Compulsory Retirement: to their last breath?
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Major Issues

Proposed reforms of the Australian Public Service (APS) will be an important issue in 1995 with the Report of the Public Service Review Group (the McLeod Committee) released on 16 January 1995 and legislation expected later in the year.

In December 1993, the Industrial Relations Reform Act 1993 (the Reform Act) was passed establishing minimum national standards in relation to termination of employment.

The Public Service Act 1992 (the PS Act) currently provides that public Commonwealth servants must retire on reaching age 65. However, the amendments made to the Industrial Relations Act 1988 (the Industrial Relations Act) make termination of employment based on age unlawful thus creating an apparent conflict between the two Acts.

The Reform Act came into effect on 30 March 1994, and despite subsequent amendments, applies to most employment relations and not only to workers covered by federal awards. (Outside the APS, this aspect of the legislation rests on the use of the Commonwealth’s external affairs power and is supported by Australia’s treaty obligations in the areas of employment and human rights.)

When the Reform Bill was before the Senate, Senator Spindler moved that 'age' be made a prohibited ground for termination. The Government agreed to this amendment to paragraph 170DF(1)(f) of the Bill and the legislation accordingly provides that an employer must not terminate a contract of employment on account of a worker’s:

race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The majority of States and Territories have outlawed age discrimination in employment and the Commonwealth has also legislated in this area and indicated that it intends to widen existing protections in 1995. The Spindler amendment was therefore 'in tune' with emerging State and Commonwealth approaches to age discrimination and compulsory retirement.

The changes made by the Reform Act supplemented an existing Commonwealth remedy under the Human Rights and Equal Opportunity Commission Act 1986 (the HREOC Act) whereby the Human Rights and Equal Opportunity Commission (HREOC) may conciliate in cases of alleged age discrimination in the workplace.

Somewhat surprisingly, however, serious (and probably compelling) doubts have emerged as to whether the Reform Act ends compulsory age retirement in the APS. As the Commonwealth has direct power to legislate with respect
to its public servants, the doubts do not concern the constitutional antecedents of the Bill but instead arose initially from the Commonwealth's narrow interpretation of the Spindler amendment. After the Reform Bill had safely negotiated the Senate, the Commonwealth sought to maintain the status quo in relation to compulsory retirement in the APS, arguing that termination effected by the operation of law, rather than the actions of the employer, is not subject to the Industrial Relations Act.

There are no clearly articulated policy reasons for retaining compulsory age retirement and treating public servants less favourably than private sector workers. Objections to ending age retirement appear to rest on concerns regarding the possible impact on young job seekers and the difficulty of relying on inefficiency as the ground for terminating the services of ageing members of the APS.

Indeed, there are sound policy reasons for giving a wide reading to the Reform Act's provisions on age discrimination and unfair dismissal. For instance, except where specifically stated, the Reform Act is universal in its application. The legislation's reliance on standards contained in international instruments also argues for applying the anti-age discrimination to the APS as well as to other workplaces. Moreover, changes in community standards, the relatively small number of Commonwealth public servants remaining in the APS beyond age 60 and previous government assurances that compulsory age retirement would be reviewed, also argue against special treatment for the APS.

If the Government thought that this distinction reflected the intention of the Spindler amendment, was grounded in logic or based on weighty policy considerations it did not say so. Moreover, it did not take the opportunity in 1994, in seeking to tidy up the unfair dismissal provisions of the Reform Act, to apply unambiguously the same rules to the APS as it had to other employers.

The Commonwealth's approach sparked a number of complaints to HREOC and resulted in two applications to the Industrial Relations Court of Australia. However, as has now been confirmed by two decisions of the Industrial Relations Court, the Commonwealth may continue to compulsorily retire public servants solely on the criterion of age.

The McLeod Committee supported ending compulsory age retirement but the Government has yet to endorse this particular recommendation. At this stage, despite some encouraging comments by the Attorney-General, there is no guarantee that the Government will move to end compulsory age retirement in the APS in the near future.
Background

Community awareness of various forms of discrimination has risen over recent years and age discrimination has received a significant amount of legislative attention. Compulsory age retirement has been a key issue for reformers although their zeal has been somewhat tempered by high levels of youth unemployment and a growing tendency for Australian workers to leave the paid workforce well before they would be retired on the grounds of age.

This paper is about how the Commonwealth has continued to discriminate against its own employees in relation to compulsory age retirement. Whilst legislating to prevent other employers from engaging in age discrimination, the Commonwealth has been able to take advantage of its unique status as an employer to avoid its own anti-discrimination laws.

Most jurisdictions in Australia have passed laws outlawing various forms of discrimination including age discrimination. For example, under the Commonwealth’s Human Rights and Equal Opportunity Commission Act 1986 (the HREOC Act) the Human Rights and Equal Opportunity Commission (HREOC) may conciliate in cases of alleged age discrimination in the workplace. Most anti-discrimination laws extend to employment relations and invariably have a universalist tenor being either directly or indirectly shaped by the wording of international treaties to which Australia is a party (see Appendix A).2

Whilst the Commonwealth and the majority of States and Territories have enacted legislation designed to discourage discrimination based on age, not all have acted to remove compulsory age retirement provisions applying to public sector workers (see Appendix B).

At the same time, the coverage of the various anti-discrimination laws is patchy, being characterised by both areas of overlap and duplication as well as areas where behaviour is unregulated or else subject to special exemptions.

The PS Act contains one such exemption, presently providing that APS officers must retire at age 65. This requirement applies to Commonwealth public servants including Departmental Secretaries3, members of the Senior

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1 Conciliation is, however, the only remedy available under the HREOC Act and HREOC cannot grant substantive relief or oblige a recalcitrant employer to reinstate a dismissed worker.


3 Section 76C.
Executive Service (SES)\textsuperscript{4} and all other grades\textsuperscript{5}. The relevant provisions, however, allow Departmental Secretaries to make determinations permitting their permanent officers to continue to be engaged beyond 'maximum retiring age'. This may only be done as a matter of individual discretion and the provisions cannot be used to grant a general exemption.\textsuperscript{6}

This approach now appears somewhat outmoded given current community standards which should apply equally to the APS and the rest of the community. Although there are some important differences, public sector employment is not divorced from the fundamental principles of individual and collective industrial law, nor is the public sector immune from changes in employment relations generally. Indeed, the trend in recent years has been towards a convergence in private and public sector work practices.

Nonetheless, Commonwealth public servants may not work beyond age 65 without a special dispensation from the Head of their department or agency.

Naturally, given these changed community standards and the activism of the Commonwealth in the field of anti-discrimination law over the past decade, its lack of action in relation to the compulsory age retirement in the APS has not gone unnoticed. Indeed, the Commonwealth's apparent reluctance to end compulsory age retirement in its own bailiwick is the more remarkable given the relatively small number of Commonwealth public servants likely to be affected.\textsuperscript{7} Most Australian Parliaments have now enacted legislation limiting discrimination based on age without dire results.\textsuperscript{8} Given that the overwhelming majority of public servants retire before age 60, the effect on Commonwealth finances is also likely to be negligible.\textsuperscript{9}

\begin{itemize}
\item \textsuperscript{4} Section 76J.
\item \textsuperscript{5} Section 76V.
\item \textsuperscript{6} A blanket exemption would probably amount to a failure to properly exercise discretion (ie consider the merits of each individual case), and would probably be regarded as invalid (\textit{ultra vires}).
\item \textsuperscript{7} In the year ending June 1994, there were 974 age retirements from the APS but only 249 of these were amongst permanent staff aged 64 or over. Moreover, the figure of 974 represents only about 11 percent of total separations amongst permanent staff. By contrast, as at 30 June 1994, there were 81 permanent public servants aged 65. Source: Department of Finance, \textit{Australian Public Service Statistical Bulletin 1993-1994}, pp 59 and 103.
\item \textsuperscript{8} \textit{Anti-Discrimination Act 1991} (QLD); \textit{Equal Opportunity Act 1984} (SA); \textit{Equal Opportunity Act 1984} (WA); \textit{Anti-Discrimination Act 1992} (NT); \textit{Anti-Discrimination Act 1977} (NSW); and \textit{Discrimination (Amendment) Act 1994} (ACT).
\item \textsuperscript{9} Only 2.2 percent of permanent Commonwealth public servants are aged 60 and over and only a further 2.9 percent are older than 56. Department of Finance, \textit{Australian Public Service Statistical Bulletin 1993-94}, p 59.
\end{itemize}
Nor is compulsory age retirement explicable as a form of indirect trade-off for permanency of tenure in the APS. Whilst the practice may suggest otherwise, permanency of tenure is possibly one of the livelier myths of public sector employment.\(^\text{10}\)

The Commonwealth has direct power under the Australian Constitution to abolish compulsory age retirement in the APS and does not need to rely on the external affairs power and the existence of a relevant international treaty to achieve this end.\(^\text{11}\) Accordingly, there appear to be no major legal impediments to changing existing practice and any that exist could no doubt be overcome by a process of careful drafting and a 'phasing in' of any new arrangements.

**Pre 1993 Attempts at Reform**

As already observed, age discrimination has attracted attention for a number of years. Some of the more recent forays into this area are worth noting simply to make the point that the Commonwealth has been on notice in respect of community concerns for some time.

In 1990, Senator Vicki Bourne (Australian Democrats, NSW) was given an undertaking by the Minister for Social Security to remove age discrimination from all existing federal legislation.\(^\text{12}\)

The House of Representatives Standing Committee for Long Term Strategies Report, *Expectations of Life: Increasing The Options For the 21st Century*, presented in April 1992, recommended that:

> ... the Commonwealth Government abolish compulsory age-related retirement in the Australian Public Service and other employment areas.\(^\text{13}\)

In November 1992, the Government responded to the Report of the Long Term Strategies Committee and gave in principle support to ending

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\(^{10}\) As Associate Professor Greg McGarry recently put it: '... in legal terms, tenure in the public sector has not died. In legal terms it never existed. In general, there has always been at least adequate and often ample power to terminate the services of public sector workers. In fact, in some services, the state of law was such that employees had less legal security than workers in the private sector.' Refer 'The Demise of Tenure in Public Sector Employment' in McCallum, McGarry and Ronfeldt (eds), *Employment Security*, Federation Press, 1994, pp 138-162 at p 138.

\(^{11}\) Section 52 of the Australian Constitution.

\(^{12}\) *Media Release*, 13 September 1990.

\(^{13}\) Recommendation 3.
Compulsory age-related retirement. On 17 December 1992, Senator Patterson presented a private Senator's Bill, the Public Service (Abolition of Compulsory Retirement Age) Amendment Bill 1992 which would have abolished compulsory age retirement and enabled recruitment by the Commonwealth of persons who had turned 65. The Bill was to commence on 1 July 1995 to "allow sufficient time to adjust personnel planning policies and for the relevant authorities to make any necessary adjustments".

On 19 October 1993, Senator Patterson asked on notice whether any decision had been taken to end age discrimination in the federal arena. On 7 December 1993, the Attorney-General, through Senator Bolkus, responded that no decision had been taken but:

- the Attorney-General’s Department is working towards the development of a comprehensive Commonwealth age discrimination policy; and
- . . . public consultations on the desirability or otherwise of measures to combat age discrimination in the federal arena have not yet been undertaken. The Attorney-General’s Department proposes to release a discussion paper to facilitate community consultations on the issues involved early next year [1994]. Public consultations will occur following the release of the discussion paper.

As at time of writing, the 'Discussion Paper' mooted for completion in early 1994 has not been released and may not appear until age discrimination has again been formally considered by Cabinet.

In June 1994, the Assistant Minister for Industrial Relations and Minister Assisting the Prime Minister for Public Service Matters, the Hon Gary Johns, commissioned a review group headed by a senior public servant, Mr R N McLeod, to examine the legal framework within which the APS operates.

(As the McLeod Committee was due to report in late 1994, the Government may have decided to delay any action on age discrimination in the APS during 1994. In any event, further progress is unlikely until the Government has examined the Report of the McLeod Committee which was presented to


15 Senate, Parliamentary Debates (Hansard), 17 December 1992, p 5325.

16 Senate, Parliamentary Debates (Hansard), 7 December 1993; p 4091.

17 A Task Force chaired by the Attorney-General’s Department is due to report shortly and indicated to the Public Service Act Review Committee headed by Mr McLeod that it would support the abolition of compulsory age retirement. Public Service Act Review Group (McLeod Committee), Report, December 1994, p 57.

18 The Review of the Public Service Act was announced by Minister Johns on 30 June 1994. Ron McLeod is a senior public servant in the Department of Defence.
Minister Johns on 22 December 1994 and released by him to the public on 16 January 1995.)

The Industrial Relations Reform Bill - Constitutional Aspects

In December 1993, the Reform Act was passed establishing minimum national standards in relation to termination of employment. The Reform Act came into effect on 30 March 1994, and despite subsequent amendments, applies to most employment relations and not only to workers covered by federal awards.

When the Industrial Relations Reform Bill 1993 was before the Senate, Senator Spindler moved that 'age' be made a prohibited ground for termination. The Government agreed to amend paragraph 170DF(1)(f) to achieve this result. Accordingly, the Act presently provides that an employer must not terminate an employee's contract on account of the worker's "race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin."

Like other aspects of the new law on termination, the prohibition of age discrimination relies on the Australian Constitution's external affairs power (section 51, placitum (xxix)) to import into Australian domestic law a series of internationally agreed minimum standards on employment and human rights.

As the industrial power of the Commonwealth (section 51, placitum (xxxv)) does not allow the Commonwealth to pass legislation setting down universal standards relating to unfair dismissals and termination of employment, the Commonwealth has sought to rely on other heads of power to achieve this end. This approach has proven to be somewhat contentious and there are to be a number of High Court challenges to the constitutional validity of the Reform Act including its reliance on the external affairs power.

The Reform Bill as presented did not make 'age' a prohibited ground for termination. This may have been because the Attorney-General's Department


20 Industrial Relations Amendment Act (No.2) 1994, assented to 30 June 1994.

21 Senate, Parliamentary Debates (Hansard), 8 December 1993, pp 4200-4201.

22 The external affairs power may only be relied on where a matter is physically external to Australia, where there is a genuine (bona fide) treaty obligation or where there is a matter of 'international concern' which the Commonwealth is seeking to address through domestic law.

23 These are set down for hearing in May 1995.
was still developing a comprehensive policy on age discrimination at the time that the Minister for Industrial Relations introduced his reform package in late 1993. This may have also been because doubts exist as to whether the relevant international treaties provide an adequate basis for domestic legislation prohibiting termination of employment on the ground of age.\textsuperscript{24}

The more significant international instruments in respect of age discrimination and compulsory age retirement are the \textit{International Covenant on Civil and Political Rights}, International Labour Organisation (ILO) Convention No.111 \textit{Concerning Discrimination in Respect of Employment and Occupation} and the associated Recommendation (No. 111) which deals with the same matter, and ILO Convention 158 and ILO Recommendation (No.166) on \textit{Termination of Employment at the Initiative of the Employer}. The possible application of these instruments is discussed in more detail at Appendix A.

As there was little debate on the 'age' amendment moved by Senator Spindler, it is not clear what the Government's advice was on the constitutionality of the Senator's proposal. Its acceptance of Senator Spindler's amendment suggests, however, that it was at least prepared to entertain the argument that national legislation outlawing age-based discrimination in the workplace will survive a constitutional challenge.

\textbf{The Reform Bill - the Spindler Amendment}

As already noted, the Government has direct power under the Constitution to amend the PS Act in relation to compulsory age retirement without relying on the external affairs power. Indeed, in respect of its own employees, any ambiguity in the relevant international instruments is not an issue. The 'treaties issue' is only relevant here because the Commonwealth has allowed the PS Act to become out of step with prevailing community standards on age retirement which have themselves been bolstered by the use of the external affairs power. Similarly, the Democrat amendment to section 170DF of the Reform Act would not have created such uncertainty had it been plain that it was intended to end compulsory age retirement in the APS.\textsuperscript{25}

Nonetheless, subject to specific exclusions,\textsuperscript{26} the Reform Act is arguably meant to provide a uniform national standard in relation to termination of employment for all employees whether they are covered by federal or state

\textsuperscript{24} The Australian Government has itself lent support to the view that the International Covenant on Civil and Political Rights does extend to age based discrimination. Refer Submission by the Australian Government on the Merits of the Communication lodged by Nicholas Francis Toonen, Communication No 488/1992, September 1993, p 13.

\textsuperscript{25} This may have happened had the Democrat amendment been more fully debated in the Senate.

\textsuperscript{26} Including that the Reform Act remedies do not apply where an adequate alternative remedy exists (section 170EB), eg under State law.
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awards or are award free. The Industrial Relations Act extends to Commonwealth employees, private sector workers and State public servants, although there may be some doubt in regard to certain classes of the last of these groups. 27

If the Act is intended to operate universally, how then, it may be asked, is it that it a major employer, the Commonwealth, is not bound by it? Moreover, as it has never been suggested that the Democrat sponsored amendment on age discrimination was not intended to extend to persons engaged under the PS Act, how can the Commonwealth say that it should not be treated in law like any other employer? 28

Limits to the Reform Act

Although it did not demur at the time, the Commonwealth, since agreeing to Senator Spindler’s amendment, has argued that public servants must still comply with sections 76J and 76V of the PS Act. These sections provide for a maximum retiring age of 65 except where the Secretary of a Department is of the opinion that it is in the interests of the Commonwealth that the relevant officer should continue in employment.

The technical argument advanced for this approach is that subsection 170DF(1) of the Industrial Relations Act only applies to terminations effected by the actions of an employer. 29 In the case of the PS Act terminations, it is argued by the Commonwealth that the ‘separation’ arises out of the operation of a law and not the actions of the employer. 30 Compulsory age retirement in the APS is therefore not a termination made unlawful by the 1993 amendments to Industrial Relations Act. This view has not gone uncontested.

As noted in a supplementary Bills Digest prepared for Industrial Relations Amendment Bill (No.2) 1994, 31 there are technical as well as policy grounds for opposing the Government’s current approach. First, the Reform Act makes no exception for the APS, nor do the relevant Parliamentary debates reveal any intention on the part of the Parliament to discriminate against public

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27 The extent of any implied immunity of State public servants from Commonwealth laws is unclear but may be determined by the High Court in handing down a final decision on the Victorian State Government’s challenge to federal industrial laws. Refer Re Australian Nursing Federation; Ex parte State of Victoria 112 ALR 177.

28 Workforce, 18 February 1994.

29 A view brought to public notice by comments made by Ms Helen McKenzie, a partner with the law firm, Blake Dawson Waldron. Canberra Times, 14 April 1994.

30 See section 76J for application to Members of the Senior Executive Service.

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servants in relation to compulsory age retirement. Second, given the usual tenets of statutory interpretation, that is that a later piece of legislation overrides an earlier Act to the extent of any inconsistency, the compulsory retirement provisions of the PS Act may indeed have been amended by the Reform Act.

Predictably then, the Commonwealth’s approach sparked a number of complaints to HREOC. It also resulted in two applications to the Industrial Relations Court of Australia with each matter turning on claims by APS officers that the Commonwealth had unlawfully terminated their employment at age 65.\(^\text{32}\) Both these matters were resolved in favour of the Commonwealth with the Industrial Court upholding the compulsory age retirement provisions of the PS Act.

In each instance, the Court accepted the Commonwealth’s argument that termination had not breached the Industrial Relations Act as the ending of employment had been brought about by the operation of law (the PS Act) rather than through the actions of the employer.

**Further reform?**

It seems clear that the status quo has been maintained and, subject to the exceptions outlined above, Commonwealth public servants must retire on reaching 65.

Excluding the remote possibility of successful court action, the only way of eliminating age discrimination in respect of retirement from the APS is by amending the relevant provisions of the PS Act (viz sections 76C, 76J and 76V).

Any such amendments to the PS Act may need to reflect other considerations including the treatment of public servants who may turn 65 whilst the amending legislation is prepared. To avoid disadvantaging individuals, consequential amendments may be necessary to overcome these transitional problems. Given the inappropriateness of retrospective legislation, one way of proceeding might be to immediately raise the current maximum retirement age by one or two years. Such an (albeit) ‘second best’ solution could allow the Commonwealth further time to tidy up any loose ends without disadvantaging those officers who will turn 65 during any ‘changeover’ period.

In practice, the prospects for a speedy resolution of this issue are mixed.

The Report of the McLeod Committee recommends that compulsory age retirement not be included in the new PS Act, supporting instead a universal system of annual performance appraisal which would operate to remove inefficient officers regardless of age. The Report also argues for further consideration being given to the development of more flexible working arrangements within the APS. In line with suggestions made to the McLeod Committee, these arrangements ideally should allow staff nearing retirement to 'wind down' their commitment to paid employment without detriment to their superannuation entitlements.\(^{33}\)

The Attorney-General has also indicated that he is 'working on age discrimination policy' with a view to introducing changes based on the New South Wales model sometime in 1995. Under the relevant New South Wales legislation\(^ {34}\) it is, amongst other things, unlawful to sack a worker purely on the basis of age.\(^ {35}\)

On the other hand, the McLeod Report has yet to be endorsed by Cabinet and detailed proposals for reforming the PS Act generally have many hurdles to jump before becoming law.

The PS Act is complex, but forms only part of an array of instruments - which include awards, regulations, determinations, orders and guidelines - governing APS employment. Together these form an inter-related and mutually dependent set of rules.

Before Minister Johns took hold of the process, attempts to secure a major rewriting of the PS Act had been close to stalled for a number of years partly because of the complex nature of the legislative code governing Commonwealth public sector employment. A further impediment has been (and will be) the sensitivity of the public sector unions to any changes to the PS Act. An activist Minister notwithstanding, the Government will be doing well to have completed the proposed overhaul of the PS Act during the life of the present Parliament.\(^ {36}\)

A multi-stage approach to amending the PS Act cannot be entirely discounted with matters of substantive change being left to stage two whilst tidying up proposals are proceeded with in stage one this year. It is therefore possible that specific changes to the compulsory retirement provisions will be

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\(^{34}\) Anti-Discrimination Act 1977.

\(^{35}\) Sunday Herald Sun, 6 November 1994 and Sunday Telegraph (NSW), 6 November 1994.

\(^{36}\) Canberra Times, 10 February 1995, p 5.
abandoned or deferred if significant opposition emerges within the management of the APS.

If the Government fails to act quickly, it may be that individual Members and Senators decide to initiate further legislative action to achieve what some presumably thought had already been done under the auspices of Senator Spindler’s amendment to the Reform Act. If such action is not taken, APS staff will continue to be retired not on the basis of their capacity to work, but because they have reached an arbitrarily determined age.

Concluding Comments

Notwithstanding constitutional difficulties and the desirability of developing a comprehensive and consistent approach to age retirement, there appear to be ample grounds for criticising the Commonwealth’s conduct in relation to this issue.

The Government has been slow to act on Parliamentary and outside interest in this issue and it has not met in full the commitments referred to earlier in this paper.

Moreover, the Government did not take the opportunity in the course of seeking to tidy up the unfair dismissal provisions of the Reform Act, to bind itself in relation to age discrimination in the same way that it had been prepared to constrain other employers. This may not be a case of double standards but, given the trend to greater comity between public and private sector employment practices, it is hard to justify as a 'special case'.

An unkind critic might also suggest that the Commonwealth’s present approach continues what could perhaps be described as its masterful inactivity in this area. Such criticisms just may be unfair but it is difficult to make a contrary assessment given the absence of action on earlier undertakings, the brevity of parliamentary debate on the Spindler amendment and the relatively slow progress of the Government’s review of age discrimination.

It could also be argued that it was worth waiting for the completion of the McLeod Committee’s Review of the PS Act and that this now provides a logical context for attending to this matter. The Attorney-General’s remarks in November 1994, demonstrating a preparedness to address these issues during 1995, hopefully also indicate that the way is open for progress to be made.

37 Industrial Relations Amendment Bill (No.2) 1994
APPENDIX A

Age Discrimination - International Treaties

1. The *International Covenant on Civil and Political Rights*, which is the main international treaty on human rights and discrimination, does not specifically refer to 'age' as a ground upon which discrimination is to be prohibited. In article 2, parties are required to respect and ensure to all individuals the rights recognised in the Covenant without distinction of any kind, such as:

   race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.

   It is quite possible that 'other status' would be taken as including 'age', although this is not yet clear.

2. Article 2 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides that parties to that treaty shall "guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race . . . or other status." Article 6 of the ICESCR recognises a broad right to work and article 7 recognises the right of "everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence."

   The Preamble to, and Parts II and III of, the ICESCR form Schedule 8 to the *Industrial Relations Act 1988*.

3. The ILO Convention (No. 111) *Concerning Discrimination in Respect of Employment and Occupation* defines 'discrimination' as:

   any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

   Although it does not specifically refer to 'age', article 5 notes that special measures designed to provide special protection for people by reason of attributes which include 'age', do not constitute discrimination.

   ILO Recommendation No.111 *Concerning Discrimination in Respect of Employment and Occupation* states that national policies should be developed, consistent with national conditions and practice, which prevent discrimination in employment including in relation to security of employment [subclause 2(b)]. Subclause 2(c) of this Recommendation specifically provides that "government agencies
should apply non-discriminatory employment policies in all their activities."

These provisions may provide support for the proposition that age discrimination [except in cases of positive discrimination (clause 6)] is contrary to Australia's international treaty obligations. Subclause 2(c) of Recommendation No.111 is particularly relevant to compulsory age retirement in the public sector.

Recommendation No.111 forms Schedule 9 to the *Industrial Relations Act 1988*.

4. ILO Convention (No.158) *Concerning Termination of Employment at the Initiative of the Employer* at article 5 lists reasons which do not constitute valid reasons for termination. The reasons listed do not, however, include age.

ILO Recommendation (No.166) *Concerning Termination of Employment at the Initiative of the Employer* states at clause 5 that in addition to the grounds listed at article 5 in Convention No.158, "age, subject to national law and practice regarding retirement" should also not constitute a valid reason for termination.

Subject to doubts over the effect of the rider "subject to national law and practice regarding retirement"; Convention No.158 and Recommendation No.166 taken together, may support a valid Commonwealth law on age discrimination in employment.

These two instruments are incorporated into the *Industrial Relations Act 1988* as Schedules 10 and 11 respectively.
APPENDIX B

Age Discrimination - Australia

Age Discrimination - The Commonwealth

Human Rights and Equal Opportunity Commission Act 1986

'Discrimination' is defined in s. 3 of the Human Rights and Equal Opportunity Commission Act 1986 as any distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation which has been declared by the regulations to constitute discrimination.

Such a declaration was made in the Human Rights and Equal Opportunity Commission Regulations 1989, which set out 'age' as a ground of discrimination which is prohibited by the Act.

Division 4 of Part II of the Act sets out the Human Rights and Equal Opportunity Commission's (HREOC's) equal opportunity functions. These functions relate to 'acts or practices' which are done by or on behalf of a State or Territory, under a law of a State or Territory, or wholly within a State or Territory.

Section 31 gives HREOC the power to inquire into any 'act or practice' that may constitute discrimination and to deal with it by conciliation. If the Commission cannot resolve the matter by conciliation, and it finds that discrimination has occurred, it may report to the Minister. HREOC cannot make any binding or enforceable determination in relation to age discrimination.

As the Commonwealth has no direct constitutional power to legislate in relation to human rights, it must rely on its power to implement international treaties under the external affairs power (except in relation to areas over which it has direct power, such as territories and the Commonwealth public service). The basis for the age discrimination provisions in the Human Rights and Equal Opportunity Commission Act 1986 is assumed to be the reference to 'other status' in article 2 of the International Covenant on Civil and Political Rights. The validity of this assumption has not been challenged before the courts.

Public Service Act 1922 and Industrial Relations Act 1988

As discussed in the text, the Industrial Relations Reform Act 1993 amended the Industrial Relations Act 1988 to make it unlawful for an employer to dismiss a worker because of the worker's age. The Public Service Act 1922 provides
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for compulsory age retirement at age 65 subject to the discretion of the head of the relevant department or agency.

Age Discrimination in the States

New South Wales

The Anti-Discrimination Act 1977 contains two parts dealing with age discrimination. Part 4G deals generally with age discrimination in the areas of work, education, access to places and vehicles, provision of goods and services, accommodation and registered clubs. There are certain exemptions in relation to superannuation and insurance, safety procedures, sport, special needs programs and activities, and the legal capacity and welfare of children.

Part 4E, which was inserted in 1990, deals with compulsory retirement age. It had a staggered introduction, applying initially only to persons employed in the public sector, but had extended to all employees in New South Wales by 1 January 1993. Exceptions made in s. 49ZX cover judges, police officers, people who can only be removed from office by a resolution of Parliament (and who are not appointed for a term) and any person holding a prescribed office.

Section 49ZV provides that it is unlawful for a person to retire a person, or require the person to retire, or threaten or attempt to cause the person to retire, on the ground of the employee's age.

There is no requirement of compulsory age retirement in the public service.

Victoria

Victoria does not have legislation concerning age discrimination, although there are proposals to enact such legislation. The Equal Opportunity Act 1984 prohibits discrimination based on status and impairment (section 21) but does not explicitly define these terms to encompass "age" (section 4).

Section 41 of the Public Sector Management Act 1992 provides that officers of the Public Service must retire at 65. Section 42 allows an officer to continue in the Public Service after turning 65 if the Minister so directs. Sub-section 41(4) also provides that the Department Head may call on an officer who has attained the age of 60 to retire, and the officer must do so.

Queensland

In the Anti-Discrimination Act 1991, age is included as a ground of discrimination which is prohibited in all the areas covered by the Act. These areas include work, education, goods and services, superannuation, insurance,
disposition of land, accommodation, club membership, administration of State laws and programs, and local government.

Section 106A provides that the Act has no effect on the imposition of compulsory retirement age on judges and magistrates, fire officers, police officers, railways employees, certain staff at the University of Queensland, directors of public companies, and others prescribed by regulation.

Section 32 allows conditions for partnerships that a person joining the partnership not be over a specified age, or must retire from the partnership at a specified age. Section 33 provides that persons under 21 years may be remunerated according to the worker's age.

Section 26 of the Public Service Management and Employment Act 1988 allows voluntary retirement from the age of 55. There is no requirement of compulsory age retirement.

South Australia


Section 85f provides exemptions for employment within a private household. It also exempts cases where there is a genuine occupational requirement that a person be of a particular age, or if a person of a certain age would not be able to perform the work adequately without endangering himself or herself or others, or would not be able to respond adequately to emergencies. Exemptions are also given in relation to the requirements of industrial awards and youth wages.

Provisions of awards or industrial agreements made under the Industrial Relations Act 1972 (SA) which impose a compulsory retirement age are deemed void, although subsection 85f(5) provides that an employer may impose a 'standard retiring age' in respect of employment of a particular kind.

Exemptions are provided for associations which have been established for persons of a particular age group, or where it is reasonable to establish classes of membership based on age groups. There are also exemptions for competitive sport, the conditions on which insurance and superannuation are granted, and educational institutions which are designed for persons of a particular age group.

Section 63 of the Government Management and Employment Act 1985 allows voluntary retirement from the age of 55. There is no requirement of compulsory retirement.
Western Australia

Part IVB of the *Equal Opportunity Act 1984* deals with age discrimination. It covers the areas of work, education, access to places and vehicles, goods, services and facilities, accommodation, land, clubs and incorporated associations, sport, application forms, superannuation schemes and provident funds.

Section 66ZM provides that age discrimination is not prohibited if it is necessary to comply with reasonable health and safety considerations. Section 66ZN provides that it is not unlawful to offer an employee a voluntary retirement scheme. It also includes a phase-in period of 2 years until 8 January 1995 during which compulsory retirement is not an offence. Subsection 66ZN(2) provides that the Act does not affect the compulsory retirement of judges, magistrates and masters.

Section 66ZQ provides an exemption for certain dramatic, modelling and visual work where people of particular ages are required for reasons of authenticity, and cases where people of a particular age can most effectively provide services for the promotion of the welfare of people of a particular age.

Section 66ZR provides an exemption in relation to insurance where it is based upon actuarial or statistical data.

Section 66ZS provides exemptions for acts done in compliance with certain legislative requirements.

There is no longer a requirement that members of the State Public Service retire at the age of 65.

Tasmania

Tasmania does not yet have general anti-discrimination legislation. An anti-discrimination Bill was introduced by the Labor Opposition in 1992, but was defeated on the Second Reading on 2 March 1993. The Bill has been re-introduced on several occasions, the latest being in the form of the Anti-Discrimination Bill 1994 which was given a First Reading on 13 April 1994. The Bill covers discrimination on the grounds of age in the areas of employment, education, provision of facilities, goods and services, accommodation, and club membership and activity.

Subclause 16(3) provides that a person must not discriminate against another on the ground of "age".

Clause 28 of the Bill provides an exemption for discrimination in the area of employment where by reason of the age of the person, he or she has a restricted capacity to do the job or requires special conditions in order to be
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able to do the job. It also provides an exemption where the discrimination is based on a genuine occupational qualification or if it is related to inherent requirements of the job.

Clause 33 provides an exemption for discrimination based on age in competitive sporting activities, and clause 34 provides that clubs may restrict their membership to members of a specific age group.

Clause 35 provides an exemption for age discrimination in relation to insurance and superannuation where it is based on actuarial or statistical data.

Under the scheme of the Bill, complaints of discrimination are dealt with by conciliation. If conciliation fails, an inquiry is then undertaken by "the Tribunal" (clause 12). In relation to some kinds of discrimination, the Tribunal can make a range of orders which may include requiring the payment of compensation or the re-employment of a person (clause 65). Such orders are enforceable as if it were a court order. In relation to age discrimination (subclause 16(3)), the Tribunal can only make a declaration that prohibited discrimination has occurred and recommendations as to how it should be redressed. The declaration and recommendation is not binding or enforceable (clause 66).

Section 41 of the Tasmanian State Service Act 1984 provides that a permanent employee is required to retire upon attaining maximum retiring age, which is 65, unless the person falls within a class of persons specified in the regulations, for which a different maximum retiring age is set.

Australian Capital Territory

The Discrimination Act 1991 includes age discrimination in the grounds on which discrimination is prohibited. The areas of discrimination which are covered include work, education, access to premises, goods, services and facilities, accommodation, and clubs.

Section 28 provides an exemption for insurance where the discrimination is based on actuarial or statistical data. Section 29 provides for certain exemptions in relation to superannuation. Section 30 provides exemptions when the act done is necessary to comply with a law or an order of a court.

Section 57A exempts discrimination on the ground of age in relation to participating in a dramatic performance or being a model, where a person of that age group is required for reasons of authenticity. It also exempts the hiring of persons of a particular age group where they can most effectively provide services for the welfare of persons of a particular age group.

Section 57B allows the payment of youth wages to employees under the age of 21. Section 57C provides that it is not unlawful to discriminate against a person in employment on the ground of age where that discrimination is
practised in order to comply with reasonable health and safety requirements. Section 57J makes the same exemption in relation to the provision of goods, services and facilities.

Compulsory retirement is dealt with in section 57D, which gives a two year period from 1994 when compulsory retirement will not be unlawful under the Act. After that period expires, it will be unlawful to impose compulsory retirement upon employees.

Exemptions are also provided for minimum and maximum age requirements at educational institutions, benefits and discretions, and recreational tours and accommodation (e.g. tours for under 30’s). Section 57L provides that it is not unlawful for a club to discriminate against a person on the ground of age where the club’s principal object is the provision of benefits for persons of a particular age group. Section 57M provides an exemption in relation to sport where competition is based on age groups.

The Public Sector Management Act 1994 provides in sections 124, 131 and 142 for the compulsory retirement of members of the public service at the age of 65, but these provisions cease to have effect on 5 March 1996. From this date there will be no compulsory age retirement for members of the A.C.T. public service.

**Northern Territory**

The Anti-Discrimination Act 1992 prohibits discrimination on a number of grounds which include age. The areas in which discrimination is prohibited include education, work, accommodation, goods, services and facilities, clubs, insurance and superannuation.

Section 35 provides that a person may discriminate against a person in the area of work by fixing reasonable terms if by reason of age the worker has a restricted capacity to do the work. It also exempts discrimination based on a genuine occupational qualification, or on the person’s inability to adequately perform the inherent requirements of the work.

Section 36 provides an exemption which allows a person to discriminate on the grounds of age by imposing a standard age for commencement of work or a standard retirement age.

Section 44 provides that a person may supply benefits and concessions on the basis of age. Section 47 allows age discrimination in clubs where the club is mainly for people of a specific age group.

Section 49 allows discrimination in relation to insurance and superannuation which is based on actuarial or statistical data.
Section 53 exempts acts done in compliance with legislation, an order of a court or tribunal or an industrial agreement.

Section 56 sets out exemptions in relation to sport for people of specified age groups.

The *Public Sector Employment and Management Act 1993* provides in section 36 that public servants must retire upon attaining the age of 65, or such other age as is prescribed for a prescribed group. The Anti-Discrimination Commission is inquiring into this law.