, 2007).

By contrast, an employer who attempted to appoint a young woman in place of an older employee was spectacularly unsuccessful. Annette Goodworth, a secretary in the employ of a motor car dealer in the town of Moruya on the NSW south coast, was summarily dismissed at age 53. Her employer endeavoured to replace her with a much younger woman, and told Mrs Goodworth that she should consider early retirement. (The employer denied this before the tribunal). It was also alleged that the employer’s son had offered the job to the younger woman on the grounds that Mrs Goodworth’s health was not good (this was also denied). The tribunal rejected the employer’s argument that Mrs Goodworth had been dismissed because of inefficiency and awarded damages covering loss of salary and entitlements, as well as distress at the peremptory manner of her dismissal (Encel and Studencki, 1998: 22).

Emphasis on youth and physical attractiveness, especially for women, provided the backdrop for an important case in the airline industry, commonly referred to as the *Hopper* case, in which the airline Virgin Blue was sued by former employees of Ansett Airlines. After Ansett collapsed in 2000, Virgin entered the Australian market and engaged in large-scale recruitment, actively seeking to attract former Ansett staff. The selection process for cabin staff included group assessments of 60 applicants. One of the criteria was a quality described as “Virgin Flair”, defined as “a desire to create a memorable, positive experience for customers: the ability to have fun, making it fun for the customers” (Hopper and others vs Virgin Blue, 2005). The assessment process required applicants to prepare and perform a dramatic routine under the direction of existing members of Virgin staff. Out of 750 applicants, only one person aged more than 35 was employed.

The complaint against Virgin was brought by eight experienced female flight attendants aged between 36 and 56, who had been unsuccessful applicants. All had extensive experience with Ansett. Virgin argued that their system of behavioural competency testing was designed to produce age-neutral results, and had done so in other sections of the company. In practice, however, assessments had been conducted by young employees with minimal training in the psychological assessment procedure. The complainants argued that “Virgin Blue encouraged a work culture that equated youth and its outward physical manifestations with the ability to have fun”. It was argued that the youthful assessors identified with people who were the same age and had similar experiences, and therefore “unconsciously but invariably preferred younger people .

The complainants also contended that the assessment procedure was essentially a beauty contest, “an elaborate ruse to mask an intentional choice by the assessors of the most physically attractive employees (male or female)”, and cited promotional material with images of young, attractive women used for the recruitment drive.

The tribunal found that direct and indirect discrimination had occurred. While the initial discrimination was unintentional, the recruitment process did not really allow for

appointment based on merit, and Virgin Blue had treated older people differently from younger people in similar circumstances. Damages were awarded ranging from \$7000 to \$12,000. Costs were also awarded against the airline. A subsequent appeal by the airline was rejected by the Queensland Supreme Court (Hopper and Others vs. Virgin Blue, 2005; Virgin Blue Airlines vs Stewart and Others, 2007).

The Virgin Blue case illustrates a particular problem arising for older workers from the demands of service industries like airlines, which have been accused of the commercialisation of human feelings. Hochschild, who made a study of flight attendants working for a major American airline, described the process by which such workers are required to undertake “emotional labour” (Hochschild, 1985). This expectation is evidently what the assessment process referred to as willingness to introduce “fun” into the job, and attractive young women are presumably more capable of providing such service.

AGE, EMPLOYABILITY AND SOCIAL EXCLUSION

In May 2009 the Australian Government’s Social Inclusion Board considered the participation rates of older workers in its report, *A Compendium of Social Indicators – How’s Australia Faring?* It found that the Australian employment rate for persons aged 55 to 64 years, at 57%, was higher than the EU27 average in 2007, which was 45%. Denmark, Sweden and Estonia had higher rates than Australia. In 1998, 57% of men aged 55 to 64 were in the workforce, and by 2008 the figure had risen to 66%. for women in the same age group the participation rate was 31% in 1998 and 49% in 2008, a significant increase over the decade.

Launching the Social Inclusion Board’s report, *A Stronger, Fairer Australia*, in early 2010, Julia Gillard, then Minister for Social Inclusion, urged all sectors to work to eliminate disadvantage. The media release said in part:

Social Inclusion means ensuring no Australian is left behind by giving all the opportunities, resources, capabilities and responsibilities to learn, work, connect with others and have a say in community life.

In a speech to the conference, Ms Gillard said that at the start of a new decade the test of this work is the progress we have made together by the decade’s close. This agenda is about embedding a commitment to fairness in everything that the Government does.

The statement sets out a new approach to break down the barriers that stand between the most disadvantaged Australians and participation. Despite a strong economy in recent years, disadvantage still prevents many Australians from getting a fair go.

The Government is determined to address this disadvantage, which costs the entire nation in lower productivity, chronic health problems, welfare dependence and fractured communities.

Social inclusion principles include giving people the chance to secure a job, access services, connect with family, friends, work, personal interests and local community, and have their voice heard.

An inclusive society embraces the talents and contributions of all citizens, regardless of their age, gender or ethnic background. While anti-discrimination laws have worked to sanction unacceptable treatment of individuals, social inclusion approaches build on the strengths of individuals and communities (Becker and Boreham, 2009; Hayes et.al.; 2008; Vinson, 2009). This approach has much to recommend it. Age discrimination at work denies full participation to an important section of the community and leads to intergenerational tensions. A socially inclusive society, on the other hand, not only epitomizes the fair go, but increases prosperity.

Social exclusion, on the other hand, incorporates a number of forms of disadvantage such as poverty, unemployment, ill-health, physical and mental disability, and isolation, which become more acute with advantage age. Age itself is on the way to becoming an aspect of social exclusion, especially when it is linked with employment and employability. Many of the people who contributed their experiences to this project clearly felt excluded because of their lack of success in the labour market. They were indignant at the hypocrisy displayed when their job applications were refused.

The vocabulary of exclusion

The reality of exclusion is regularly masked by a vocabulary of euphemisms and circumlocutions. Dr Don Watson, speechwriter for the former prime Minister, Paul Keating, has selected a number of such expressions related to employment and the probability of success in the labour market:

- multi-skilling
- flexibility
- possession of definite goals
- commitment to the job.

Bennington (2003) also collected a number of favourable comments used in the management literature and in management training courses:

- buzzy
- fast-paced
- go-getter
- high-flyer
- can-do (and its opposite)
- in before closing time (so to speak)

From the contributed accounts, we can glean the following negative comments:

- We didn't think you were right for the job.
- We didn't think you'd fit in.
- Overqualified. (a code term for length of experience, which equates to age)
- Underqualified (too old to have obtained the current certificate or diploma qualification although experience may be of equal or superior quality)
- Why don't you go on the pension?
- Qualifications and experience not up to date.
- Would you be able/happy to work with a young team?
- Are you a team player?
- We want someone with a high energy level.
- We doubt whether you could learn the required new skills in the available time.
- Losing your zip.
- Standing in the way of younger people.
- You should be at home looking after your family (more often said to women)
- Why don't you spend time with your grandchildren and watching television?
- You shouldn't be at work if you are menopausal.

The Social Inclusion Board report *A Stronger, Fairer Australia* (January 2010) quotes ABS figures from a 2007 survey of 3.9 million workers aged 45 and over. 85% intend to retire from the workforce eventually, while the remainder do not intend to retire. For those who intend to retire:

- 24% intend to retire aged 70 years or over (30% of men and 17% of women)
- 40% intend to retire aged 65 to 69 years (45% of men and 34% of women)
- 24% intend to retire aged 60 to 64 years (18% of men and 31% of women)

These aspirations suggest that middle aged Australians envisage an active lifestyle in their sixties, and take for granted the option of remaining in the workforce. In time, this generation may change the community attitudes that have put several of our informants under pressure to retire at 60 or soon afterwards.

THE EXPERIENCE OF DISCRIMINATION

Cases before the NSW Anti-Discrimination Board

As explained in the introduction, one of our sources of evidence regarding age discrimination in employment was the NSW Anti-Discrimination Board. The Board provided us with details of ten "closed" cases which had been "de-identified". Some preliminary remarks about the Board and its processes are appropriate before proceeding to the details of these cases.

The Board was established in 1977 to administer the Anti-Discrimination Act passed by the NSW parliament in that year (commonly referred to as the ADA). The ADB's functions include the investigation of complaints relating to discrimination, harassment and vilification on a variety of grounds including sex, racial origin, marital status, religion and disability. Age was added to this list in 1993 when the ADA was amended accordingly, and came within the jurisdiction of the ADB in 1994. In 1997, the NSW Committee on Ageing (now the Ministerial Advisory Committee on Ageing), approached the ADB with a request to examine the records of age discrimination cases which had been settled. The Committee held the view that the operation of the legislation warranted detailed research. Permission was granted, providing that the confidentiality of the information was observed. The results of the research were published by the Committee in 1998 (Encel and Studencki, 1998). We have made some comparisons between the results of the earlier study and the present research.

Since 1997, important legislative changes have provided a somewhat different context for the present research. In 2009, the ADA was amended to give the ADB authority to "liaise or collaborate with academics or other persons engaged in carrying out investigations, research or inquiries relating to discrimination when it considers it appropriate to do so and, for those purposes, to facilitate disclosure to those persons of information obtained under the ADA". Despite this encouraging statement of principle, other legislation imposes restrictions which made life difficult for the researchers. In particular, the Privacy and Personal Information Protection Act of 1998 (the PPIP Act) imposes limits on the disclosure of personal information.

The ADB's files contain personal information about complainants, respondents and, in some cases, other individuals. Some files also contain health information. Under the PPIP Act the Board would either need to obtain the express consent of individuals to the proposed disclosure of their personal information, or would need to de-identify any files before allowing access to researchers. Either option would necessitate a considerable investment of time by ADB staff. Because of resource constraints and time pressure, the researchers agreed to settle for ten de-identified cases, which were provided after considerable delay.

The Cases

Section 92 of the ADA provides that complaints may be settled, resolved, withdrawn or abandoned. The Act also gives the Board (through the President) the power to terminate a complaint using one or other of these categories, whose relative frequency is set out in the following table.

Information provided by the ADB for the period from the beginning of the year 2000 until the end of 2009 shows that a total of 456 complaints of age discrimination in employment were registered during that decade. In order to test whether complaints have shown any significant trends over the period, we collated the results for the two years 2000—2001, and again for the two years 2008—2009.

TABLE 5

**Analysis of Cases and Outcomes,
2000-2001 and 2008-2009**

	2000---2001	2008--2009
Not proceeded with	62	28
Settled/resolved	44	38
Referred to Tribunal	11	12
Abandoned/withdrawn	9	26
Declined	4	22
Total	130	126

Over a period of ten years, the incidence of complaints appears to have remained fairly steady. By comparison, the total figure for the first year of action under the amended Act (1994-95) was 85, but then dropped sharply for the two succeeding years, giving a three-year total of 188 complaints. The proportion of complaints described as settled or resolved also remained fairly steady, although there have been fluctuations under the other headings, for reasons which are not immediately obvious.

The Tribunal mentioned in the above table was created by an amendment to the ADA in 1981, when it was called the Equal Opportunity Tribunal. In 1997, it was abolished and incorporated into a new body, the Administrative Decisions Tribunal, which has an Equal Opportunity Division. Here again, the numbers have remained fairly stable. Details of decisions in cases referred to the ADT were not available in the files we examined

Encel and Studencki made a detailed analysis of 22 cases out of the 188 complaints recorded in 1994-97, and found that discomfort in the workplace was a major theme, reflected in the following causes for complaint:

*Overlooked in favour of younger people	9
*Harassed by repeated pressure to retire	8
*Unfairly treated at redundancy	2
*Other	3

Out of the 22 complaints, only two were concerned with about age discrimination in dealing with job applications. Among the ten cases provided by the ADB for the current project,, unfairness in the workplace was again a major theme, expressed in a variety of

ways, including stigmatisation, being treated as “past it”, peremptory dismissal, and pressure to retire. None of them related to applications for jobs. As with the contributors who contacted us, the impact of discrimination comes out most clearly in their individual stories, which we have summarised from the files. All names are pseudonymous . The ten cases are categorised, although most of them involve more than one aspect of discrimination. The categories have been chosen to reflect the dominant feature of each case. .

1. Stigmatisation

Athol worked in the building industry and had multiple skills, for which he received an over-award wage. At the time of his complaint he was 49 and had just returned to work after treatment for a heart condition. One of his workmates said, “You’re only wanted for the milk” {traditionally a junior’s errand on building sites}, nobody loves you and you’ve got no friends”. His foreman, aged about 30, made derogatory and threatening comments to him, such as {...} will make your blood pressure so high that you will have another heart attack”.

A man in his 50s joined the workforce, and after that he and Athol were referred to on many occasions as “fucking geriatrics”. After a constant barrage of abuse the two men chose to leave.

Representatives of the employer and the complainant met at a conciliation conference at the ADB. The employer acknowledged that derogatory remarks had been made, but insisted they were jocular. He pointed out that Athol had been well paid and had left the job without notice. Athol accepted a compensation offer of \$5000 and did not take his complaint further.

2. Exclusion from Recruitment---but declined

Jeremy, aged 45, had accountancy qualifications but was interested in a change of employment. He applied to a big sporting goods chain, but was told that the company preferred group interviews. He should leave a copy of his resume and would then be called to the next round of interviews. He received no notification, but phone calls elicited the information that the next round would take place on 9th April. However, his name was not on the list and the personnel officer could not find his resume. He was asked to come on the day and to bring his resume with him. Suspecting age discrimination, he chose not to attend the interview, but requested information from the company about their employment criteria.

The company responded by identifying its employment criteria as seven-day availability, retail experience, relevant ski or cycling knowledge, and specific work experience, for instance with cash registers. They also provided information to the ADB about the age profile of their workforce, following a request from Jeremy. The ADB produced a table which indicated that over 80 per cent of total staff were aged under 30, and over 60 per cent were casuals under 30.

Jeremy disputed several aspects of the company's account, but as he had failed to take up the offer of an interview the ADB found the complaint lacking in substance. His complaint was declined under Section 92A of the ADA, which allows the President to decline a complaint if it is lacking in substance.

3. Redundancy

Sheldon held a senior managerial role in a big technology consultancy. The company was the result of a series of mergers and reorganisations, with consequent changes of job title. By 2005, Sheldon was classified as a Principal, and was told that Principals would be accepted as salaried partners. Late one afternoon in April 2005, now aged 60, he was told that the role of Principal was "not working on the east coast", and he was redundant.

In his complaint to the ADB, Sheldon attached a copy of an email distributed to staff announcing his departure and that of two other colleagues. The memo described the strategy of the company to "increase the ratio of resources at the entry/intermediate levels of our business...{and}...continuing to create opportunities for development and career progression at the lower levels". According to Sheldon, this statement implied that the east coast Principals had not been successfully integrated into the practice, cost too much and were blocking the career paths of younger practitioners. He pointed out that only the youngest of the three Principals had been retained.

Sheldon asked for a written apology and the equivalent of 12 months' salary. The company refused to apologise or pay the sum demanded, but in 2007 it entered into a Deed of Release by which it paid him \$24,166 in settlement of the complaint. Accordingly, the Board terminated the complaint under Section 92A of the ADA.

4. Harassment

Danita, aged 73, was a kitchen hand at a food service company, where she had worked for 23 years. In 2008 the company introduced a new integrated roster system, and Danita was required to work on the Plating Line for at least three months before returning to her previous section. She was soon in difficulties, and was taken to see a manager who asked why she was so slow. She explained that she had attended school in Fiji only as far as second grade, and although her spoken English was fluent, she could not read fast enough to keep up with the conveyor belt. The manager then offered her a part-time job on the evening shift. When she arrived to take up this offer, Danita found that the job had gone to someone else. Nor was any work available in her previous section. The only option seemed to be return to the Plating Line.

On the Plating Line, harassment and intimidation continued. She was asked repeatedly how old she was and when she was going to retire. "Hardly a day went by without someone making such remarks as 'How old are you?' 'When are you going to retire?' or 'You should retire and spend your time with your grandchildren and watching television'. I felt that because of my age I was always being watched and whenever I made a mistake {...} would pounce on me and drag me off to see the manager."

In March 2008, Danita and her daughter met a union representative to discuss the matter. She was advised to take up the part-time job as a temporary measure, but was again met with a barrage of questions as to why she did not retire. A company memo referred to her as someone who because of her advanced age was unable to perform all the duties required of her. Finally, in December 2008, Danita and her daughter met with representatives of the ADB and her employer. She succeeded in having her three weeks' annual leave and two weeks' sick leave reinstated. The company also undertook to caution staff about making derogatory comments concerning age. She would remain a full-time employee, subject to assessment under Occupational Health and Safety legislation.

Danita subsequently informed the ADB that she was satisfied with the outcome and therefore wished to withdraw her complaint.

5. Screened out by recruitment agency

Adam, aged 36, applied for a job as a specialist IT engineer. The job was advertised by a specialist recruitment agency, to whom Adam sent his C.V. He rang the agency some days later, only to discover that he had not been short-listed for interview. He spoke to a consultant who told him, "I didn't forward your application to the short list because in the past this employer has been burned by employing more mature applicants who have then left the company after their initial 12 months....I feel the employer is really looking for someone younger, in their twenties....A younger applicant would be more likely to stay with the firm longer, rather than a more mature applicant who will stay for 12 months and then go off chasing the dollars".

Adam decided to take the matter further and telephoned the CEO of the recruitment agency, who agreed that the consultant concerned would have to be more cautious in his phrasing. He alleged that the real problem was that Adam's C.V. was inadequate, to which Adam replied that it had been written by an employment consultant. The CEO then said, "This is a young team, do you really want to work with 20-year-olds?" Adam replied that he did.

When the case was dealt with by the ADB, the recruitment consultant denied making the more ageist remarks alleged in the complaint. He did, however, admit to saying that his client had been "burned" by employing more mature applicants for junior roles. The ADB encouraged the parties to settle the complaint. Adam's original claim was for \$10,500 compensation, to which the company responded with an offer of \$1000. Adam finally accepted the sum of \$1500.

6. Victimisation

Joshua's case indicates some of the legal complexities arising from overlapping jurisdictions in the field of industrial relations. He worked at a call centre where, at age 48, he was approximately 20 years older than his supervisor. After six months probation, he expected to receive confirmation of his appointment. Instead, he received a letter from his employer, stating that... {the employer}... was unable to confirm his employment.

There was friction with his team leader, who suggested that Joshua needed to establish a “wow” factor with prospective customers, although company policy was to limit the length of calls. Joshua told him that his management style was very subjective, to which the team leader replied that, as team leader, he was entitled to be subjective.

Joshua concluded that the company did not want to keep him on after the six months’ probationary period. He complained to the ADB, on the grounds that he was being victimised, but also began proceedings in the Industrial Relations Commission of NSW. The ADB ruled that the matter fell within its jurisdiction, and advised Joshua to withdraw his complaint, which would be terminated if Joshua accepted an offer of payment from his employer and signed a Deed of Release. The sum received was just over \$3000. In the light of this deed, the complaint was declined under Section 92A of the ADA. A reference to the Administrative Decisions Tribunal was still possible, but Joshua decided not to follow that route and the file was closed.

7. Discriminatory reduction of working hours

Toby, a bus driver and tour guide in his early 70s, was asked to “step back” by his employer, who said, “In good faith and recognising you are aged in your early 70s, what I suggest is that it’s time to step back from frontline work”. He was told that 12-hour shifts and tours of the Blue Mountains were too strenuous for him. The employer also told him that he would recommend him for driving minibuses or day tours around Sydney, but he was subsequently informed that he was no longer required for work in the city. Passenger safety was cited as the reason for this decision.

Toby complained about age discrimination and alleged that criticism of his work amounted to no more than a smokescreen. The employer countered with complaints from passengers. The ADB scheduled a conciliation conference, but the parties were unable to resolve the complaint at that meeting. The matter was then referred to the Administrative Decisions Tribunal.

8. Exclusion

Helen, a fitness coach in her mid-40s, gained a part-time position at a recreation centre. She also completed a Certificate course in Fitness (Personal training), and believed that she had a good chance of becoming a full-time assistant co-ordinator. However, work was allocated to childcare workers who had no fitness qualifications, and her inquiry about full-time work was ignored. A co-ordinator for school sports was duly appointed, aged 21. Helen had not been informed of the vacancy.

Helen complained to the ADB about age discrimination. She also cited humiliation, a practical joke, social exclusion and gossip. The employer’s human resources manager disputed Helen’s accounts of these incidents, and observed that Helen’s allegations of being talked about and yelled at could not be examined without details of dates, times and people involved. A conciliation meeting failed to reach agreement, and the matter was referred to the Administrative Decisions Tribunal.

9. Out to Pasture

Marjorie, aged 60, had worked at the same retail store for ten years. In the latter part of this period, she had changed to casual employment so that she could care for her parents if necessary. After Christmas 2008, her work was cut back to every second Saturday, although she had requested extra hours. She was then told that there was no regular work, only casual shifts “at call”. Marjorie felt that she was being put out to pasture because of her age. She contacted the shop assistants’ union and was offered hours at other stores. Marjorie then complained to the ADB, and subsequently her shifts were restored.

A representative of the Board inquired whether her complaint was now settled. Marjorie responded that after four months of absence she found that she no longer fitted in and that she had been reinstated only to avoid conflict with the ADB. As soon as an opportunity presented itself she would be put on call again. She submitted her resignation. In a formal response, the store alleged that during a period of staff shortages Marjorie had declined to work extra hours. The organisation described itself as an equal opportunity employer and denied that age was a factor. At a conciliation conference, Marjorie received a letter expressing regret and emphasising that her skills, loyalty and commitment were never in doubt. The company wished her the best in all her future endeavours.

10. Bullying

Renata, a dental receptionist, aged 40, claimed that the manager of the dental practice, Mr J, had bullied and insulted her. (Mr J was the partner of Dr. Y, the dentist). Renata maintained that Dr Y had told her that Mr J considered her (Renata), to be “old and ugly”, but thought that the 26-year-old dental nurse was attractive and had a nice cleavage. Renata refused to return to work and complained to the ADB, asking for a statement of service, apologies from both Dr Y and Mr J, and financial compensation for pain and suffering.

Dr Y informed the Board that she was the sole director of the practice, that Mr J had at no time been the practice manager, and that she had informed Renata accordingly. Mr J was a teacher without any managerial role in the practice, and thus had no liability. She was unaware of Mr J making any negative comments about staff, or of anyone else having an issue with him. Dr Y alleged that Renata’s husband made numerous phone calls threatening to break Mr J’s fingers and ruin the dental practice. The matter had been referred to the police. Dr Y asked the Board to reject the complaint as frivolous and vexatious. For her part, Renata claimed that her work contract had been signed by Mr J and herself.

A conciliation conference did not resolve the issues, and the case was referred to the Administrative Decisions Tribunal.

Human Rights Commission (HREOC)- Conciliated Cases

The following cases have been extracted from the annual reports of the Commission between 2004 and 2009, with the exception of the last case, which came directly to the research team. They have been grouped as follows:

Recruitment/appointment
Termination/redundancy
Discrimination in the workplace

The categories are not watertight, but indicate the main themes.

Recruitment/appointment

1. A 60-year-old applied for a position as cleaner through an employment service. He claimed that a staff member of the employment service had told him he was too old for the position. The employment service said that the staff member in question could not recall the conversation, and there were other applicants close to the same age. At a conciliation meeting, the complaint was resolved. The employment service agreed to write a formal written apology and to discuss possible employment options with the complainant, who expressed his satisfaction with the outcome.

2. A 48-year-old woman complained about the wording of an advertisement for a position with a real estate firm. The advertisement specified that the firm “seeks a well presented younger applicant...for the position of receptionist/personal assistant”. She claimed that she would have applied for the position but for the word “younger”, as she had the relevant skills and experience. The company acknowledged that there was no reason for the use of the term “younger”. The person who placed the advertisement was in his mid-50s and new to the organisation. His use of the term denoted someone younger than himself. The matter was resolved through a written apology to the complainant.

3. The complainant, aged 55, used a private employment agency to apply for a position of graduate information technologist in the large government department where he had worked for the preceding ten years. His application was rejected, and he claimed it was due to age discrimination. According to his complaint, the employment agency had told him that he should not be applying for graduate positions.

Age discrimination was denied both by the department and by the employment agency. The department said it was unaware of the application because it only became involved in the recruitment process when candidates were short-listed. The complainant had not reached that stage. For its part, the agency said that data relating to an applicant’s age or age group was not sought nor considered relevant. There was also some confusion about the applicant’s employment situation at the time of the application.

The complaint was resolved through conciliation, and the employment agency agreed to pay general damages and to contribute towards accrued legal costs.

Termination/redundancy

4. *The complainant, aged 66, worked as a hairdresser for a large retail chain for ten years until it was taken over by another company, which was the respondent in this case. He claimed that his new employer placed him on a three-month probationary contract and that his employment was terminated three weeks later. He alleged age discrimination, and also an attempt to avoid paying entitlements due from his previous employment.*

The company denied that age was a factor, and that termination was in response to unsatisfactory behaviour which included inconsistent pricing, poor workmanship, taking extended breaks, and unco-operative attitudes. He had been counselled several times and provided with a written warning.

After conciliation, the company agreed to provide the complainant with a statement of regret and \$3000 in general damages.

5. *The complainant, aged 60, worked for a recreation club and had been employed for two years as a casual worker, but was recently made redundant. She claimed that she had been chosen for redundancy because of her age, and that a younger person was subsequently employed in her position. The club denied that a younger person had been employed in the complainant's position, but acknowledged that the board of directors was not aware of the general manager's decision to make the position redundant. The club maintained that new staff were employed with specific skills to undertake particular tasks, and the complainant's duties had been incorporated into other positions.*

At a conciliation conference, the club agreed to reinstate the complainant to her former position, pay her general damages of \$3000, and write her a letter of apology.

6. *The complainant, aged over 60, worked for a small automotive firm which was taken over by new management. Four weeks before, the new general manager had conducted interviews with each member of staff, and told the complainant that he would not be offered a job because of his age and for other reasons. A few months later, he was advised that his position was to be made redundant. As he was the last person employed, he would be the first to be made redundant. The complainant pointed out that someone else had been appointed after him, but the general manager replied that the other worker was much younger and had a more important job.*

The complainant alleged age discrimination, but the general manager denied making any reference to age during the interview, and maintained that the complainant's redundancy was due to business needs and performance issues. The matter was resolved when the company agreed to pay the complainant in general damages.

7. *The complainant, aged 54, was employed by a small retail company as a full-time sales assistant. The business was taken over, and the new owner told the complainant that she*

was too expensive to retain. At the same time, according to the complaint, the new owner advertised for a new junior sales assistant. The company, for its part, denied that the complainant's employment had been terminated because she was too old. Another staff member was urgently needed in a production role, and the business could not afford to employ both a new person in production and a full-time senior sales assistant.

The matter was resolved through telephone discussions with the parties, and the business agreed to pay the complainant compensation equivalent to three weeks' wages.

8. The complainant was aged 65 and the general manager of an export company with a parent company in Kuwait. He was told by the company that he must retire, as the law in Kuwait requires that people over 65 do not remain in employment. The complainant told his employer that he did not wish to retire, but his employment was nevertheless terminated. The company maintained that this was not because of age, but because the company wanted new blood and new vision.

The complaint was resolved by conciliation, and the company agreed to pay \$150,000 in compensation.

Discrimination in the workplace (age combined with sexual and racial discrimination)

9. The complainant, aged 65, was employed at a local recreation club, doing reception and other general duties. She alleged sexual harassment by a club manager who made comments such as, "You have not got very big tits, have you", and "It would be a lot better if you came over here and sat on my face." A further complaint related to her treatment following a back injury incurred in a work-related incident. She claimed that she was treated less favourably than other workers because of her age, and that her supervisor made comments such as "I don't know what you're doing back at your age--- it's not going to get any better". Eventually, her employment was terminated.

In response, the club maintained that the complainant's employment was terminated because her back injury prevented her from performing the inherent requirements of her job. She had not made any complaints about sexual harassment during her employment. The manager accused of sexual harassment claimed that he had always treated the complainant with respect and that she had never told him that she was offended by anything he said.

The case was resolved when the club agreed to pay \$40,000 in compensation.

10. The complainant, aged 56, worked as an office manager for a livestock company. She alleged that a director of the company discriminated against her because of her age and sex by querying her suitability for the job and making comments such as "Women and men should be treated differently" and "You are not suitable for work as you are approaching menopause". She also claimed that the same director undermined her role within the organisation by referring to her as an untrained office girl. She had resigned

her job, and alleged that this was because the company did not adequately address her concerns.

The company denied age and sex discrimination, but agreed to participate in conciliation proceedings, and finally agreed that both the company and the named director would extend apologies and compensation of \$20,000 would be paid.

11. The complainant, aged 45, was of Sri Lankan background. He complained of discrimination in his employment as a warehouse assistant, claiming that another employee, younger and of Anglo-Saxon background, was given better hours and provided with more assistance. The complainant also claimed that this other employee would stare at him and make comments such as “black bastards” and “black arse-holes” whenever he passed by. In addition, the complainant alleged that he had not been given promotions and salary increments due to him, and had only been paid half of the bonuses due to him.

The company denied any discrimination, and maintained that the two employees had different duties and different hours of work. The complainant had not been financially disadvantaged and had not raised any concerns with management about racial or age discrimination.

After conciliation, the complainant decided to resign. The company agreed to pay him his resignation entitlements.

12. The complainant, aged 50, had worked for seven years with a car hire company, originally full-time and then on a casual basis. At a meeting with her manager, she requested a part-time position and a roster change so that she could be allocated more hours. The manager declined her request, and suggested that she consider going to work for establishments where “50 to 60-year-old ladies scan products they really do not know anything about”. Following the meeting, her working hours were reduced and she believed this was due to her age.

The company denied that the rejection of the requests for a permanent part-time position and a roster change was due to age, and maintained that the decision was based on operational requirements. The company agreed that the complainant would now be appointed to a permanent part-time position, and given an ex gratia payment of \$5000. The manager to whom she had spoken was being counselled.

13. The complainant was a university professor aged 64, who was required by law to retire in the year in which he turned 65. He had recently received a three-year research grant which named him as administrator, but the university would not allow him to take on this role because of his pending retirement.

After a conciliation meeting, the university agreed that the complainant would be employed as a professor on a fractional three-year fixed term contract before his retirement, and would be appointed as chief investigator for the research grant.

14. A positive outcome

Alex was a security guard, sub-contracted to an agency. In 2009 he had been offered a guaranteed shift every Friday at a trendy Sydney hotel. On his first night he met the manager, who was “not much younger than me”. They shook hands, and the manager walked away towards the bar, saying loudly, “I can’t understand why they’ve sent an older person. We get a young crowd in here!”

Alex was very familiar with the right of licensees to evict from the premises, so he did not protest. He went straight home and typed up detailed notes concerning the incident, which he then emailed to the Human Rights Commission, requesting that he be paid for the lost shift plus travel. Although unsure of the outcome, he wanted to take a stand against the hotelier’s unacceptable behaviour.

The hotel management was initially resistant to the payment of compensation. The Commission’s caseworker advised him that the process would take some time and would involve an informal meeting followed by a hearing if necessary. Alex would have abandoned the complaint, but continued at the urging of the caseworker. Just before Christmas he received a letter from the caseworker to organise a meeting, but before the set date the hotel’s solicitor capitulated and Alex received a cheque for the amount claimed. “I was very happy with the outcome as I didn’t think I had a chance. And perhaps the manager will think twice next time!”

PERSONAL RESPONSES

We received a large number of responses from cyberspace, as well as direct communications by email, letter, and interviews. A number of the responses are cited below. There were also a number of more general comments, without reference to specific work situations, which are eminently quotable. Some responses have been edited for reasons of length or clarification, or to protect the anonymity of the sender.

General Comments

Darren, June 2008

**Ageism does exist. You face up to an interview at the tender age of 56, with all your experience and knowledge, and are faced with a panel of employers in their mid-40s. They don’t want to have you ranked below them—it could be uncomfortable.*

JB, August 2009

*Poorly managed companies have an aggressive preference for a young-looking team to present to clients, and they turn a blind eye to age discrimination attitudes among young staff, to snubbing, sarcasm and cliques which actively and verbally isolate older employees.....I now work with a company that is more sophisticated and appreciate that they have an “adult” to deal with clients. Because I have a more respected role in this company, I curiously now find that I am “cool”. This is a perk of being appreciated by management and having that manifested in many subtle ways.

MD, August 2009

*Working in Human Resources in government, I can assure you that age discrimination is alive and well. It’s easy to reject on the basis of age, so long as you find a more appropriate reason to hang it on.

(The two following cases illustrate the divergence of attitudes among professional recruitment consultants)

*I’m an expert in rejection. When 100 people apply for the job, eventually I’ll reject 99 of them. All ages get rejected, from teenagers to pensioners. The issues regarding discrimination on the basis of age, race and gender almost always arise when the individual’s perception of their own ability is not aligned with their actual ability. Get a positive attitude and you might just get a job. (FE, August 2009)

*As an expert recruitment consultant, I agree that the industry is badly affected .by ageism. This is primarily driven by our desire to give our clients what they want (JA, August 2009).

(From a former Centrelink manager, now a private consultant)

*While at Centrelink, I interviewed hundreds of people who were over 50 and were long term involuntarily unemployed. Of these, the majority had been told they were too old or too set in their ways. In Centrelink, in addition, there are a lot of young team leaders—aged around 28—who simply don’t relate to older staff. Centrelink’s whole approach is oriented towards stopping people from claiming. Accordingly, the whole process is virtually designed to be demoralising and destructive. As a result, older workers tend to become discouraged and drop out of the statistics. However, changes in the law since June 2009 make it easier and cheaper to take an employer to court. In Victoria, cases of unfair dismissal were up by 70 per cent over the previous year.

Classification of Responses

Altogether, 50 usable responses were received via the Internet, follow-up interviews and personal contacts. They covered a wide range of causes for complaint about discrimination.

TABLE 6

Classification of Responses in Contributed Accounts

Recruitment or Appointment	24
Retrenchment/Redundancy	8
“Gendered Ageism”	4
Stigmatised	3
Victim of Restructuring	2
Pressed to retire	2
Bullying	2
Discouraged by Superiors	1
Denied Promotion	1
Other	5

In addition, more general comments, without reference to the experiences of a particular individual, dealt with discouragement by senior staff, lack of legal protection, difficult relationships with younger employees, and misleading information supplied by government agencies and NGOs. There were a number of complaints about the style of questions used by interviewing panels, especially a recurrent question whether the applicant would be happy working with a young team. Professional recruiters were deeply unpopular; with one respondent describing them as “meddlesome middlemen”.

Research which relies on personal testimony is regularly criticised on the grounds of subjectivity and bias. Undoubtedly, some of the accounts collected in this study reflect an unwillingness on the part of the contributor to recognise personal shortcomings which may have been as important as age in causing difficulties. However, the general pattern of discrimination emerges clearly from all sources, including official proceedings before tribunals, so that such criticism may validly be regarded as marginal in importance.

Personal Accounts

In this section, we give our participants the opportunity to state their grievances in their own words. The original statements have been abridged to maintain the benchmark of 200-300 words described above, and editorial interpolations are italicised. Names have been altered to maintain anonymity. Statements are grouped to follow the headings listed above. Not every personal account has been cited, to avoid excessive repetition, but each of the following stories includes a distinctive experience.

Recruitment or Appointment

1. BJ, age 51, employed part-time. BJ works for a project entitled “Men’s Sheds”, funded by government, which provides activities for unemployed men and enables them to use skills for which they would otherwise have no outlet. BJ runs a “virtual” men’s shed in a rural area afflicted by drought. He was employed at middle management level at Centrelink and the Job Network, but decided in his late 40s to find something easier. He suddenly found that getting a job had become very difficult.

It suddenly happened! What’s changed about me? ... Age is impossible to hide in a resume. I did get a few interviews for jobs to which I was well suited, but the job always went to a younger person. The reasons given were always vague and defensive: “We didn’t think you were right for the job” or “we didn’t think you’d fit in”.

From working with the Job Network and Centrelink, I observed that most employers are aware that it is wrong to discriminate, but have found a variety of ways to get round that. This is mainly an issue for administrative and clerical positions, and much less in the professional, mining and unskilled areas. An employer indicates that he wishes to employ an 18 year old girl. The agency would advise him that they can’t use this as a specification but will have to settle for “someone who fits the requirements”. In other words, the agencies make employers aware of the law. Despite this, I saw many cases where a youngster, without experience but with a certificate for office skills, was given the job over an older person with years of office experience but no certificate. On being challenged, employers will say ‘Oh, but we need that certificate!’

2. RA, age 55, unemployed

After a successful career in the paper and packaging industries, I left my middle management role in my late forties, opting for a better lifestyle and to spend more time with my wife and family. Initially, I had no trouble finding work and in some cases my age and mature outlook on life was a help rather than a hindrance. However, in the last three years the reverse has been true. About four years ago, my wife and I moved to the Central Coast of NSW and finding work up here is even more difficult than in Sydney because of high unemployment and a glut of young people looking for work.

When applying for jobs, I hide my age as far as possible and only offer more recent job experience in my resume. I have taken an employment agency to the Tribunal and won, on the grounds of “perceived age and/or disability”. I also obtained my forklift driver’s

licence, only to be rejected on the grounds of a so-called pre-employment medical (not actually conducted) despite having passed all the physical tests. The employment agency went to the Tribunal with me and offered to find alternative employment. As it turned out, they had little to offer except call centres.

On one occasion, a Job Search office in Wyong told me frankly (off the record of course), “Honestly, there is nothing we can do for you because we concentrate on young school leavers who have not completed their studies. Why don’t you go on the pension?” To which I answered “But I want to work!”

3. IG, age 57, art teacher

IG responded to publicity from the NSW Department of Education, encouraging older people to train as teachers. At age 45, she gained her Diploma of Education.

It’s been a complete farce. They say one thing and do another....I started as a casual teacher and put my name on the list for consideration for a permanent position. I heard nothing. After a few years I contacted the recruitment headquarters to inquire when I could expect a permanent position. What he said to me was, “Basically because of your age you won’t get a permanent position because all the new jobs are offered to new graduates and transfers”. I was gobsmacked.

I worked for six years in a regional centre as a “temporary casual”, on a yearly contract, with day-to-day work. When a new deputy principal arrived in 2007, he sacked all the casuals. He said, “I don’t want you because I’m going to employ younger people to bring a fresh approach.”

None of us considered making a formal complaint about age discrimination. If we had complained, the deputy would have just claimed that we were incompetent, and that would have made it impossible for us when we sought other positions. Since 2007, I have applied for approximately 80 teaching positions in private and state schools, without success. Because I gained my Diploma of Art many years ago, the date alerts prospective employers to my age.

I feel that I have been misled and ill-treated by the Department of Education. They’ve treated me like a dog. I’m 57 but it’s not as if I’m past it. I’m good at my job, good at art and good at Japanese”. (*IG studied Japanese at university level*). Basically casuals have no rights at all. If I’d been permanent it would have been a different matter.

4. Oliver, age 45, IT professional

Oliver is a long-term IT professional who has worked in Sydney for many years. Over the last few years he has found it very difficult to get and retain a job which suits him. In an industry obsessed with youth, he is evidently out of place.

At recruitment he has found himself dealing with a “20-something” person who knows little or nothing about IT. This inevitably means that the recruiter has to work to a fairly strict skills template. Oliver is screened out because he lacks one or more elements of the

required toolkit. He considers this ridiculous, as it is virtually impossible for all potential recruits to have mastered every single piece of the jigsaw. With sufficient IT knowledge, skills and experience, it is possible to acquire the missing elements on the job.

Some comments he has received after recruitment interviews describe him as over-qualified; paradoxically, others as under-qualified. It is, he considers, very easy for recruiters to use this as an excuse when applying a very detailed skills template. He has recently completed two master's degrees to add to his CV, one in IT and one in Business Studies, but is unsure whether these additional qualifications are actually assisting in his job search. In those instances where he has found employment, he typically finds himself reporting to a person in their early 20s who may be technically very knowledgeable but with no management skills or experience. He has experienced managers who cannot communicate, who are abusive, overbearing or simply rude. He has also experienced trainers who know less than he does.

5. Andrew, age 50 plus, IT professional

Andrew's story is similar to Oliver's, with some additional touches. After failing to obtain a position despite careful choice of vacancies, he suspected age discrimination and tailored his resumé to disguise his age. In one instance he was in the last three out of 600 applicants, but was ultimately unsuccessful as in all other cases.

I was typically confronted by a young, "dynamic" team of interviewers (the term is frequently used by recruiters), and it was suggested that I wouldn't feel comfortable. I believe that I would be comfortable, having worked in such an environment for many years. There was no appreciation of the depth of his experience, despite having kept my skills base up to date. Agencies were worse than employers, and they are the gatekeepers to most positions. They work to a script and don't want to go out on a limb. Comments included queries as to my ability to fit into a young team, and surprise that I was not younger.

I finally lowered my sights and after widening my search I ultimately got a job in insurance, where my age is not considered a barrier. I did not make any complaints about age discrimination, because how can you prove it?

6. PM, age 54, private investigator

PM was with the Australian Federal Police for 12 years, and has carried out numerous investigations on behalf of Commonwealth government agencies, specialising in fraud inquiries. For domestic reasons, he now lives on the Central Coast of NSW. Over the last two years, he has applied for more than 25 jobs in his special field, without success.

He has noticed that job interviews and applications are becoming harder. It is typical to be asked to write a report in 20 minutes under examination type conditions. Inevitably, not all questions can be covered in this short time, which gives the interviewers lots of ammunition to reject anyone they please. His wife works for Centrelink, so he knows there are many men of his age in a similar situation. He feels hurt and angry to be "put out on the scrap heap at 54".

7. Melanie, age 45, private business

Melanie has had a successful career in telemarketing, both in Australia and overseas. For the last four years she has run her own business, but is now seeking to return to events marketing and sponsorship.

In the US and Europe it was never about your age! It was about what you can do! Here in Australia you are dealing with small-minded people and culture....I can absolutely say that I have been experiencing discrimination about my age. The expressions “overqualified” and “fitting in with our company culture” and “we have a young team here”....the list goes on and on....Nobody has ever come out and said it, though, until this morning. I spoke with a recruitment agency who had asked for people with “clear proven experience”. She said, “May I have your date of birth for our database?” When I replied (and there was no background noise of her typing this into her database), I was told that the employer had categorically stated that he wanted nobody over the age of 30, that they were too difficult to train, and then she told me that I was “overqualified”.

Australians are...uncomfortable about working with people of different ages. It is a very young country with a very physical culture. These two factors collide and create small-minded attitudes.....Legislation has, if anything, made the situation worse. Now there are so many innuendoes and things not being said because they can't (legally) be said, but you know it's there—it's the elephant in the room! Complaining won't do any good because age discrimination is so deeply ingrained within the culture...It would actually be better if age discrimination could be openly acknowledged as a real screening factor. At the moment, interview feedback is either non-existent or a farce, because no one can talk honestly about age being a reason for rejection. It is all unspoken because everyone knows that it's illegal. It's not so much the discrimination—it's the lies that go along with it.

Going over my interview performance it came as a shock to realise OH! **That's** why they were asking those questions! It was my **AGE!** Now it makes sense.

8. Janet, age 46, training manager

I have been a successful stockbroker in Australia and Japan, and I was a freelance journalist in the US. I have previously been headhunted at every stage of my career by those who ultimately employed me. Since then, I have run my own consultancy and training business in Australia. I have recently needed more income and have applied for about ten jobs.

I am 46 years old and have not even received an email to say that my applications have been received. This is an entirely new experience for me. I have applied for about ten jobs, all of which were slap bang in the middle of my competency set....I think employers are having to make it harder for people to apply for jobs, now that there is a requirement for anyone on the dole to apply for a certain number of jobs each week to demonstrate commitment. But the only thing I can point to, which explains why I'm getting nowhere, is the fact that I'm 46!

9. *Natasha, age 58, general manager*

I have been contracting for jobs for years and have recently found the number of clients diminishing. In the past ten months I have applied for more than 110 jobs. I never even got an interview until I took off my resume my date of birth, photo and the first ten years of my working life when I was a piano teacher. Then I did get a couple of interviews, but I never heard from the companies again.

It is my experience and that of my husband that if you become unemployed over 40 years of age it is hard to get back into the workforce. Those people running interviews are at best 30-something and often far younger. Often there are more than 100 applications for advertised jobs and if they find someone younger with the same skills and experience as older applicants, the younger person will be the first to be interviewed. In 1993, I became unemployed at age 42. I was, however, profoundly deaf. Over the next 18 months I applied for 473 jobs and attended 100 interviews. Finally a friend employed me but I had to move interstate. Now I'm 58 and have had a successful cochlear implant and have also completed a BA degree. In 1993 I at least had interviews for 25 per cent of everything I applied for.

Obviously, someone looking at my resumé must guess that I am not young. Whether this is a contributing factor to me not even getting on the “long list” I'm not sure. It is all very well to raise the retirement age to 67, and it is a great idea that as we age we keep our minds active by continuing to work, but where are the employers who employ older people?

10. *MY, age 60, architect*

I began my working life as a cadet draftsman. Over a period of many years, I worked my way up the ladder before attending university part-time to become an architect.... As I become older, it is has become increasingly obvious to me that my age is a negative factor. During the 1960s and 70s, all the employers I met were mature people—elderly and dignified gentlemen in their 60s or 70s....I have noticed, over time, that the average age of principals/directors of architectural firms has become much younger. Whenever I have been interviewed by such people, I have felt a certain unease among them which is characteristic of someone who is troubled about hiring an older person. The reality is that many young employers behave these days as if an older person is some kind of threat.

I know from personal experience that ageism is alive and well in the private employment sector. What else could possibly explain the countless number of rejection letters or non-response to telephone inquiries that I have experienced over the years? Even specialist employment agencies show little interest. I was told a few years ago at age 56 that I needn't list my name with their agency as no employer would be interested in me because of my age.

Because of the strength of ageism in the private sector, I now work in a government agency, the Commonwealth Rehabilitation Service. My experience of government employment shows a far more enlightened approach to the needs of older working people. My skills are valued for what they are and I am treated with dignity and respect.

Ageism is very hard to prove. It will tend to be anecdotal or verbally based. We all know as a matter of common sense that ageism is a problem in the private sector, but how do you legislate against attitudes in an effective way?

11. *AZ age 61, project manager*

I'm a contractor, providing IT project management services to whoever will pay me a reasonable rate. I have never failed to deliver over a PM career of more than 25 years. About four years ago, I applied for a project manager position with a large Australian retail organisation. My interview panel of three, none of whom was older than 40, disagreed. The feedback given to my agent was that they were looking for someone with "higher energy levels". At that stage, I was running 40km per week as well as playing tennis and bike riding on a weekly basis, so I can say pretty unreservedly that anyone with higher energy levels would be pretty exceptional. My agent and I both agreed that "higher energy levels" was a euphemism for "younger."

12. *Ken, age 61, IT contractor*

I have been unemployed or more than two years. In 2007, I completed a traineeship with the Queensland Department of Main Roads. I then moved to Brisbane to develop my skills further. At the same time, I applied for jobs—100 in all—and was interviewed for at least half of them. I have had only two short term contracts in this time.

It is easy to find excuses other than age discrimination when asking for feedback, but one can learn many things, and one of them is the overwhelming surprise of the selection panels when the face behind the application actually appears. I have done enough of these to know that in some cases the body language says it all and the rest of the interview is just going through the motions.

Having completed my certificate, and with the many skills I have developed, I should be light-years ahead in my career progression. Not so. I can find no valid reason for this other than the desire to discriminate against the aged in this country. Skills shortage? What skills shortage? We're all just wasting away at Centrelink.

13. *Peter, in his 40s, marketing manager*

Peter was working for the Melbourne branch of a company which manages office relocations. The branch was not doing well and Peter was retrenched. He was not particularly concerned as he considered he had impeccable credentials, including a degree in marketing. As time passed, he lowered his sights. After more than 300 applications, he gave up and started his own business.

*He recalls one recruiter who said, "I don't have a job for you at the moment but I just wanted to hear what you sounded like." Peter asked, "What do you mean?" The recruiter replied, "I thought you would sound **REALLY OLD!**" On another occasion, Peter was rejected by a computer which returned his email application directly saying he was rejected. In addition to running his own business, Peter works as a volunteer for two municipal councils in Melbourne*

14. *RM, age57, self-employed mechanical fitter*

I recently returned to Victoria from WA for family reasons. The work I had in WA was taken up by others. I own and operate a mini-excavator as well. I have tried hard to find work through sending resumés, emails, personal visits to councils and companies, but it's all doom and gloom. I made inquiries about extending my fitting work to a plumbing career. Mature age apprenticeships require that you be employed by a plumber, and after contacting several plumbers it became apparent that they were afraid of responding to our inquiries, even if it is to seek advice or help in finding employment. What is really frustrating to me is the fact that the government runs really good information sources like "Skills Store", and offers organisations and individual businesses extra funding to assist them with the employment of mature age workers. I have not given up trying but the system is trying me!

In conclusion, a somewhat ironic account of age discrimination in recruitment:

15. *CA's Story*

CA moved to Darwin where his wife had a senior government job. Aged 70, with qualifications in accountancy and management, he planned to do some consultancy work. When a religious denomination advertised for a business manager, CA applied and was duly interviewed. During the interview, he inquired why the job was vacant. "When I asked why the previous occupant of the position was leaving, I was told that he was retiring because he'd turned 60. It obviously seemed strange to the committee to be considering someone older than that as his replacement."

C.A. told our interviewer that the proceedings were meticulously conducted, without age or religion being mentioned. He was able to give considered replies to some hypothetical questions. Later, the chair of the interview panel contacted him and informed CA that he had given a good interview, but the appointment had gone to an applicant who had performed well in another region, and was also a practising Christian.

CA said that he enjoyed applying, but his lack of success in this and other applications reinforces his belief that his age is a barrier to full-time employment

Retrenchment

16. J.R, age 61, journalist

J.R. worked for the same media organisation in Sydney for 35 years. One afternoon he was called to see the editor-in-chief, who was accompanied by the head of Human Resources. J.R. was informed that his employment was being terminated in view of the global economic downturn. His employers produced a document setting out the conditions of his termination and asked him to sign it.

They said I was to go back to my desk, get my coat and leave the building. They said not to clear the desk and not to talk to anyone about what was happening. The editor-in-chief said, "We wouldn't mind if you want to tell people that you've decided to retire." I replied that I had no desire to retire, and it seemed odd advice to give to someone who'd just been made redundant. I said I would be able to file my column within 30 minutes, and once I had done that, I would leave the building. I showed the termination document to a lawyer, who advised me that its provisions complied with current employment law and he could see no legal avenues for challenging it.

As part of the termination package, the company paid for JR to receive advice from a financial consultant and an outplacement agency. All your plans are suddenly thrown up in the air. You have to organise money to live on and work out how to support yourself for the next couple of decades....The outplacement agency had no idea what advice to offer a journalist. All they could suggest was that I should tell everyone I know, and eventually someone would offer me a job. Bit of a joke, really: there are only two major media outfits in Sydney, and one had just terminated me.

For the past few years, the Human Resources department has encouraged some staff to take voluntary redundancy. I was never interested. I was in no financial position to retire and besides, I loved the job. There's a general trend towards younger, cheaper journalists. Some of the experienced people have been taken off the staff lists and then brought back as contributors. I find it ironic that the Federal Government is encouraging everyone to work till the age of 67, when they are perfectly aware that employers can shed people whenever they like, quite lawfully.

17. Michelle, age 51, welfare worker

Michelle has worked in the community services/welfare field, including homelessness, women's and children's services, and family support, for most of her career. At the time she was retrenched, she was part of a small team of five working within a large and highly regarded not-for-profit organisation. The organisation lost its funding for a key program, and four of the five were retrenched. Only the youngest, least experienced, and lowest paid remained. The manager, on the highest salary, retained her position.

Michelle describes the not-for-profit sector as having an "older" management profile which is becoming even older and resistant to change. Most of the senior staff of the organisation had been there for many years and knew each other well. They had become known as the "silverbacks".

Michelle had applied for about 70 jobs and had 10 interviews. Interviewers are surprised that she is still applying for frontline jobs at her age, and refusing to apply for managerial positions. The recruitment process, she maintains, is woeful, unprofessional, and ad hoc. Questions are subjective rather than evidence based. However, she has not thought of making a complaint. “There are so many factors. I can’t say it is definitely my age, but it’s definitely harder than when I was looking for jobs when I was younger”.

18. *Teresa, age 63, book publishing*

I was working in the industry as a commissioning editor for a general publisher. This industry is notorious for employing “smart young things”, all dressed in black. Once you reach a certain age, despite a strong track record, you’re nobody. This is especially true of the big multinationals.

I was retrenched at 61 after a company takeover. I was given five minutes notice, told to leave now (at 5 p.m.) and not to come back next day. No chance to notify my 100-plus clients, no chance to prepare handover briefs, no chance to say goodbye to my colleagues or even to clear out my desk. Ironically, I was on my way to a business function where I was to represent the company, and I had to make a speech and pretend nothing had happened.

In the course of my career I had been retrenched twice, but both times I got a month’s notice and was able to leave things in order and be given a farewell by my colleagues. I am now living on the old age pension. Not a snowball’s chance in hell of getting another job at my age.

19. *A.H., age 64, employer not stated*

Because of takeovers and mergers I was with virtually the same company for 28 years and was retrenched at 55. During my notice period I succeeded in gaining a part-time position, considerably less money and no status. After one month, I was transferred to full-time and have now been in a management position for two years. I have now been with the company for nearly ten years. Last year I turned 64—the oldest in the organisation. All it took was a lot of guts and a great deal of tenacity. Whereas I believe mature workers should be prepared to start at the bottom again, governments also need to offer financial support to companies who employ mature age personnel, as they have so much to offer in the way of experience, loyalty and dedication.

“Gendered Ageism”

20. *K.E., age 52, research scientist*

K.E. completed a B.Sc. degree, then a Master’s in her specialty subject. She left the paid workforce to care for two children, then returned to work as a part-time tutor and study for her Ph.D. Aged 40 when she gained her doctorate, K.E. was told not to expect a research officer’s job in her scientific area, dominated by males. Her professor, who was also head of the department, believed that “women lose their zip for research at 40”. Some part-time, lower paid jobs as research assistants and demonstrators were usually

given to younger people. The young man in charge of temporary positions said he did not want to employ “handbag ladies”.

Women in my position were being advised to do a Diploma of Education at their own expense, and then to make a career teaching science in high schools. That was never my career goal. After a few months without a job, I decided to move away from academic science and get another post-graduate qualification which enabled me to move to a new field. I believe that my treatment in my scientific field was unjust. There was no use complaining. I would have been the disgruntled older woman, and he was the eminent professor. Complaining about ageism or sexism is a no-win situation. You’re labelled as difficult, and then things get more difficult than ever.

21. K.R., age 64, primary school teacher

Having reached the age of 64, K.R. began receiving queries about her age from the school principal. She refused to answer, but eventually he found out and passed on the information to the rest of the staff. K.R. found in her pigeonhole an anonymous card with the words “Happy 64”. Her age became a topic of conversation. K.R. remarks that most of the women she works with have well-paid husbands, while she is single and is paying off a mortgage. “They have no conception what’s it like being single”, she said. K.R. was advised by the school representative of the Teachers’ Federation to complain to the principal. The harassment then stopped, but the principal then embarked on a close scrutiny of her teaching abilities.

He stopped the age thing, and now he’s on to attacking my professionalism and efficiency. When children came up to me in the playground, he said, “All this touching stops. If you were a man I’d see it as grooming behaviour.” I went home in floods of tears.

22. Marion, age 60, public service administrative officer

Marion has extensive experience in administrative roles in Brisbane, Melbourne and Perth. Her last full-time position was that of GST compliance officer for the Australian Taxation Office. She has kept her skills up to date and has completed courses at Murdoch University and at TAFE.

During the last two years she has found it increasingly difficult to get work. She feels Perth is more ageist than Melbourne and Brisbane. She now recognises that age may be more of a factor than when she was seeking employment in the Eastern States, where she got jobs easily—within two days in Brisbane and a month in Melbourne. By contrast, in Perth it has taken six months and 27 applications.

She gave two particular examples of unsuccessful applications. The first was with directory assistance services, where the only other candidate was a 17-year-old boy, who attended the interview with his father and was given the job. She sought feedback but was refused.

I was disgusted. This was a \$12-50 an hour job and my abilities are well above that. I was previously earning \$55,000 a year. It was very upsetting and demoralising.

Her second instance concerned the position of receptionist at a women's health centre. She was interviewed at length by a (female) practice manager, who was impressed with her skills and was openly favourable, but warned Marion that the decision would be made by the senior (male) doctor. Marion then had a short interview with the doctor, followed by an apologetic phone call from the practice manager, who told her the doctor had decided to hire a young girl.

She tried revising her resumé and omitting her age from application forms, but was typically contacted later and asked specifically for her age. She knew this was illegal-- "but what can you do?" She did not take either case any further, observing that the older you are, the less hassles you want in your life. You just want to be happy. You just want a peaceful life. I've seen how they treat whistleblowers....Do I want to be right or do I want to be happy? What have you won?

Victim of restructuring

25. V.A., aged 51, State government official

I was shattered by my experience and still find it tough. Everyone's very clever and everyone knows the law, so no one mentions age. It's there, though, they factor it in and they cover it over.

I was one of five managers in my branch of the department. Each of us headed a unit of several people. My performance appraisals were all positive. Two years ago, a new senior executive, aged in her thirties, was given responsibility for the branch. The five managerial positions were reduced to three. The five of us, all aged over 45, found ourselves competing for the three positions, and only one was appointed. We were told to clear our desks and nominate a preferred area for other work. When I asked for feedback on my failure to be reappointed, I was told that in the opinion of the selection panel, I would not be able to learn the required new skills in a reasonable time. I was shattered. You're like the Ghost of Christmas Past. They don't want to hear you. Any corporate memory is seen as the old way, and it doesn't have any value.

I believe that covert age discrimination was a key factor. The four unsuccessful people were all older, shorter and fatter than the new executive. The only one of the five to be reappointed was the youngest, in his early thirties. Although compulsory retirement ages have been phased out, there is still a strong social norm operating. People nearing the age of 60 are expected to leave voluntarily, and if they don't, they are made to feel unwelcome.

There is no chance any of us can work the length of time the Commonwealth expects us to if we have younger managers coming in who are threatened by us. Some type of scorecard to ensure a balance of employees across the age groups may be the only way to counter age discrimination and sexist attitudes.

26. Bob, age 58, sales representative

I was happily working as a sales representative. We had no accumulated debts, the kids had left home, my wife and I could do as we pleased. Then came the word that there would be cutbacks, but I didn't give it a single thought. I was giving leads to the younger guys and helping them finalise their opportunities. Most of all, I had the ear of "the Boss".

Then the call came from "the Boss". "I'm sorry, mate, but we have to let you go....Why you ? We can't fire John because he has a young family. Joe has a new baby. Bill has a handicapped child. Allan has marital problems. We felt that you had built up such a good relationship with your clients that we would be able to carve up your territory and give it to the other members of the team. Here's a month's salary and we would prefer if you returned your mobile phone and left now."

Shocked? Yes. Confused? Yes. But, after the much needed short break I updated my resumé and sent off ten applications online. No replies. Maybe there was a computer glitch and they didn't receive the applications. A couple of days later, I sent off another ten. All in all, 200 applications without a reply. I rang one agency who told me I hadn't made the top ten applicants but they would keep me on file. That's the standard way to pacify people and stop us calling.

We were lucky that an opportunity arose utilising the specialist companies to whom I had previously outsourced work. The new business has provided us with some income. It's still tough financially. We will keep at it because the only other alternative is to roll over and die. We are determined not to do that!

A Miscellaneous Collection

The individual cases cited below do not fit clearly into the categories above, but are cited because of their intrinsic interest and relevance.

27. H.W., age 55, senior State public servant

Social norms and methods of identifying future leaders tend to exclude those over 45 from training programs and succession planning. For example, my department runs Young Leadership breakfasts and other social events for talented employees aged under 35. Employees across the NSW public sector compete to undertake a management program operated by the University of Sydney and administered by the NSW Department of Premier and Cabinet. The course leads to a graduate diploma which stands the recipient in good stead when applying for an executive position. Anecdotally, if you're over 45, forget it. It would be interesting to crunch the numbers on this program and similar ones, to see if older people are denied opportunities on the ground of possibly quite fallacious assumptions about how many years they will remain in the workforce. There is a widely held view that people aged 60 will retire. People internalise these social norms and hold back from taking advantage of opportunities

At present, these attitudes are self-perpetuating. If the shortage of skilled labour occurs in the future, things will have to change. Age is never specified but is used as a criterion to exclude older workers....if evidence-based discrimination is discovered with further research, some type of positive program may be required to counter it.

28. M.H., age 59, computer consultant

Since returning to Australia from working in Asia, I have received not one response to any of the hundreds of job applications I have made in the last eight years..... this is not just age discrimination but experience discrimination. Anyone understanding the IT industry, being able to keep abreast of the changes over the last 35 years, should understand that experience is worth much more than a piece of paper to show that I learnt well.

29. A.B., age 56, government welfare worker

Age discrimination occurs when people in my department who have never taken a child protection case to court and have much less overall experience are asked to relieve over the heads of senior caseworkers like myself. This makes a mockery of child protection. It discriminates against people who did not have a degree when they entered the service, or have family commitments, or live in a remote rural location, but are expected to compete with graduates straight out of university with no life experience.

30. C.D., age 48, State public servant

I am a full-time working mother, and have been working in an administrative capacity for a government department for the past two years. Recently, at my own expense, I decided to undertake distance studies in Psychology through Charles Sturt University. I wished to improve my career path opportunities and to keep my mind active while working in a job which is tedious and non-challenging.

About a month ago a senior member of Management saw my textbooks on my desk, and asked what I had them for. When I explained, she looked at me with indifference, raised her eyebrows and said, "Don't you think you are a bit old to be studying this course? It goes for six years and by the time you finish would you be able to put it into practice as it isn't really within the role that you are employed? Until when do you intend to work?"

Needless to say, I was shattered. I felt as though she wanted to put me in my place and that my opportunities for betterment were over as I had passed my **Use-By-Date**. This has had a lasting impact, as although I was not expecting anything from this organisation it was a hard step to undertake studies again and I had enough uncertainties without this kind of stereotyping.

31. EF, 63, State public servant

Over the past two years I have been asked seven times to detail my retirement plans. I have never given any indication that I intended to retire early, nor have I indicated that I was after a voluntary redundancy (VR). As far as I am aware, I am the only person in this office who has been asked this question. My job title is Project Manager, but I don't manage a project. I am given very little to do. To give you an idea of my workload, I

recently went on recreation leave for four weeks with no backfilling of my position. I was able to catch up four weeks of outstanding work in one and a half days. My duties consist mainly of work that was once carried out by somebody at a much lower grade. I am still reasonably fit and strong for my age, and so far from being frail, I could lie about my age by at least five years and get away with it successfully. It seems obvious to me that I am not wanted by the department and I believe it is because of my age.

32. *L.C., age 67, ESL teacher, community college*

LC taught English as a second language for many years. She developed her own curriculum material and maintained close relationships with students. Each semester, the college required the part-time teachers to take a training course to keep their skills up to date. The teachers had to pay \$1200 for the course, while hourly pay was less than \$50. In 2009, LC had her teaching hours reduced to two per week, which made teaching financially impossible after paying the \$1200 fee. She felt she had been bullied by the college principal, but maintains that it was not age discrimination. "She just plain didn't like me. She bullied me until I got so discouraged that I left."

Since being dropped by the community college, LC has applied to other colleges and to TAFE without success. "They prefer younger applicants, and it makes sense. Someone my age is obviously going to retire eventually. There are so few jobs in ESL that people are lucky to get 6 or 8 hours, so they just hang on to them".

33. *G.E., age 55, university lecturer*

G.E. was a senior lecturer in a large university department. She had many years of service, many publications, a good academic reputation, and a large number of post-graduate students under her supervision. One day, the Dean of the Faculty called her to an interview and asked whether she would enjoy early retirement. G.E. replied that, regardless of her feelings about early retirement, she did not have enough superannuation to fund her retirement. She believed she was doing a good job, and would stay in the workforce for several more years. "Don't you worry about standing in the way of younger people?" inquired the Dean, who was a couple of years older than G.E.

The university had recently introduced formal staff appraisals, and this plus the pressure from the Dean made a stressful combination for the academic staff. Others in the same Faculty and the same age group told G.E. of similar experiences. Some of them (but not G.E.) buckled under the pressure.

34. *J.D., age 57, finance officer, private sector*

I was given a new boss, who was in his 30s. He was very gung-ho and very challenging, and made me step up in some ways. He generally left me alone to get on with it. But I didn't fit into his social scene. He liked to go to the pub, as I did 30 years ago. So the job took its toll. To stay ahead of the targets I was set, I had to work 50-60 hours per week. I was hospitalised twice with suspected heart attacks, which were ultimately diagnosed as anxiety attacks.

After the first attack, my boss started muttering about performance issues. I lodged a complaint with the Human Resources people, but before I returned from the second

attack I received a message asking me to attend a meeting on the following Monday at 8-30 a.m. By 9-00 a.m. I had been sent home, without even being allowed to clear my desk.

The cited reasons for dismissal were “performance issues” and “restructuring”. As to the first, my unit had beaten all performance targets. Restructuring has indeed taken place, but my old position remains unfilled. I consulted a solicitor, who was not encouraging. To prove unlawful discrimination would be very difficult and would require support from the workplace. I wouldn’t dream of asking my subordinates to do this, but I am still pondering whether to go for advice to the Anti-Discrimination Commission.

I am now self-employed, working in the same specialist area where I can use my knowledge of superannuation. It was awful—I’d never treat people the way I was treated. It’s hard to admit this!—it may be the best thing that has happened to me.”

UNION PERSPECTIVES

The union movement has, until very recently, shown little interest in the problems confronting older workers. In general, unions have stressed the need to protect existing jobs. This can entail opposition to policies to promote labour force participation by older workers, who may be seen as competitors for their younger counterparts. The Australian Council of Trade Unions (ACTU) adopted a policy on older workers for the first time at its national congress in 2003. The policy opposes age discrimination and supports the rights of workers to continue in employment after the “normal” retiring age. (Borowski et al, 2007 : 154).

In an effort to canvass a range of union opinions, we endeavoured to arrange interviews with union officials, whose busy timetable made this very difficult. While these efforts were continuing, considerable publicity was given to a speech by Dave Noonan, national secretary of the construction division of the Construction, Forestry, Mining and Energy Union (CFMEU) before the national congress of the union in October 2009. Mr Noonan envisaged a campaign by unions to introduce quotas for mature age workers on major government building projects. This was seen as an alternative to the stated intention of the government to raise the age of eligibility for the age pension from 65 to 67, a move already taken by governments in some European countries, and supported by the Turner report in Britain in 2007. Noonan argued for a new approach, one that recognises that construction workers may have a limit on the physical strain to which they can subject their bodies, but are none the less able to share their experience, knowledge and skills. “The days of mature-age workers being thrown out like broken toys must end,” he maintained, and his union would make the plight of mature-age workers an industrial issue in the building industry.

Noonan observed that the percentage of mature-age workers in the construction industry is below the share of older workers employed across the workforce. Building workers aged 45 to 54 account for 20.1 per cent of construction employees, compared with 22.2 per cent for all industries, and those aged 55 to 64 represent 11.6 per cent compared with 12.7 per cent for all industries. He pointed out that many of the jobs once reserved for mature-age building workers, such as gatemen, traffic controllers and hoist drivers, were being taken by labour hire employees and backpackers, whereas many mature –age workers could be involved in job planning and training younger workers (*Australian* 13-10-09).

The Finance Sector Union (FSU), like other unions, does not support the raising of the pension age from 65 to 67, although it has not taken a formal position on the issue. Their official concerns relate more to the inadequacy of the superannuation system. Geoff Derrick, secretary of the NSW/ACT branch of the FSU, made this point in a wide-ranging interview with Penelope Nelson in November 2009. As a result of mergers and takeovers in the finance industry, especially in banking, many people have been retrenched in their fifties, with no real prospect of re-employment. Many of them have been able to qualify for disability pensions, which have served to bridge the gap until they become eligible for the age pension. (The former Treasurer, Peter Costello, pointed out in his Budget speech in 2004 that the number of people receiving disability pensions had risen to three per cent of the population, compared with one per cent a generation earlier--Encel, 2007: 144).

According to Derrick, gendered ageism is rife, both directly and indirectly, in the finance sector. He quoted a story, well known in the industry, of a regional manager who walked into a bank branch and remarked, audibly, "*All these fat old women are making our business look untidy.*" The combination of age and gender is reflected in the gap between male and female pay rates. Most of the people working in the sales area of insurance and banking are men, and most of the service workers are women, whose jobs are paid less. Paradoxically, this makes the women more vulnerable to discrimination, and a recent example was seen in a television commercial aired in 2010 on behalf of one of the Big Four banks, the ANZ. The commercial showed an attractive young woman arriving at "A Bank", to be greeted by a surly bank officer, apparently in her forties or fifties. This is "Barbara". The customer asks why she has been charged bank fees on her account. Barbara, who has a bad haircut, misapplied lipstick and a permanent scowl, is unhelpful. Her language is bureaucratic and stiff, and all problems are blamed on the customer. With relief, the customer abandons Barbara's bank and transfers to the ANZ, where she is greeted by soothing music, a good-looking young male bank officer, and the assurance that there are "no buried fees and no Barbara".

Geoff Derrick was also sceptical of the much publicised moves by the Westpac banking corporation to appoint 600 new branch managers with greater autonomy. These "new" jobs favoured men and outside appointees, whereas most existing branch managers were females and many of them were aged over 45. According to Derrick, they risked being demoted or retrenched.

Penelope Nelson also had an extended interview with Mark Boyd, NSW branch secretary of the Liquor, Hospitality and Miscellaneous Workers Union (LHMWU or Missoes). Boyd observed that his union did not generally use the anti-discrimination legislation, whether State or Commonwealth, as a way of resolving problems or disputes. Their usual method is to approach a particular employer with a specific problem. For example, if a supervisor in a contract cleaning firm behaved in a discriminatory way, they would seek a meeting with the human resources manager or State manager of the firm. The union would request that the supervisors receive training about correct behaviour. “We would continue to work with the company about understanding discrimination, whatever the reason.” He could recall only three cases taken by the union to the Anti-Discrimination Board, one of which he described as a complete waste of time. One, however, achieved a good outcome.

Few older workers are now employed in commercial cleaning, which is now done almost entirely by overseas students. School cleaning, on the other hand, is conducted by an older, predominantly female workforce. There is no detriment to being female or mature-age in this industry, where cleaners are part of the school community and are treated with corresponding respect.

The LHMWU, like other unions, does not welcome the raising of the pension age to 67, although they recognise that many of their members are in their 60s and still working, because they cannot afford to retire. It would not be fair to shift the retirement age further out of reach. “What do you do if you’re in your late 50s and for whatever reason have difficulty going to work every day? Many don’t have the option to retire and we’ve just moved the bar even further.”

Steve Ball, acting secretary of the NSW branch of one of Australia’s largest and oldest unions, the Australian Workers Union (AWU), was preoccupied with a major industrial crisis, but sent brief email responses to our questions. On the raising of the pension age, the union was opposed. To the question whether older members were disproportionately affected by the global financial crisis, the answer was “Probably”. To the question whether the AWU had supported any age discrimination cases through the NSW Anti-Discrimination Board or the Human Rights Commission in the past decade, the answer was again, “Probably”.

Penelope Nelson also interviewed Dick Shearman, national president of the Independent Education Union of Australia, which has 30,000 members in NSW. His union has never taken any cases to the Human Rights Commission or the NSW Anti-Discrimination Board. Employers in this sector generally work to templates prepared by centralised employer organisations, which are written in compliance with relevant industrial regulations. Very occasionally the union receives a complaint that someone was passed over in promotion because of their age, but these complaints have never gone further because age is not the only factor in the case.

The Public Service Association of NSW published an item about this research project in its journal which led to several interviews with people who had encountered age

discrimination. The union runs courses to make people aware of their rights in the workplace, emphasising occupational health and safety and the hazards of bullying. The aim is to make people aware of their rights and obligations. Positive prevention is seen as preferable to the use of complaint procedures, but support can be provided to those who choose to make formal complaints. Despite anti-victimisation provisions in the Anti-Discrimination Act, complainants risk being stigmatised, with adverse career consequences. It is rare for someone who makes a formal complaint to advance on the career ladder within the same organisation.

CONCLUSION AND POLICY IMPLICATIONS

As documented in this report, age discrimination in employment has been acknowledged as a significant issue for many decades in all Western democracies. Australia has been active in enacting laws to give redress to people who have experienced age discrimination. Commonwealth and State legislation has made people aware of the necessity to avoid discrimination, with dual effects. Policies have been framed to ensure that workplace procedures comply with the law, and employers and employees have been made aware of their rights and obligations. However, this awareness also ensures that age is not mentioned in decisions about recruitment, training, career advancement or downsizing.

Both our literature review and our informants have pointed to the continued existence of a disguised form of age discrimination, “the elephant in the room”.

Australia is a prosperous country with a long tradition of a fair go and a broad consensus about fair treatment at work. Social inclusion policies emphasise participation for all. As the case studies in this report show, age discrimination has severe consequences for families and communities as well as individuals. Recourse to the formal complaints system has satisfactory outcomes for some complainants, but for others it may lead to stigma and damage to career prospects.

Despite the abolition of mandatory retirement ages, ideas about a social norm of the right age to retire lead to pressure on many older workers. Australians are leading longer, healthier lives and are being urged by economists and politicians to work longer. Many are keen to do so, while others feel that after a lifetime of hard work they are entitled to an easier life. Policies must allow individuals to make their own choices in the light of their own health, aspirations, financial status and family situations.

It is evident from this study that age discrimination is alive and well, and that it has devastating impacts on its victims. Legislation and administrative remedies are both necessary, but they are clearly only of limited significance. One of the reasons for this limited value is the legalistic character of procedures available to people complaining

about age discrimination. Governments must make more efforts than is currently the case. A prominent example is the need for better programs of training and retraining for older, displaced workers endeavouring to re-enter the workforce. Although there are many promising initiatives in this area, they require much more support before they will make a significant impact on the problem.

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APPENDIX – DATA SOURCES

1 Established Blogs

SOURCE	TARGET GROUP	MEMBERSHIP (where known)
Theage.com.au	Small business blog - <i>The Age</i> newspaper	
Aboutmyage.com	Over 50s social network Australia wide	5,000
Sixfiguresblog.com	Executives seeking employment Australia wide	
News.com.au	News Limited Newspapers	
Nationaltimes.com.au	Sydney Morning Herald	
Nationalseniors.com.au	Seniors Australia wide	

2. Websites where research was advertised/promoted

CommunityBuilders.com.au	Community, health & social services workers, mainly NSW	2,000
Womensnetwork.com.au	Women in business, Australia wide	15,000
Aboutmyage.com	Over 50s social network Australia wide	5,000
LinkedIn.com	International Professional website – message on Australian engineering section	289
Mediacall.com.au	Mainly service for researcher/ journalists	

3. Newsletters/Emails

Cancer Council of NSW	Volunteers' Newslaetter	2000 volunteers (mostly over 50)
VWCSS Commonwealth Rehabilitation Service	Email to all volunteers 170 branch offices	60 volunteers Very large number of clients

