

DEFINING 'DISCRIMINATION' IN UK AND AUSTRALIAN AGE DISCRIMINATION LAW

ALYSIA BLACKHAM*

Population ageing is a challenge facing governments across the Organisation for Economic Co-operation and Development. In a bid to increase employment rates for older workers, extend working lives and acknowledge the inherent dignity of workers of all ages, governments have introduced age discrimination laws, to make differential treatment on the basis of age largely unlawful. While the core ideas and rationales of age discrimination laws are similar in the UK and Australia, the countries differ in the way in which the notion of 'discrimination' has been developed in the case law. Drawing on employment age discrimination cases in the UK and Australia, I argue that the Australian cases have conceived of age discrimination in a far narrower way than those in the UK, possibly due to the inability to justify direct age discrimination in Australia. This has resulted in a restricted jurisprudence in Australia, which potentially undermines the development of the law and effectiveness of legal protection in this area.

Population ageing is a challenge facing governments across the Organisation for Economic Co-operation and Development ('OECD'). The *2015 Intergenerational Report: Australia in 2055* predicts that the number of Australians aged 65 to 84 will increase from 13 per cent to just under 18 per cent of the population by 2054–5, and those aged 85 and over will increase from two per cent to five per cent of the population.¹ The number of people of traditional working age (15–64) is therefore declining when compared with those aged over 65, dropping from 7.3 people of working age for every person aged 65 or over in 1975, to 4.5 people in 2015, and is predicted to drop to 2.7 people in 2054–5.² This will have significant consequences for the sustainability of labour markets and social security systems. Australia is not alone in facing these demographic trends: indeed, ageing is recognised as one of the 'most important challenges' confronting OECD countries.³

* BA, LLB (Hons) (Melb), PhD (Cantab); Senior Lecturer and ARC Discovery Early Career Research Fellow, Melbourne Law School, The University of Melbourne. This research was funded by the Australian Government through the Australian Research Council's *Discovery Projects* funding scheme (project DE170100228). The views expressed herein are those of the author and are not necessarily those of the Australian Government or the Australian Research Council. A preliminary version of this work was presented at the Eighth Biennial National Australian Labour Law Association Conference in Melbourne in 2016.

1 J B Hockey, The Treasury, *2015 Intergenerational Report: Australia in 2055* (Commonwealth of Australia, 2015) 13.

2 Ibid 1.

3 Organisation for Economic Co-operation and Development, *Ageing and Employment Policies: Live Longer, Work Longer* (2006) 9.

In a bid to increase employment rates for older workers, extend working lives and acknowledge the inherent dignity of workers of all ages, governments have introduced age discrimination laws, to make differential treatment on the basis of age largely unlawful. While the scope of age discrimination legislation is not confined to employment, it is in this area that age discrimination legislation is seen as having most potential to mitigate the economic effects of an ageing population. Thus, it is this aspect of age discrimination laws that forms the focus of this paper. Countering ageist stereotypes may help older workers to remain in the workplace for longer, thereby reducing demands on pension systems and promoting social inclusion of the elderly through work.⁴ Thus, age discrimination laws are seen as having both instrumental benefits for the economy and society, and intrinsic benefits for older workers themselves.

Age discrimination laws in both Australia and the UK have been framed around an individual rights model.⁵ The common legal foundations of the two countries, similar experiences of population ageing, and historical influence of UK discrimination law on Australian legal development⁶ make the UK a highly appropriate comparator country for a discussion of Australian discrimination law. However, while the core ideas and rationales of age discrimination laws are similar in the UK and Australia, the countries differ in the way in which the notion of 'discrimination' has been developed in statute and case law. Gaze has argued that establishing 'discrimination' is a 'major area of tension between conservative and progressive' interpretations of discrimination law.⁷ Thus, it is an area worthy of detailed study.

Drawing on employment age discrimination cases in the UK and Australia, I argue that the Australian cases have conceived of age discrimination in a far narrower way than those in the UK, possibly due to the inability to justify direct age discrimination in Australia. This has resulted in a restricted jurisprudence in Australia, which potentially undermines the development of the law and effectiveness of legal protection in this area.

I OBJECTIVES AND AIMS OF AGE DISCRIMINATION LAW

It is necessary to consider the objectives and aims underlying age discrimination laws, before assessing their capacity to achieve these ends. Age discrimination laws are generally expressed as being aimed at achieving two objectives:

- 4 See, eg, *ibid* 17–25; OECD, *Ageing and Employment Policies* <<http://www.oecd.org/els/emp/ageingandemploymentpolicies.htm>>.
- 5 In the UK, see Linda Dickens, 'The Road Is Long: Thirty Years of Equality Legislation in Britain' (2007) 45 *British Journal of Industrial Relations* 463.
- 6 See Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 1.
- 7 Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 341.

instrumental economic ends, and inherent or dignity ends.⁸ These two — potentially conflicting — objectives are both evident in the purpose and rationale of the Australian *Age Discrimination Act 2004* (Cth) ('ADA').

First, the *ADA* sought to respond to the social and economic costs of demographic ageing, by removing 'barriers to older people participating in society — particularly [in] the work force',⁹ including by prohibiting age discriminatory employment practices in hiring, training, setting terms and conditions of employment, selecting for redundancy and managing retirement.¹⁰ It was anticipated that this would maximise older workers' workforce participation, and give 'all Australians ... equality of opportunity to participate in the social and economic life of our country',¹¹ and increase organisational efficiency, which might be undermined by reliance on stereotypical assumptions of older workers that '[prevent] business from getting the best person for the job'.¹²

Second, in addition to these instrumental economic benefits, age discrimination legislation also offers intrinsic benefits, by recognising the inherent worth and dignity of workers of all ages.¹³ Indeed, the *ADA* was thought to 'play a key role in changing negative attitudes about older and younger Australians'.¹⁴ Thus, the *ADA* would 'send a powerful national message about the importance of eliminating unfair age discrimination'.¹⁵

The potential conflict between instrumental and intrinsic ends creates a 'double bind' at the heart of age discrimination legislation, as discourse based on fundamental rights competes with market logic.¹⁶ An intrinsic or fundamental rights approach would tend towards a strong, absolute approach to the equal treatment principle. In contrast, an instrumental or market approach provides significant scope to use age as an organising principle, where it is deemed expedient or economically efficient. This tension is evident in the *ADA*, where a broad prohibition of age discrimination in employment is undercut by extensive exceptions to the principle of age equality.

8 In the UK, see Alysia Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Hart Publishing, 2016) 7–13.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17 623 (Daryl Williams).

10 *ADA* pt 4.

11 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17 624 (Daryl Williams). This has economic benefits for the country, as it reduces welfare expenditure and increases 'self-reliance': see Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) 43.

12 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17 623 (Daryl Williams).

13 Blackham, *Extending Working Life for Older Workers*, above n 8, 9.

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17 624 (Daryl Williams).

15 *Ibid.*

16 Ann Numhauser-Henning, 'The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 391, 401.

Evaluating the effectiveness of age discrimination law, then, can proceed from an intrinsic or instrumental starting point. From an intrinsic or fundamental rights perspective, effective age discrimination law would be seeking to 'eliminate, as far as possible, age discrimination in key areas of public life',¹⁷ and in employment in particular. This would be necessary to address, reduce and ultimately eliminate the 'negative consequences of age discrimination both on the economy and on the health, financial and psychological wellbeing of individuals.'¹⁸ To reach this end, it would be necessary to both change individual and organisational behaviour, and to shift societal norms and attitudes,¹⁹ which are firmly grounded in ageist assumptions and behaviours. This is not solely the province of law and legal change: indeed, law forms only one part of a multifaceted and complex web of influences on social change.²⁰

From an instrumental starting point, however, the aims of age discrimination law are more measured: effective discrimination law should aim to reduce age discrimination in key areas of public life, to the extent required to alleviate the negative consequences of discrimination for the market and social systems (such as pensions). Thus, extensive exceptions to the general prohibition of age discrimination are allowable and desirable, so long as those exceptions promote economic efficiency or are instrumentally useful.

While recognising the fundamental differences between these two approaches, to assess the effectiveness of the *ADA* from either perspective it is necessary to consider the extent to which age discrimination has been reduced or eliminated in public life (and in the workforce in particular), and the extent to which the *ADA* has promoted the workforce participation of older workers. Preliminary data from the Australian Human Rights Commission ('AHRC') reveals serious concerns about how effective the *ADA* has been in practice. In 2014, over a quarter (27 per cent) of surveyed Australians aged 50 years and over reported experiencing age discrimination in employment in the previous two years.²¹ The AHRC was therefore tasked with conducting a national inquiry into discrimination against older workers, describing this as a 'systemic problem and a considerable barrier to their enjoyment of human rights'.²²

In its 2016 report,²³ the AHRC found that age discrimination against older workers was 'an ongoing and common occurrence',²⁴ and called for a 'targeted

17 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17 622 (Daryl Williams).

18 *Ibid* 17 623.

19 Belinda Smith, 'From *Wardley* to *Purvis* — How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 4. See similarly Australian Human Rights Commission, *Willing to Work*, above n 11, 331.

20 Roger Cotterrell, *The Sociology of Law: An Introduction* (Butterworths, 1984) 66–7.

21 Australian Human Rights Commission, *National Prevalence Survey of Age Discrimination in the Workplace: The Prevalence, Nature and Impact of Workplace Age Discrimination amongst the Australian Population Aged 50 Years and Older* (2015) 3, 18.

22 Australian Human Rights Commission, *Willing to Work — Terms of Reference for the Inquiry* <<https://www.humanrights.gov.au/willing-work-terms-reference-inquiry>>.

23 Australian Human Rights Commission, *Willing to Work*, above n 11.

24 *Ibid* 59.

focus on addressing employment discrimination and increasing the labour force participation of older people.²⁵ In relation to discrimination laws, the AHRC noted significant under-reporting of age discrimination, particularly when compared with the national prevalence of age discrimination.²⁶ The AHRC flagged issues in accessing legal assistance, the costs of court action, the emotional cost of pursuing a complaint, the burden of proving discrimination, issues with the comparator test, fear of victimisation following a complaint, intersectionality, and the overall effectiveness of an individual complaints system.²⁷

Some of these issues may resolve themselves over time: social change rarely occurs quickly, and the *ADA* has only been in place for just over a decade. At the same time, other issues may reflect deeper limitations in the legal framework, which time will not resolve. Thus, there is a serious need to re-evaluate the effectiveness of the *ADA*, and to consider how it might be improved. Of course, the way ‘discrimination’ is defined and interpreted by courts is only one possible reason for the limited impact of the *ADA*. Indeed, more fundamental issues, particularly relating to the difficulties of effecting social change through law, may affect the *ADA* and other discrimination statutes.²⁸ However, the defining and interpreting of ‘discrimination’ is still an important aspect to consider in relation to legislative effectiveness.²⁹ Thus, this paper considers how the concept of ‘discrimination’ has been developed in Australian case law, via case studies contrasting decisions with UK precedent.

II THE AUSTRALIAN AND UK LEGAL FRAMEWORKS

Age discrimination in employment is regulated in Australia by a myriad of pieces of age discrimination legislation at federal,³⁰ state and territory level,³¹ and as both an equality issue generally, and in relation to employment particularly.³² The differences between the federal, state and territory statutes are explored below.

Focusing initially on provisions at the federal level, the *ADA* s 18 makes it ‘unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against’ job applicants or employees on the grounds of age. This applies to determining who should be offered employment; setting

25 Ibid 107.

26 Ibid 320.

27 Ibid 320–7.

28 Cotterrell, above n 20, 48–9, 68. In practice, effecting social change and shifting social norms may require a strong champion, effective implementation of law by government, and a significant period of time to elapse. How these might be pursued in the context of age discrimination laws is a matter for later work.

29 See similarly Smith, above n 19, 4–5.

30 *Age Discrimination Act 2004* (Cth) (*‘ADA’*).

31 *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

32 *Fair Work Act 2009* (Cth).

terms and conditions; providing access to 'opportunities for promotion, transfer or training, or to any other benefits associated with employment'; dismissal; and in relation to 'any other detriment'. While age discrimination in employment is also regulated by the adverse action provisions in the *Fair Work Act 2009* (Cth) ('*FWA*'), this paper focuses particularly on the *ADA* provisions and their implementation, as the *FWA* definition of 'discrimination' expressly incorporates action unlawful under anti-discrimination law.³³ Thus, while this paper does not expressly consider the case law under the *FWA*, its findings are also relevant to the interpretation of the adverse action provisions.

The situation in the UK is less complex: the *Equality Act 2010* (UK) c 15 ('*EqA*') is a single piece of legislation prohibiting discrimination because of a range of protected characteristics, including age. There is no separate legislation relating to employment, and while some equality regulation is devolved to Northern Ireland, Wales and Scotland, the core legislative provisions remain the same in each region.³⁴ The *EqA* consolidated a number of pieces of equality legislation into a single statute in 2010, including the *Employment Equality (Age) Regulations 2006* (UK) SI 2006/1031, which implemented the EU Framework Directive 2000/78³⁵ into UK law as it related to age. The *EqA* prohibits direct and indirect discrimination, harassment and victimisation in the workplace on the grounds of age during recruitment, in setting the terms of employment, deciding to award promotions and provide training, and in dismissal.³⁶

III STATUTORY DEFINITION OF 'DISCRIMINATION'

The *EqA* and *ADA* both generally prohibit direct and indirect age discrimination in employment. However, the definitions of 'direct' and 'indirect' discrimination differ somewhat between the legislative schemes, and between the state, territory and federal schemes in Australia.

A Direct Discrimination

The *ADA* s 14 defines direct discrimination as occurring where:

- (a) the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially

33 Ibid s 351(2)(a). For discussion of the adverse action provisions generally, see the work being undertaken by Anna Chapman and Beth Gaze as part of the project *Reshaping Employment Discrimination Law: Towards Substantive Equality at Work?* (ARC grant DP110101076). In relation to age, see Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34 *University of New South Wales Law Journal* 182, 199–209.

34 *Northern Ireland Act 1998* (UK) c 47; *Employment Equality (Age) Regulations (Northern Ireland) 2006* (NI) SR 2006/261; *EqA* ss 209, 210.

35 *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16.

36 *EqA* s 39.

different, the discriminator treats or would treat a person of a different age;
and

- (b) the discriminator does so because of:
 - (i) the age of the aggrieved person; or
 - (ii) a characteristic that appertains generally to persons of the age of the aggrieved person; or
 - (iii) a characteristic that is generally imputed to persons of the age of the aggrieved person.

Section 5 of the *ADA* defines ‘age’ to include ‘age group’. Similar provisions are in place in New South Wales,³⁷ South Australia,³⁸ and Queensland.³⁹ In Western Australia, the discriminator must actually treat the person less favourably: there is no mention of ‘proposes to treat’.⁴⁰

Under the *EqA* s 13, direct discrimination is defined as occurring where, ‘because of a protected characteristic, A treats B less favourably than A treats or would treat others.’ Age as a protected characteristic is defined in s 5 as being a reference to a person of a particular age group, whether that is defined by reference to a particular age or to a range of ages.

Both jurisdictions require that ‘less favourable’ treatment be ‘because of’ age, meaning there is a broad similarity between the provisions. However, the Australian *ADA* provides more specificity regarding what might constitute direct age discrimination, at least in relation to characteristics and imputed characteristics. The *ADA* also includes a requirement that the treatment is less favourable than that ‘in circumstances that are the same or are not materially different’, which is not a requirement under the UK *EqA*.

Both the *ADA* and *EqA* rely on a comparator for establishing discrimination. The challenges of this approach have been well documented,⁴¹ particularly where it is difficult to produce a suitable real or hypothetical comparator. This is especially complex in the context of age, where it is also difficult to identify the age of the relevant comparator, given ‘age groups’ are nebulous and context-specific.⁴² This

37 *Anti-Discrimination Act 1977* (NSW) s 49ZYA(1)(a).

38 *Equal Opportunity Act 1984* (SA) ss 6(3), 85A.

39 *Anti-Discrimination Act 1991* (Qld) s 10.

40 *Equal Opportunity Act 1984* (WA) s 66V(1).

41 In relation to young workers, see Alysia Blackham, ‘Falling on Their Feet: Young Workers, Employment and Age Discrimination’ (2015) 44 *Industrial Law Journal* 246. See also Smith, above n 19.

42 See similarly Therese MacDermott, ‘Affirming Age: Making Federal Anti-Discrimination Regulation Work for Older Australians’ (2013) 26 *Australian Journal of Labour Law* 141, 144.

may be compounded by the requirement under the *ADA* that the treatment occur 'in circumstances that are the same or are not materially different'.⁴³

In its 2016 report, the AHRC recommended that the government consider amending federal discrimination laws to remove the comparator requirement, and replace it with a 'detriment' test based on the *Discrimination Act 1991* (ACT).⁴⁴ Under the provisions in both the Australian Capital Territory and Victoria, direct discrimination occurs where someone is treated or proposed to be treated 'unfavourably' because of age.⁴⁵ In Tasmania, direct discrimination is being treated less favourably because of age: proposed treatment is not mentioned.⁴⁶ In these jurisdictions, establishing discrimination is no longer a comparative exercise: the focus is on the treatment of the complainant, not how others may or may not have been treated.⁴⁷

In the Northern Territory, the definition is substantially different: discrimination includes 'any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity',⁴⁸ and proposed or actual less favourable treatment is one example of discrimination, but does not limit the generality of the definition.⁴⁹ Recasting the definition of direct discrimination in this broad way could substantially alter how the law is interpreted and applied in the courts.

B Indirect Discrimination

Indirect discrimination is defined in s 15 of the *ADA* as occurring where:

- (a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and
- (b) the condition, requirement or practice is not reasonable in the circumstances; and
- (c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.

Thus, it does not appear that the condition, requirement or practice needs to disadvantage the claimant in particular. Further, the condition, requirement or

43 *ADA* s 14(a). In relation to disability, see *Purvis v New South Wales* (2003) 217 CLR 92 ('*Purvis*'). This decision has been extensively criticised: see Colin D Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the *Disability Discrimination Act 1992* (Cth)' (2007) 35 *Federal Law Review* 111; Kate Rattigan, '*Purvis v New South Wales* (Department of Education & Training): A Case for Amending the *Disability Discrimination Act 1992* (Cth)' (2004) 28 *Melbourne University Law Review* 532; Smith, above n 19.

44 Australian Human Rights Commission, *Willing to Work*, above n 11, 336.

45 *Equal Opportunity Act 2010* (Vic) s 8(1); *Discrimination Act 1991* (ACT) s 8(2).

46 *Anti-Discrimination Act 1998* (Tas) s 14(2).

47 See *Wang v Australian Capital Territory (Discrimination)* [2015] ACAT 5 (16 January 2015) [78]–[79].

48 *Anti-Discrimination Act 1992* (NT) s 20(1)(a).

49 *Ibid* s 20(2).

practice must be shown to be *reasonable* to not be unlawful.⁵⁰ Similar provisions are in place in Victoria⁵¹ and Tasmania.⁵² In New South Wales, South Australia and Western Australia the provision is framed somewhat differently, to require that a ‘substantially higher proportion’ of people who are not of that age be able to comply with the condition or requirement.⁵³ Queensland, by contrast, requires only a ‘higher proportion’.⁵⁴ The Australian Capital Territory, Western Australia and New South Wales also omit mention of a ‘practice’, referring only to a requirement or condition.⁵⁵ This is a far more restrictive definition of indirect discrimination. In the Northern Territory, by contrast, there is no distinction made between direct and indirect discrimination.⁵⁶

These Australian provisions may be contrasted with the UK legislation. Section 19 of the *EqA* defines indirect discrimination as where ‘A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.’ A provision, criterion or practice (‘PCP’) is discriminatory if:

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Two key differences stand out when contrasted with the *ADA*: first, the PCP must put B at that disadvantage;⁵⁷ and, second, the discrimination is not unlawful if it is shown to be a proportionate means of achieving a legitimate aim. This is a more complex, multi-stage test than that of ‘reasonableness’. Indeed, in the context of sex discrimination, Thornton has described the ‘reasonableness’ standard as ‘a classic instance of the abdication of responsibility by the legislature’, which

50 And, under *ADA* s 15(2), ‘the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.’

51 *Equal Opportunity Act 2010* (Vic) s 9. Though, in Victoria, guidance is provided as to the criteria for determining what is ‘reasonable’: s 9(3).

52 *Anti-Discrimination Act 1998* (Tas) s 15(1).

53 *Anti-Discrimination Act 1977* (NSW) s 49ZYA(1)(b); *Equal Opportunity Act 1984* (WA) s 66V(3)(a); *Equal Opportunity Act 1984* (SA) s 85A(b)(i). This more restrictive test proved fatal to the claim in *Shirley v Director-General, Department of Education and Training* [No 2] [2009] NSWADT 235 (15 September 2009).

54 *Anti-Discrimination Act 1991* (Qld) s 11(1)(b).

55 *Anti-Discrimination Act 1977* (NSW) s 49ZYA(1)(b); *Discrimination Act 1991* (ACT) s 8(3); *Equal Opportunity Act 1984* (WA) s 66V(3).

56 *Anti-Discrimination Act 1992* (NT) s 20.

57 This could have a significant impact in practice: see the discussion in *Home Office (UK Border Agency) v Essop* [2016] 3 All ER 137, 157–9 [60]–[61], [66]. This is consistent with the law in NSW, WA, SA and Queensland, where the aggrieved person must not be able to comply with the requirement or condition: *Anti-Discrimination Act 1977* (NSW) s 49ZYA(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1)(a); *Equal Opportunity Act 1984* (WA) s 66V(3)(c); *Equal Opportunity Act 1984* (SA) s 85A(b).

depends entirely on the judiciary for meaning.⁵⁸ The impact of these differences is difficult to assess, given there is minimal case law on this aspect of the *ADA*.⁵⁹ In Queensland, Victoria and the Australian Capital Territory, the statute goes a step further, providing guidance as to the criteria for determining what is 'reasonable'⁶⁰ and, in Victoria and the Australian Capital Territory, integrating proportionality as one criteria for assessing reasonableness.⁶¹ It is unclear how these two standards — of reasonableness and proportionality — interact in practice, with no age discrimination case law on this point, and limited case law in other areas.⁶²

C Burden of Proof

The *EqA* contains a provision shifting the burden of proof in discrimination cases: 'if there are facts from which the court could decide, in the absence of any other explanation, that a person ... [has] contravened the [*EqA*], the court must hold that the contravention occurred', unless it can be shown that the person did not contravene the *EqA*.⁶³ Unlike in the UK, there is no provision for the shifting of the burden of proof under the *ADA*,⁶⁴ which may have implications for the development of the concept of 'discrimination'.⁶⁵ However, in relation to indirect discrimination, 'the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.'⁶⁶

58 Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31, 48.

59 Though, under the *FWA*, see *Australian Catholic University Ltd* [2011] FWA 3693 (10 June 2011) [33], where it was held that a term in an enterprise agreement providing for differential treatment of employees selected for redundancy, depending upon whether they had passed their 'normal retirement date', was not reasonable where there was no compulsory retirement age and employees could 'otherwise continue in employment for an indefinite period ... particularly [given the] ageing population and a policy imperative' to extend working lives. Ultimately, however, it was not necessary to decide this point, given the court felt it was actually a case of direct discrimination.

60 *Anti-Discrimination Act 1991* (Qld) s 11(2); *Equal Opportunity Act 2010* (Vic) s 9(3); *Discrimination Act 1991* (ACT) s 8(5).

61 *Equal Opportunity Act 2010* (Vic) s 9(3)(b); *Discrimination Act 1991* (ACT) s 8(5)(c).

62 See, eg, *Wang v Australian Capital Territory (Discrimination)* [2016] ACAT 71 (30 June 2016), where reasonableness was discussed extensively, but with limited mention of proportionality.

63 *EqA* s 136.

64 See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 142.

65 In its 2016 report, the AHRC made no recommendation relating to the burden of proof: see Australian Human Rights Commission, *Willing to Work*, above n 11, 335–6.

66 *ADA* s 15(2). For further literature on the burden of proof in Australia and the UK, see Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579.

IV JUDICIAL INTERPRETATION OF ‘DISCRIMINATION’

There is limited case law on the *ADA*, and many cases are raised (and dismissed) in applications for summary dismissal, rather than entailing a full hearing.⁶⁷ There is also limited case law at the state and territory level, with only 50 age discrimination cases reported to the start of 2016 (one in Victoria, 20 in New South Wales, 14 in Queensland, three in Western Australia, two in the Australian Capital Territory, two in the Northern Territory, two in South Australia, and six in Tasmania). In only eight of these 50 cases was the claimant ultimately successful,⁶⁸ and two of these successful cases related to the gathering of ‘unnecessary information’ by employers.⁶⁹ Thus, there has been limited analysis to date of the meaning of ‘discrimination’ in the context of the *ADA* or equivalent state or territory legislation. However, some general insights might be gained from Australian case law and literature regarding findings of discrimination in relation to other protected characteristics, such as race and sex.

First, in the context of ‘serious’ civil matters generally, it appears that there is a subtly higher standard of proof than the balance of probabilities in Australia. In *Briginshaw v Briginshaw* (*‘Briginshaw’*), Dixon J framed the standard to be one of ‘reasonable satisfaction’, which will be informed by the ‘seriousness of an allegation made’.⁷⁰ As de Plevitz has traced, this standard was adopted by all anti-discrimination jurisdictions in Australia, based on the assumption that discrimination was a ‘serious matter’, even before the passing of the *ADA*.⁷¹ Since then, the *Briginshaw* standard (as developed in later case law) has been adopted in statute.⁷² The *Evidence Act 1995* (Cth) s 140 provides:

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject-matter of the proceeding; and
 - (c) the gravity of the matters alleged.

67 See similarly Therese MacDermott, ‘Resolving Federal Age Discrimination Complaints: Where Have All the Complainants Gone?’ (2013) 24 *Australasian Dispute Resolution Journal* 102, 105.

68 *Willmott v Woolworths Ltd* [2014] QCAT 601 (29 September 2014); *Hosking v Fraser* [1996] NTADComm 2 (17 July 1996); *Talbot v Sperling Tourism & Investments Pty Ltd* (2011) 211 IR 419; *McCauley v Club Resort Holdings Pty Ltd [No 2]* [2013] QCAT 243 (13 May 2013); *Bloomfield v Westco Jeans Pty Ltd* [2001] EOC 93-161; *Hopper v Virgin Blue Airlines Pty Ltd* [2005] EOC 93-417; *Skinner v Lightning Bolt Co Pty Ltd* [2001] QADT 12 (4 July 2001); *Tully v McIntyre* [1999] EOC 92-983.

69 *Willmott v Woolworths Ltd* [2014] QCAT 601 (29 September 2014) [62]; *Hosking v Fraser* [1996] NTADComm 2 (17 July 1996).

70 (1938) 60 CLR 336, 362.

71 Loretta de Plevitz, ‘The Briginshaw “Standard of Proof” in Anti-Discrimination Law: “Pointing with a Wavering Finger”’ (2003) 27 *Melbourne University Law Review* 308.

72 See *Vergara v Ewin* (2014) 223 FCR 151, 158.

Thus, the interpretation of 'discrimination', and factual findings in age discrimination cases, will likely require stronger evidence than in the UK,⁷³ given discrimination in Australia is generally assumed to be a 'serious matter' or matter of 'gravity'.⁷⁴ The shifting of the burden of proof in discrimination cases in the UK stands in stark contrast to the higher standard of proof applied to Australian claimants.

Beyond the *Briginshaw* test and *Evidence Act 1995* (Cth), Thornton and Luker have argued that the evidential bar is even higher in the context of age discrimination, as 'competing rationalities' make it extremely difficult to prove age discrimination without a reverse onus of proof.⁷⁵ For example, an employer might rationalise their actions towards older workers on the basis of restructuring or downsizing, or through arguments based on 'incompetence'.⁷⁶ This reflects the 'double bind' of age discrimination law and the tension between instrumental and intrinsic aims. Thornton and Luker further argue that state and territory tribunals exhibit less sympathy for 'mature-old' and 'old-old' claimants, than for 'young-old' claimants,⁷⁷ possibly reflecting these competing rationalities, or perhaps demonstrating a stereotypical association between age and capacity.⁷⁸ Thus, 'discrimination' might be even harder to establish in the context of the *ADA* than for other forms of discrimination.

Second, Gaze has argued that there is 'limited understanding of equality and discrimination in mainstream Australian legal ... thought', which influences the judicial interpretation of discrimination statutes.⁷⁹ Judges often interpret discrimination law using 'neutral' principles of statutory interpretation, ignoring the need for purposive interpretation to adequately interpret discrimination statutes and achieve equality.⁸⁰ Going further, Gaze argues that the judicial 'elite' may have limited understanding of disadvantage or discrimination, making it difficult for judges to recognise the seriousness of discrimination.⁸¹ This, then, means that a 'neutral' interpretation of discrimination statutes is likely to undermine the progressive potential of discrimination laws, and may even replicate '[p]ractices of discrimination and disadvantage' in the implementation

73 Indeed, the UK House of Lords appears to have rejected any different standard of proof: in the context of care proceedings, see *Re B (Children) (Care Proceedings: Standard of Proof)* (CAFCASS Intervening) [2009] 1 AC 11, 21 [15] (Lord Hoffmann), 35 [69]–[70] (Baroness Hale of Richmond).

74 See, eg, *Pop v Taylor* [2015] FCCA 1720 (26 June 2015) [72]; *Chen v Monash University* [2015] FCA 130 (27 February 2015) [16] (approach implicitly endorsed in *Chen v Monash University* (2016) 244 FCR 424, 452); *Vata-Meyer v Commonwealth* [2014] FCCA 463 (10 September 2014) [61]–[62], citing *Sharma v Legal Aid* [2002] FCAFC 196 (21 June 2002) [40]; but see *Huntley v New South Wales* [2015] FCCA 1827 (26 June 2014) [87]–[91], where there was insufficient pleading regarding the 'seriousness' of the discrimination.

75 Margaret Thornton and Trish Luker, 'Age Discrimination in Turbulent Times' (2010) 19 *Griffith Law Review* 141, 151, citing Sandra Fredman, 'The Age of Equality' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) 21.

76 Thornton and Luker, above n 75.

77 *Ibid* 143.

78 *Ibid* 152–8.

79 Gaze, above n 7, 327.

80 *Ibid* 327, 332.

81 *Ibid* 338–9.

of equality law.⁸² This general approach to discrimination law may also promote a narrow interpretation of ‘discrimination’ in the context of the *ADA*.

This limited approach to interpreting discrimination statutes runs counter to developments in statutory interpretation more generally. It is clear that judges now accept the need to adopt a purposive or contextual approach to statutory interpretation, even without the presence of statutory ambiguity:⁸³ the object of statutory construction is to give effect to Parliament’s (imputed, objective) purpose, as expressed in the statute.⁸⁴ Indeed, the *Acts Interpretation Act 1901* (Cth) s 15AA expressly endorses a purposive approach to interpretation, even if the words of the statute are clear.⁸⁵

That said, while a purposive approach might be adopted, identifying statutory objects or purposes can be elusive.⁸⁶ Much has been written on how (if at all) it is possible to identify legislative intentions.⁸⁷ This task is complicated by the fact that legislation rarely pursues one goal or objective, and often involves compromise or negotiation between different objectives.⁸⁸ Purposes are often broad and general, meaning they can be of limited assistance to the interpretive exercise.⁸⁹ In the UK, I have analysed the objectives driving age discrimination law and policy, and conclude that these aims are variously inconsistent, ambiguous, and ill-defined.⁹⁰ If similar, competing objectives are present in Australia (which is perhaps inevitable given the ‘double bind’ of age discrimination law), it will be difficult for judges to identify the ‘purpose’ driving age discrimination legislation: a singular,

82 Ibid 339.

83 Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 39.

84 Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35 *Melbourne University Law Review* 113, 116; Evan Bell, ‘Judicial Perspectives on Statutory Interpretation’ (2013) 39 *Commonwealth Law Bulletin* 245, 266; J J Spigelman, ‘The Principles of Legality and Clear Statement’ in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 13, 15, 18; Keith Mason, ‘The Intent of Legislators: How Judges Discern It and What They Do if They Find It’ in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 33, 40; Rachel Pepper, ‘“It’s the Statute, Stupid”: The Centrality of Statutory Interpretation in Judicial Review’ (Speech delivered at the University of New South Wales, 2 April 2014) 14–15 <http://www.legc.justice.nsw.gov.au/Documents/pepperj_statutory_interpretation_and_judicial_review.pdf>; J J Spigelman, ‘The Intolerable Wrestle: Developments in Statutory Interpretation’ (2010) 84 *Australian Law Journal* 822, 828.

85 See further Pearce and Geddes, above n 83, 43–5.

86 Kirby, above n 84, 132.

87 See, eg, Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36 *Sydney Law Review* 39; Jim South, ‘Are Legislative Intentions Real?’ (2014) 40 *Monash University Law Review* 853.

88 Bell, above n 84, 264; Spigelman, ‘The Principles of Legality and Clear Statement’, above n 84, 15; Robert French, ‘Bending Words: The Fine Art of Interpretation’ (Speech delivered at the Guest Lecture Series, University of Western Australia, 20 March 2014) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchj/frenchj20Mar14.pdf>>.

89 WMC Gummow, ‘Statutes’ in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 1, 3, quoting William N Eskridge, Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (Foundation Press, 2000) 222.

90 Alysia Blackham, ‘Addressing the Ageing Workforce: A Critical Examination of Legal Policy Objectives and Values in the United Kingdom’ (2017) 37 *Ageing & Society* 1362.

unambiguous purpose does not exist. Age discrimination legislation is not alone in being 'bifurcated' in its purpose, as attempts are made to 'converge essentially incompatible policy goals'.⁹¹ It is up to judges to try to reconcile these competing purposes as best they can, even where this represents a 'delegation to the courts' of issues that are deemed too complex to be resolved in the parliamentary process.⁹²

The question for judicial interpretation, then, is how far Parliament has been willing to go to achieve a purpose.⁹³ For Manning, the best way for judges to respect this legislative compromise is through textualism, and a move away from purposivism.⁹⁴ This reflects the Australian courts' focus on purpose *as it is expressed in the legislative text*. In relation to how far Parliament has been willing to go to reduce age discrimination, the answer is probably not very far: sweeping exceptions to the prohibition of age discrimination in Australia and the UK mean the statutes are limited in the extent to which they are pursuing age equality, and this is likely to influence judicial interpretation of the statutes.

Even with courts being directed to take a purposive approach to interpreting equality statutes, though, 'there is still scope for ... courts to limit rather than promote ... equality'.⁹⁵ All statutes are 'rotten with ambiguity',⁹⁶ and legal terms are 'infinitely contestable'.⁹⁷ Judges must make a choice between competing interpretations⁹⁸ and, in doing so, are empowered to declare and create meaning.⁹⁹ While a purposive interpretation might be the aim, then, this still leaves judges with substantial discretion. A 'purposive approach' applied by two different judges can lead to two radically different outcomes:¹⁰⁰ Chief Justice Spigelman, writing extra-judicially, identifies a 'spectrum of judicial opinion', from strict literalism to broad purposive interpretation.¹⁰¹ The choice between competing interpretations is likely linked to a judge's subconscious (or, indeed, conscious)

91 See, eg, the discussion of insider trading legislation in Mason, above n 84, 34, quoting *R v Firms* (2001) 51 NSWLR 548, 558.

92 Mason, above n 84, 36.

93 Bell, above n 84, 265.

94 John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 *Columbia Law Review* 70, 99–109. Though, as Manning points out, the differences between these two are perhaps less dramatic than previously thought, but differences remain. In particular, textualism does not require judges to ignore context or purpose: textualism is a form of weaker purposivism: John F Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1, 106.

95 Smith, above n 19, 28.

96 James C Raymond, 'Saving the Literal: Fundamentalism versus Soft Logic in Statutory Interpretation' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 177, 213.

97 *Ibid* 203. See also Pepper, above n 84, 13.

98 Raymond, above n 96, 208; French, 'Bending Words', above n 88, 9.

99 Raymond, above n 96, 203. See also RS French, 'Judicial Activism — The Boundaries of the Judicial Role' (Paper presented at the LAWASIA Conference 2009, Ho Chi Minh City, 10 November 2009) 6.

100 Bell, above n 84, 250, 279.

101 Spigelman, 'The Intolerable Wrestle', above n 84, 822. Similarly, others have identified 'degrees of purposivism', and different levels of willingness to engage with the objects of a statute: Bell, above n 84, 262. See also Manning, 'Textualism and the Equity of the Statute', above n 94.

preferences and experiences,¹⁰² including their ideological bent¹⁰³ and their view of the judicial role.¹⁰⁴ These “‘deep-lying’” considerations’ (as described by the Hon Michael Kirby)¹⁰⁵ are rarely articulated, but may fundamentally sway judicial decision-making and interpretation. As Chief Justice Spigelman has noted, there is a very real risk that judges might import their own perception of what is a ‘desirable result’ in their quest to identify legislative purpose.¹⁰⁶

To avoid a narrow interpretation of equality law, some statutes include broad objects or interpretation sections, to promote a purposive interpretation. However, these sections must be interpreted in the context of other provisions in the Act.¹⁰⁷ Further, there is a distinction between the purpose or objects of a statute, and the intention of Parliament: intention is what ‘relates to the meaning of the enactment’ or section.¹⁰⁸ Section 3 of the *ADA* specifies its objects as including to: ‘eliminate, as far as possible, discrimination against persons on the ground of age’; ‘to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights’; and ‘to respond to demographic change by: (i) removing barriers to older people participating in society, particularly in the workforce; and (ii) changing negative stereotypes about older people’. These broad objects should promote a purposive interpretation of the *ADA*, though their impact will likely be limited if interpreted in the context of other substantive sections of the Act.

Going further, the *Discrimination Act 1991* (ACT) s 4 says that the objects of that Act include to ‘eliminate discrimination to the greatest extent possible’¹⁰⁹ and ‘promote and facilitate the progressive realisation of equality, as far as reasonably practicable’.¹¹⁰ More specifically, s 4AA requires that the Act be interpreted in a way beneficial to those with protected attributes ‘to the extent it is possible to do so’ consistently with the Act’s objects and the *Human Rights Act 2004* (ACT). The *Human Rights Act 2004* (ACT) s 30 also requires that statutes ‘be interpreted in a way that is compatible with human rights’, ‘[s]o far as it is possible to do so consistently with [the statute’s] purpose’. Human rights include the ‘right to equal and effective protection against discrimination on any ground’: s 8(3).¹¹¹ This is likely to encourage courts to adopt a more purposive and less ‘neutral’

102 Kirby, above n 84, 119; Raymond, above n 96, 200.

103 Raymond, above n 96, 212. In the US, see Susan U Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control* (Oxford University Press, 1998).

104 See, eg, French, ‘Judicial Activism’ above n 99, 6.

105 Kirby, above n 84, 131.

106 Spigelman, ‘The Intolerable Wrestle’, above n 84, 826.

107 Pearce and Geddes, above n 83, 45–7.

108 Pepper, above n 84, 15.

109 See similarly *Equal Opportunity Act 1984* (WA) s 3, where objects include ‘to eliminate, so far as is possible, discrimination’; and *Anti-Discrimination Act 1992* (NT) s 3, where objects include ‘to eliminate discrimination’.

110 Cf the more limited ‘purpose’ section in the *Anti-Discrimination Act 1991* (Qld) s 6(1), which states that ‘[o]ne of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination’.

111 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) includes a similar provision: see ss 32(1), 8(3).

approach to the interpretation and application of the statute. However, the Act does not specifically define what it means by 'equality', potentially undermining the efficacy of the interpretation sections: broad statutory objectives may be of limited help in addressing specific problems of interpretation.¹¹² Thus, it is questionable to what extent broad objects or interpretation sections will actually promote a purposive interpretation in practice.

The *EqA* does not have an objects or interpretation section. Further, while some human rights-based interpretative provisions are in place in the UK, they do not generally extend to equality law. The *Human Rights Act 1998* (UK) c 42, s 3(1) requires, '[s]o far as it is possible to do so', for legislation to 'be read and given effect in a way which is compatible with the Convention rights.' However, the *European Convention on Human Rights*¹¹³ is limited in its reference to discrimination, which relates to rights under the Convention only: art 14. The broader prohibition of discrimination in *Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*¹¹⁴ is not one of the Convention rights to which the *Human Rights Act* refers: see s 1. Indeed, the UK has not signed or ratified this Protocol. Thus, there is limited statutory framing to promote a purposive interpretation of the *EqA*. This may mean that European human rights norms will have less influence on the development of UK equality law than on other fields.

Third, and relatedly, in the context of sex discrimination, Thornton has mapped the move by Australian appellate courts from 'an expansive and paideic view of the legislation to a more restrictive and positivistic approach'.¹¹⁵ Thus, the educative or progressive potential of discrimination legislation is increasingly being ignored, in favour of a conservative and norm-maintaining focus.¹¹⁶ Judges' 'innate conservatism', reinforced through rules of precedent and the non-representativeness of the judiciary, may therefore undermine the progressive potential and expansive interpretation of discrimination law.¹¹⁷

Fourth, drawing on the decision on disability discrimination in *Purvis*¹¹⁸ (discussed further below), Smith has argued that the High Court has limited the progressive potential of equality law, by focusing on formal rather than substantive equality in direct discrimination cases.¹¹⁹ For Smith, adopting formal equality as the notion 'underpinning direct discrimination' (in this case, through the comparator requirement) fails to promote meaningful inclusion of under-represented groups, and produces a 'strong conformist pressure' to participate in work by meeting

112 Bell, above n 84, 263.

113 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

114 *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 2000, ETS No 177 (entered into force 1 April 2005).

115 Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 58, 54.

116 *Ibid* 56.

117 *Ibid* 33.

118 (2003) 217 CLR 92.

119 Smith, above n 19, 24–5.

established rules and requirements.¹²⁰ An approach premised on formal equality minimises the transformative potential of equality and discrimination law, and means it is likely to have limited impact in practice.

Drawing on these general insights from other forms of discrimination, we can hypothesise that age discrimination will generally be interpreted narrowly in Australia, and generally favour a conservative construction of the *ADA*. In this context, the case law on the *ADA* that is available is illuminating, particularly when contrasted with UK case law.

In the sections that follow, *ADA* cases are contrasted with UK cases with similar factual circumstances or where similar issues have arisen. The sampling of the UK cases is designed to be illustrative of the disparate approaches taken by UK and Australian courts to questions of ‘discrimination’. It is by necessity not comprehensive, as many historical UK age discrimination cases heard at tribunal level are not reported or accessible online,¹²¹ meaning comprehensive research or searching of case law is not possible. Cases have been sourced from those reported, or accessible online, with a view to being as comprehensive and accurate as possible in the depiction of UK court and tribunal decision-making. However, given the methodological limitations of obtaining an accurate ‘sample’ or search of lower level UK case law, these cases should be seen as illustrative only, and cannot be assumed to depict comprehensive or unambiguous trends. Overall, though, these cases show that UK courts and tribunals are generally adopting a far more expansive approach to the interpretation of age discrimination law than courts in Australia.

A Length of Service and Treatment after Disciplinary Proceedings

A conservative approach is manifested in the approach of Australian federal courts to ‘length of service’ and performance management issues: there is limited evidence that Australian courts are willing to draw any link between treatment based on length of service or treatment after performance management and age discrimination. In contrast, UK courts have recognised that these issues are closely intertwined, and may well represent a form of age discrimination.

In Australia, in *Fernandez v University of Technology, Sydney* (‘*Fernandez*’) (an application for summary dismissal of an *ADA* claim),¹²² Ms Fernandez entered into a pre-retirement contract with the University of Technology, Sydney (‘UTS’) after a grievance procedure expressed ‘disapproval’ about her actions towards a more junior employee.¹²³ Under the pre-retirement contract, Ms Fernandez would relinquish her tenured position as an administrative officer, in exchange for a two-

120 Ibid.

121 Though they should be made progressively available in the future: see GOV.UK, *Employment Tribunal Decisions* <<https://www.gov.uk/employment-tribunal-decisions>>.

122 [2015] FCCA 3432 (21 December 2015).

123 Ibid [1], [39].

year contract at a higher rate of pay.¹²⁴ At the end of the contract, Ms Fernandez would cease her employment at UTS.¹²⁵ Four years after the end of the contract, Ms Fernandez lodged a complaint with the AHRC alleging age discrimination by UTS, on the basis of 'forced retirement under duress'.¹²⁶

The decision in *Fernandez* hinged on s 16 of the *ADA*, which required age to be the 'dominant' reason for an act. Section 16 was amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 1 cl 1 (effective 5 August 2009), to require that age only be 'one of the reasons' for an act. Thus, *Fernandez* has limited relevance for assisting with the interpretation of the *ADA* as it now stands.

However, while the Federal Circuit Court of Australia ('FCCA') could have decided (and, indeed, did decide) that age was not the 'dominant' reason for Ms Fernandez's treatment,¹²⁷ it also went a step further, to hold that age was not *any* reason for the conduct.¹²⁸ The FCCA found that the 'only fact which could conceivably provide any link between the actions of UTS complained of by the applicant and her age is the suggestion to her by her supervisor: "why don't you consider retiring, 20 years is a long time"'.¹²⁹ Even if this was accepted, for the FCCA, this 'would not establish that any reason for UTS' conduct was her age.¹³⁰ The FCCA justified this on two grounds.

First, Ms Fernandez's age was 'never mentioned', and the 'fact that a person has worked in one workplace for 20 years does not give an accurate indication of their age'.¹³¹ The FCCA's approach ignores the likely association between period of service and age: it is much more likely that people with a longer period of service (particularly 20 years of service) will be older. Thus, the FCCA dismissed the link between age and years of service far too quickly.

Second, and relatedly, the FCCA held that 'although a reference to retirement might give rise to some inference connected to a person's age', the matter specifically mentioned here was length of service, and not age.¹³² Again, this ignores the general association between age and length of service: extended length of service is a characteristic that appertains generally to persons of an

124 Ibid [1].

125 Ibid.

126 Ibid [18]. Ms Fernandez's real complaint appeared to relate to the terms of the pre-retirement contract, and a misunderstanding regarding how long service leave would be dealt with under the agreement. While Ms Fernandez thought her nine months of accrued long service leave would be provided in addition to the two-year contract (and paid out at the end), it was actually incorporated into the 24-month period, meaning the contract was actually only for 15 months. Ms Fernandez later made other complaints about the grievance process.

127 Ibid [39].

128 Ibid.

129 Ibid [38].

130 Ibid [39].

131 Ibid [39].

132 Ibid.

older age.¹³³ Similarly, discussions of retirement are generally confined to older workers, though this does not necessarily make them discriminatory.

The FCCA therefore doubted whether Ms Fernandez could establish direct or indirect discrimination on these facts.¹³⁴ However, it is arguable that encouraging Ms Fernandez to sign a pre-retirement contract *is* less favourable treatment because of her age. Younger employees would be unlikely to be encouraged to sign a pre-retirement contract after an adverse finding in a grievance process: instead, they would likely be offered training, mentoring or performance guidance to try to address the issue (particularly in a university setting, where enterprise agreements make dismissal a long process).¹³⁵

The finding in *Fernandez* can be contrasted with that in the NSW case of *Talbot v Sperling Tourism & Investments Pty Ltd* ('*Talbot*'),¹³⁶ where the Tribunal held that the employee's dismissal (allegedly on performance grounds) was harsher than the treatment afforded to other drivers who had arguably committed more serious infractions.¹³⁷ Other drivers were given warnings and opportunities to improve: Mr Talbot was not.¹³⁸ The Tribunal held that the reason for this different treatment was Mr Talbot's age.¹³⁹ However, here the facts of *Talbot* diverge from *Fernandez*: the employer explicitly mentioned Mr Talbot's age and (perceived) deteriorating capacity in the termination letter,¹⁴⁰ rather than referring to length of service. It is unclear whether this case would have been successful without this pivotal fact.

Both these cases may be contrasted with the UK case of *Hetherington v London Borough of Brent* ('*Hetherington*').¹⁴¹ In that case, Mrs Hetherington, a teacher in her 60s, was assessed as being 'inadequate' in an anonymous report after years without complaint about her teaching.¹⁴² Following this report, the Head Teacher sent a letter to Mrs Hetherington indicating that if her performance did not improve she would be performance managed, and she was told she should resign with 'dignity'.¹⁴³ The UK Tribunal found that the Head Teacher and a consultant had conspired to force Mrs Hetherington out of the school, and a text message between the two indicated that pay issues could be resolved if Mrs Hetherington

133 See *ADA* s 14(b)(ii).

134 *Fernandez* [2015] FCCA 3432 (21 December 2015) [40].

135 See, eg, University of Technology, Sydney, *Professional Staff Agreement 2014* (2014) 43–9. (2011) 211 IR 419.

137 *Ibid* 434 [72].

138 *Ibid*.

139 *Ibid*.

140 'In good faith and recognising you are now aged in your early 70's, what I suggest is that it's time to step back from front line tour driver/guide work': *ibid* 432 [61].

141 (Unreported, Employment Tribunal, Employment Judge Herbert, Member Lowndes and Member Sood, 20 November 2012).

142 *Ibid* [32].

143 *Ibid* [43].

left — she cost too much.¹⁴⁴ The Tribunal held that the school had attempted to get rid of (expensive) older teachers, which was a form of age discrimination.¹⁴⁵

While there is far more evidence to ground a finding of age discrimination in this case than in *Fernandez*,¹⁴⁶ *Hetherington* illustrates the potentially discriminatory effects of encouraging older workers to resign or sign pre-retirement contracts on the back of performance processes. Further, in *Hetherington*, a plan or conspiracy to remove Mrs Hetherington was seen as a *manifestation of age discrimination*, not a separate reason for action like in *Fernandez*.

Similarly, in the UK case of *Peters v Rock Chemicals Ltd*,¹⁴⁷ Mr Peters, an accountant, was dismissed at age 67 after missing a tax payment on the company's behalf and incurring a large fine for the company,¹⁴⁸ and on the basis of a number of other matters. Mr Peters argued that the real reason for his dismissal was that he refused to retire at age 65:¹⁴⁹ indeed, Rock Chemicals had already recruited Mr Peters's successor.¹⁵⁰ The Employment Tribunal upheld Mr Peters's claim of age discrimination.¹⁵¹ There was evidence that Mr Peters was the only employee disciplined in relation to the tax payment (though he was not the only one involved) and historical allegations of misconduct were raised at a succession-planning meeting.¹⁵²

With the shifting of the burden of proof under the *EqA*, Mr Peters had to 'show facts from which the Tribunal could conclude that the reason for the less favourable treatment was for a reason related to' Mr Peters's age.¹⁵³ Once that was established, the burden would shift to Rock Chemicals to 'show that the reason for the treatment was for a completely different reason that was not related to the claimant's age at all.'¹⁵⁴ The orchestration of the succession-planning meeting, the way Mr Peters was treated at that meeting, and the raising of historical allegations of misconduct, were sufficient for the Tribunal to find that 'the reason why [Mr Peters] was treated in the way he was, was for a reason related to his age.'¹⁵⁵ The Tribunal found that Mr Peters was dismissed because he had reached the age of 65 and management wanted him to retire.¹⁵⁶ This would not have happened to 'a hypothetical company accountant who had not reached retirement age'.¹⁵⁷

144 Ibid [80].

145 Ibid [72].

146 Though, given *Fernandez* was an application for summary dismissal of an *ADA* claim, not a full hearing, this is unsurprising.

147 (Unreported, Employment Tribunal, Judge Sharkett, Ms Crane and Mr Wells, 28 January 2016).

148 Ibid [19].

149 Ibid [118].

150 Ibid [15].

151 Ibid [158].

152 Ibid [146].

153 Ibid [106].

154 Ibid [106].

155 Ibid [150].

156 Ibid [151].

157 Ibid [153].

The burden of proof therefore shifted to Rock Chemicals to show that the reason for the treatment 'had nothing to do with the claimant's age'.¹⁵⁸ The Tribunal found that the evidence of the Managing Director and Personnel Manager of Rock Chemicals was unreliable, meaning the company could not show that the reason for the treatment had nothing to do with age.¹⁵⁹ The Tribunal therefore found that age discrimination had occurred, and was not justified.¹⁶⁰ Thus, Mr Peters's claim was upheld. This case illustrates the importance of the shifting of the burden of proof in establishing whether conduct is discriminatory in the UK.

Beyond the use of performance processes, length of service is often regarded as potentially age discriminatory in UK case law. However, an employer taking into account length of service is often seen as disadvantaging *younger* workers, particularly in redundancy situations. For example, the use of (shorter) length of service to select for redundancy was challenged in *Rolls-Royce plc v Unite the Union* ('*Rolls Royce*'),¹⁶¹ where the employers argued that the provisions were indirectly age discriminatory against younger workers.¹⁶² The case proceeded on the basis that the provisions were indirectly discriminatory,¹⁶³ with the ultimate issue being whether the provisions could be justified as a 'proportionate means of achieving a legitimate aim'.¹⁶⁴ In that case, Wall LJ noted that the length of service provisions were just one of a number of criteria, and were not 'determinative or definitive of selection'.¹⁶⁵ Further, the collectively negotiated redundancy agreement was designed to 'reconcile the different perspectives of company and the union in order to produce a selection process which [was] fair'.¹⁶⁶ In this context, 'to reward long service ... [is] an entirely reasonable and legitimate employment policy'.¹⁶⁷ Thus, the length of service criterion was a proportionate means of achieving the legitimate aims of rewarding loyalty, and achieving a stable workforce via a fair redundancy selection process.¹⁶⁸ This was supported by there being no evidence to contradict the union's assertion that younger workers accepted the provision.¹⁶⁹ Similarly, Arden LJ held that the provisions achieved legitimate aims of rewarding experience and, as part of a collectively negotiated agreement, implementing 'a scheme for redundancy in a peaceful fashion'.¹⁷⁰ In relation to proportionality, Arden LJ noted that the scheme had been collectively agreed; was substantively different to last-in, first-out, which might have been 'objectionable'; and that length of service was only one criterion.¹⁷¹ Therefore, the

158 Ibid [154].

159 Ibid [155].

160 Ibid [156].

161 [2010] 1 WLR 318.

162 Ibid 340 [78].

163 Ibid 359 [155].

164 Ibid [155], quoting *Employment Equality (Age) Regulations 2006* (UK) SI 2006/1031, reg 3.

165 Ibid 345 [92].

166 Ibid 345 [93].

167 Ibid 345 [95].

168 Ibid 346 [100].

169 Ibid.

170 Ibid 359 [156]–[157].

171 Ibid 360–1 [162].

provision was a proportionate means of achieving a legitimate aim. In contrast, Aikens LJ declined to make a finding of proportionality on the facts at hand.¹⁷² While mostly focused on justification, *Rolls Royce* provides a strong example of the willingness of UK courts to recognise the potentially discriminatory effects of length of service provisions.

Similarly, in *Hannell v Rydon Group Ltd*,¹⁷³ Mr Hannell (age 38) was selected for redundancy. One of the criteria in the selection process was length of experience ('relevant project delivery experience'), which was worth 40 out of a possible 95 points. To achieve full points on this criterion, an employee would need to have been employed in the industry for 16 years. The Tribunal held that this provision disadvantaged the claimant and other younger workers, who were '[s]elf evidently' unable to achieve this length of experience.¹⁷⁴ The employer argued that the policy was supported by the legitimate aim of ensuring 'stability in a difficult economic time' by keeping employees with the most experience.¹⁷⁵ However, the employer had not shown that additional years' experience resulted in (or was likely to result in) better performance of the role. Additional evidence was required to show that the provision was proportionate. Thus, the length of service criterion was discriminatory.

Letting length of service influence performance management processes was also found to be discriminatory in *Bloomfield v Whitbread Group plc*.¹⁷⁶ Ms Bloomfield (age 17) was dismissed from her job at the Premier Inn after an argument with a co-worker (age 51). Unlike Ms Bloomfield, the co-worker was only given a final written warning. The Tribunal found that length of service was the only distinguishing factor between Ms Bloomfield and her co-worker that could justify their different treatment. The Tribunal held that it was 'obvious and unarguable' that considering length of service in the disciplinary process would have an adverse impact on younger workers, particularly those aged 17 and under, as they had less opportunity to accrue length of service.¹⁷⁷ The respondent failed to show that there was a legitimate aim underlying this practice: in the absence of evidence, the Tribunal refused to assume that length of service meant an employee posed less of a risk of misconduct, or that length of service equated to more value to the business, particularly given the unskilled nature of hospitality work. Thus, the practice was not a proportionate means of achieving a legitimate aim, and Ms Bloomfield's claim succeeded.

Overall, then, UK courts and tribunals appear far more willing to accept that length of service provisions might be discriminatory on the basis of age, and that adverse treatment after performance processes can be a manifestation of age

172 Ibid 357 [147].

173 (Unreported, Employment Tribunal, Employment Judge Spencer, 20 July 2012).

174 Ibid [44]; cf *Boyle v George Best Belfast City Airport* (Unreported, Northern Ireland Industrial Tribunal, Chairman Kinney, Member Irwin and Member Archer, 9 March 2012) [28], where the Northern Ireland Industrial Tribunal did not accept that a five-year service provision in a redundancy scheme placed persons of the same age as the claimant (37) at a particular disadvantage.

175 *Hannell v Rydon Group Ltd* [2012] EqLR 903 [46].

176 [2013] EqLR 191.

177 Ibid [37].

discrimination. Thus, this illuminates the narrowness and conservativeness of the FCCA's approach to age discrimination in *Fernandez*.

B 'Long-Term Interests' and Promotion

Similarly, UK courts appear far more willing than Australian federal courts to see a refusal to promote an older worker as a manifestation of age discrimination. In the FCCA case of *Gardem v Etheridge Shire Council*,¹⁷⁸ Mr Gardem argued that he had been discriminated against on the basis of age when a younger colleague was appointed to a senior position in an acting capacity 'for which [Mr Gardem] was significantly more greatly qualified and experienced, in circumstances where that [younger] person was not qualified by way of either formal qualifications or experience to do the work.'¹⁷⁹ Mr Gardem was aged 64; the colleague, Ms Alexander, was 47 years old.¹⁸⁰

The CEO of Etheridge Shire Council explained Ms Alexander's appointment on the basis that the appointment was 'for reasons that [she] considered to be in the long-term interests and development of Etheridge Shire Council.'¹⁸¹ Beyond this, other reasons cited for the appointment included: Ms Alexander's experience, skills and leadership potential, and 'continuing interest in professional development', even if she lacked Mr Gardem's formal qualifications (and indeed, Ms Alexander could gain these qualifications in the future),¹⁸² the need, in a 'small remote community', for the Council to undertake 'some careful succession planning', and therefore to 'assist' Ms Alexander with 'some multi-skilling' and ensure all staff who 'demonstrate leadership qualities, have an opportunity to be rotated into a leadership position' to develop a 'managerial team with depth of experience';¹⁸³ and the fact that Mr Gardem had already undertaken a temporary leadership role.¹⁸⁴

A number of these justifications raise potential concerns about age discrimination: beyond a focus on the Council's 'long-term interests',¹⁸⁵ the reasons also evidence an enduring concern with Ms Alexander's long-term professional development and on-going training. While laudable, it is questionable whether similar concerns would be expressed for Mr Gardem's long-term professional development at age 64.

It was conceded that there was no evidence which 'directly' indicated that the decision to not appoint Mr Gardem to the more senior position was made on the

178 [2013] FCCA 1324 (12 September 2013).

179 *Ibid* [2].

180 *Ibid*.

181 *Ibid* [37].

182 The letter continued: 'I would hope that she will continue to undertake appropriate studies to ensure that she continues to develop formal qualifications commensurate with any promotion opportunities': *ibid* [37].

183 *Ibid*.

184 *Ibid*.

185 *Ibid*.

basis of Mr Gardem's age.¹⁸⁶ However, it was argued that the court should 'draw an inference that his age was indeed at least one of the reasons that he was not given the appointment.'¹⁸⁷

Judge Jarrett accepted the Council's evidence that

the Council staff needed to operate as a team and Mr Edmestone had reached a view that Mr Gardem would not be the best person to lead the team and meet the position's operational requirements. It is certainly clear from the evidence that Mr Gardem had strained relationships with the Council's most senior officers.¹⁸⁸

The Court therefore declined to draw any inference that one of the reasons for the Council's decision was Mr Gardem's age.¹⁸⁹ The reference to the Council's long-term interests had been taken out of context:

It was a reference to the long-term interests of [the] Council in offering existing employees with a range of experience, skills and leadership qualities the opportunity to further develop and deploy those skills. It was not a reference to any requirement, or any newly formed policy of the Council or the CEO that younger employees were more attractive to the Council than older employees because they had a potentially longer period of service to offer the Council. ... The long-term interests of the Council no doubt included having sufficiently trained and experienced staff who could act in higher duties if and when the need arose. Mr Gardem had been afforded that opportunity. That Mr Edmestone chose to give another, albeit less qualified person, the same opportunity is unremarkable.¹⁹⁰

Indeed, Judge Jarrett expressly endorsed the making of recruitment decisions with an employers' long-term interests in mind:

That an employer might do so, does not necessarily mean that the decision maker has favoured a younger employee over an older employee because of age. An employer's long-term interests might equally be served by the appointment of an older employee with few working years left, but who has skills or the capacity to affect the long-term development of an employer's business, than it is by the appointment of a much younger employee who has many more working years left but less potential to bring lasting benefits to the business.¹⁹¹

While considering an employer's 'long-term interests' might 'not necessarily mean' that younger employees are preferred, in most cases it will lead to a preference for younger appointees. Thus, it might be indirectly discriminatory in practice. This has been explicitly commented on in the literature on age discrimination: there is recognition that older workers may be excluded from the workforce through 'age-neutral' rationales such as 'business financial well-being' and 'long-term stability'.¹⁹²

186 Ibid [54].

187 Ibid [55].

188 Ibid [75].

189 Ibid [80].

190 Ibid [81]–[82].

191 Ibid [83].

192 Vincent J Roscigno et al, 'Age Discrimination, Social Closure and Employment' (2007) 86 *Social Forces* 313, 313, 325.

This approach, which essentially ignores any link between ‘long-term interests’ and age discrimination, may be contrasted with the UK decision in *Brunel University v Killen*.¹⁹³ In that case, Ms Killen’s department was restructured, and her senior position was made redundant.¹⁹⁴ Ms Killen (age 57) argued that the decision not to appoint her to a more junior position in the restructured organisation was due to age discrimination.¹⁹⁵ Instead, the position she applied for was given to a younger (age 38), less senior man.¹⁹⁶ At first instance, the Tribunal held that the burden of proof shifted to the employer due to a number of reasons, including the disparity in the seniority between the two applicants.¹⁹⁷ In the Employment Appeal Tribunal, Langstaff J opined that:

In my view, the Tribunal here was entitled to take the view that it needed an explanation from the Respondent. There was more than simply a difference in age and sex and a difference in treatment. The first matter to which the Tribunal had regard was the fact that she was of a higher grade and therefore impliedly better qualified for the post. All of course has to be viewed in the light of the particular circumstances, but in general if it is shown that of two applicants for a post one has a protected characteristic that the other does not, that person is not appointed and that person is on the face of it likely to be better qualified than the other, [that] is sufficient to call for an explanation.¹⁹⁸

However, it was sufficient for the employer to respond that the other candidate had scored better at interview, so long as there was no reason to think that the interview was ‘infected by discrimination’.¹⁹⁹ In this case, ‘[t]here [was] no suggestion or finding that the employer here preferred Mr Lindsay because he was younger or because it had the attitude that senior people should be moved on to make way for younger blood or anything of that sort.’²⁰⁰ Intriguingly, this implies that expecting older workers to ‘make way for younger blood’ might be sufficient to ‘infect’ processes with age discrimination.²⁰¹

Further, in *Shiret v Credit Suisse Securities (Europe) Ltd*,²⁰² Mr Shiret (age 55) challenged his selection for redundancy, arguing that the whole exercise was used to achieve the employer’s aim of dismissing him, in favour of retaining a younger worker (age 35).²⁰³ These arguments were accepted by the Tribunal. More pertinently for our purposes, in the alternative, Mr Shiret also argued that the redundancy process was indirectly discriminatory, as it included criteria such as ‘experience’ and ‘potential’ when selecting for redundancy.²⁰⁴

193 (Unreported, Employment Appeal Tribunal, Langstaff J, 14 March 2014).

194 *Ibid* [4].

195 *Ibid* [5].

196 *Ibid*.

197 *Ibid* [6]–[7].

198 *Ibid* [36].

199 *Ibid* [38].

200 *Ibid* [39].

201 *Ibid* [38]–[39].

202 (Unreported, Employment Tribunal, Employment Judge Brown, 18 July 2013).

203 *Ibid* [2].

204 *Ibid* [157].

The Tribunal acknowledged that 'experience' could indirectly discriminate against younger workers, and 'potential' could indirectly discriminate against older workers.²⁰⁵ In this case, though, 'potential' was applied in a directly discriminatory way to treat Mr Shiret less favourably than others in the same or not materially different circumstances: Mr Shiret's leadership and mentoring activities were not taken into account, but a younger worker was given credit for potential 'when he had done nothing at all.'²⁰⁶ Thus, the Tribunal inferred that Mr Shiret was seen as having no potential due to his age.²⁰⁷ The employer did not discharge its burden of proof to show age was not part of the reason for dismissal: indeed, the explanation provided was not credible.²⁰⁸ Thus, while 'potential' could be indirectly discriminatory when used as a criterion in a redundancy process (and could potentially be justified on the basis of seeking to retain workers who could 'best meet ... business needs going forward'), it was not necessary to consider the indirect discrimination argument in this case.²⁰⁹

Similarly, in *James v Gina Shoes Ltd*,²¹⁰ Mr James resigned from his employment after a meeting with the Managing Director of his employer.²¹¹ At that meeting, it was made clear that the Managing Director was not happy with Mr James's performance, and it was 'asked rhetorically whether it was [Mr James's] age that caused him not to be able to work to [the company's] expectations'.²¹² The Managing Director 'also said that if the Claimant was younger, it might be possible to train him'.²¹³ At a grievance meeting after the claimant ultimately resigned, the same Managing Director said words to the effect of '[y]ou can't teach an old dog new tricks'.²¹⁴ At first instance, it was held that this was not enough to shift the burden of proof, as the comments were likely taken out of context and were most likely not to have influenced how the claimant was treated.²¹⁵ This was overturned on appeal: the references to age 'plainly [raise] a prima facie case of discrimination'.²¹⁶ It was 'immaterial' that there was no other material which demonstrated that age was a factor in Mr James's treatment.²¹⁷ Thus, the case was remitted to the Employment Tribunal to determine whether there was a 'wholly non-discriminatory explanation for Attila's remarks unconnected with

205 Ibid [145].

206 Ibid [147]–[148].

207 Ibid [149].

208 Ibid [153].

209 Ibid [157]–[158].

210 (Unreported, Employment Appeal Tribunal, Judge Clark, Mr Bleiman and Mr Gammon, 18 January 2012).

211 Ibid [5].

212 Ibid [4].

213 Ibid.

214 Ibid [6].

215 Ibid [9].

216 Ibid [15].

217 Ibid [15].

the Claimant's age'.²¹⁸ It also needed to be determined whether the first statement was a 'significant factor in the Claimant's decision to resign'.²¹⁹

Thus, again, UK courts and tribunals appear more willing to recognise the link between 'potential', an unwillingness to train older workers and a failure to promote older workers, and age discrimination. These contrasting cases also demonstrate the importance of the shifting of the burden of proof in the UK, and the noticeable impact of the absence of any shift in Australia. This is also significant in state case law: in NSW, which has similar provisions relating to direct discrimination as the *ADA*, a substantial number of claims have failed due to a lack of direct evidence of age discrimination,²²⁰ and/or an unwillingness to draw inferences to fill the evidentiary hole.²²¹ Even when an employer has made (potentially) discriminatory remarks, NSW Tribunals have held that 'passing comment[s]'²²² and 'off the cuff' remarks²²³ are not enough to show that age was a factor in decision-making. Thus, the absence of the shifting burden of proof in Australia has proven fatal to many claims at state level.

C Statutory Benefits

UK courts and tribunals are also far more likely than Australian courts to regard employers' conduct as discriminatory where the employers' actions are guided by statutory provisions.

In the Federal Court of Australia ('FCA') case of *Keech v Western Australia Metropolitan Health Service* ('*Keech*'),²²⁴ Ms Keech (age 66) argued she was discriminated against on the basis of age when her weekly compensation payments for her incapacity to work were ceased after one year,²²⁵ in accordance with the *Workers' Compensation and Injury Management Act 1981* (WA) s 56.

The FCA held that this was not a case of age discrimination by Ms Keech's employer, as there was:

218 Ibid [17].

219 Ibid [18].

220 *Kennedy v Director-General, Department of Industrial Relations (NSW)* [2002] NSWADT 186 (27 September 2002) [72]; *Neeson v Director General, Department of Education and Training* [2009] NSWADT 292 (25 November 2009); *Heber v Glen Henney & Son Pty Ltd [No 3]* [2008] NSWADT 168 (11 June 2008); *Pignat v Richmond Valley Council* [2005] NSWADT 162 (14 July 2005); *Plancke v Director General, Department of Education and Training* [2001] NSWADT 137 (16 August 2001); *Shirley v Director-General, Department of Education and Training [No 2]* [2009] NSWADT 235 (15 September 2009) [45].

221 *Sidhu v Sydney Local Health District* [2015] NSWCATAD 70 (27 February 2015) [16]–[17]; *North v City of Sydney Council* [2001] NSWADT 75 (15 May 2001) [45]; *Shirley v Director-General, Department of Education and Training [No 2]* [2009] NSWADT 235 (15 September 2009) [48].

222 *Mooney v Commissioner of Police, New South Wales Police Service [No 2]* [2003] NSWADT 107 (19 May 2003) [50]–[51].

223 *Coote v Commissioner of Police, New South Wales Police* [2007] NSWADT 128 (18 June 2007) [11].

224 (2010) 276 ALR 118.

225 Ibid 119 [8].

no discretion or liberty vested in the respondent to determine whether to pay Ms Keech the weekly payments and for how long those weekly payments should be paid. In commencing to make the weekly payments when it did, and in ceasing to make the weekly payments when it did, the respondent did no more, nor less, than perform its statutory obligation to Ms Keech.²²⁶

Thus, the employer did not discriminate against Ms Keech, as it was 'statute that provided the entitlement, and also circumscribed the extent of the entitlement'.²²⁷ Thus, the policy considerations underlying the *ADA* did not apply to this case,²²⁸ and it was not a matter of age discrimination.

A far more stringent approach to statutory obligations was adopted in the UK case of *Heron v Sefton Metropolitan Borough Council* ('*Heron*'),²²⁹ which concerned redundancy payments. Ms Heron, who was made redundant at age 61, was paid six months' redundancy pay, whereas other (younger) colleagues were paid in accordance with their length of service.²³⁰ This was consistent with the Civil Service Compensation Scheme 1994, which was made by the Minister under the *Superannuation Act 1972* (UK) c 11, s 1(1). Under the Compensation Scheme, employees above the pension age would receive only 6 months' pay in the event of a compulsory redundancy, not an amount calculated based on their years of service.²³¹ The Employment Appeal Tribunal had no difficulties determining that this was an instance of age-based discrimination:

Making a payment to an employee ... who is over 60 ... which is half that which would be paid to a similar employee similarly dismissed who is under 60, is clearly less favourable treatment. It is because of a protected characteristic: age. It amounts to direct discrimination under section 13(1) of the *Equality Act 2010*, unless justified under section 13(2) or otherwise deemed not to be prohibited.²³²

Sefton Metropolitan Borough Council argued that the difference in treatment was covered by an exception to the *EqA*, which provides that an employer does not contravene the prohibition of age discrimination in the *EqA* if they do anything they must do pursuant to a requirement of an enactment (which includes subordinate legislation).²³³ The Employment Appeal Tribunal found that this exception did not apply to this case: while the Compensation Scheme was subordinate legislation, and while it provided for a difference in treatment on the basis of age, 'it does not *require* that difference to be respected. A requirement is something which means that the person subject to it cannot do otherwise'.²³⁴ Further, the Compensation

226 Ibid 123 [30].

227 Ibid.

228 Ibid 123 [30]–[31]. Even if the *ADA* did apply, the FCA held at 123 [32] that s 39(4) (which states that the *ADA* 'does not make unlawful anything done by a person in direct compliance' with a state Act) would also have covered the situation.

229 (Unreported, Employment Appeal Tribunal, Mitting J, Mr Edwards and Mr Lewis, 29 October 2013).

230 Ibid [2].

231 Ibid.

232 Ibid [12].

233 Ibid [13], [18]; *EqA* sch 22 cl 1(1).

234 *Heron* (Unreported, Employment Appeal Tribunal, Mitting J, Mr Edwards and Mr Lewis, 29 October 2013) [18], [20]–[21] (emphasis in original).

Scheme did not apply directly to Ms Heron's employment: it was incorporated into her contract.²³⁵ Thus, the terms were contractual (not statutory) even if they required the Council to pay no more than six months' pay. While this latter point might distinguish this case from *Keech*, the cases demonstrate a substantially different approach to what amounts to 'discrimination' in the context of implementing a statutory benefit.

In *Heron*, the Council could have sought to justify the difference of treatment as a proportionate means of achieving a legitimate aim, presumably on the basis that Ms Heron could claim her old age pension, and therefore did not need a similar redundancy payment to that provided to younger workers, who need a financial cushion as they try to find alternative employment.²³⁶ The Council did not pursue this argument at first instance (mistakenly believing they could rely on the statutory exception), and failed to produce evidence sufficient to justify the difference in treatment. Regardless, the Employment Appeal Tribunal expressed its scepticism about this potential 'justification':

In current circumstances when, as is notorious, men and women over 60 remain in [a] large and increasing number [as] members of the active labour force and may well require income from earnings to maintain their standard of living, the idea that the simple fact that a woman over 60 might be able to draw her state and civil service pension, so justifying a difference in treatment between her and a younger colleague will not do. Statistical evidence, no doubt collated by and available to central Government, would be required to begin to justify the difference in treatment, especially now that the age of compulsory retirement in the civil service has been raised from 60 to 65.²³⁷

D Desiring Younger Workers

Again, Australian courts are far less likely than UK courts to regard a 'desire' for younger workers as sufficient to establish age discrimination. In the FCA case of *Thompson v Big Bert Pty Ltd*,²³⁸ Ms Thompson argued that variations to her working arrangements as a bar attendant (which reduced the regularity and quantity of her work) were based on direct or indirect discrimination because of her age.²³⁹ Evidence was given that the owner of the hotel had been heard to remark that he wanted to replace some older staff with 'young glammers'.²⁴⁰ A letter from the hotel's owner expressed concerns that '[w]hilst most of the [hotel's] staff are acceptable, there [are] a few who really must go. They are tired

235 Ibid [20].

236 Ibid [13].

237 Ibid [25].

238 (2007) 168 IR 309.

239 Somewhat ironically, other staff had also previously accused Ms Thompson of discriminating against younger workers on the basis of age, including by refusing to be supervised by a 21-year-old colleague: *ibid* 315–6 [27]–[28].

240 *Ibid* 310 [1].

in appearance and attitudes', meaning there was a need to 'introduce some new blood and ideas'.²⁴¹

In relation to direct discrimination, the FCA held that the initial changes to Ms Thompson's working hours were due to 'the need to reduce the bar wages bill and the overall number of working hours.'²⁴² The FCA also held that 'Ms Thompson bore a relatively large proportion of the cut in working hours, although certainly not the whole of them.'²⁴³ The Court did not consider whether this first cut to hours was originally driven by Ms Thompson's age.²⁴⁴

After these initial changes, the FCA further found that decisions about Ms Thompson's shifts were 'rapidly influenced by ... Ms Thompson's persistent and unwelcome complaints about the change to her working arrangements', which became 'tiresome and unacceptable' to her manager, and meant measures were taken so the manager could 'be rid of [Ms Thompson's] presence without terminating her employment altogether.'²⁴⁵ As a single mother, it is perhaps unsurprising that Ms Thompson was so upset by the changes to her shift arrangements.

The FCA noted that Ms Thompson bore the onus of showing that age discrimination was at least a reason for the change to her working arrangements.²⁴⁶ The Court ultimately held that she 'failed to establish that this is so by a considerable margin.'²⁴⁷

A more sympathetic interpretation was adopted in the Queensland case of *Lightning Bolt Co Pty Ltd v Skinner* ('*Skinner*').²⁴⁸ There, Fryberg J of the Supreme Court of Queensland held that, even if older employees had been dismissed because they lacked 'ambition', this was not necessarily inconsistent with a finding of age discrimination:

Ambition is not necessarily a characteristic of the young, but neither can it be said that they are necessarily devoid of it. There is no inconsistency between desiring to employ people who are ambitious to advance beyond store work and who could be part of a trained pool who could be promoted to other areas as the need arose; and desiring to employ young people.²⁴⁹

Implicitly, then, desiring to employ young people (including on the grounds that they are likely to be fitter than older workers) could be a manifestation of age

241 Ibid 314 [23].

242 Ibid 320 [44].

243 Ibid 315 [26].

244 Though it may have reflected the timing of Ms Thompson's shifts: see *ibid*.

245 Ibid 320 [44].

246 Ibid 320 [45].

247 *Ibid*. See also *Allen v Newlands Coal Pty Ltd & See [No 2]* [2014] QCAT 522 (14 March 2014) [30], where it was not proven that age was a reason for the denial of training to an older worker, even though the supervisor had elsewhere identified a priority to give 'younger' workers an opportunity to attend training.

248 [2002] QSC 62 (22 March 2002).

249 *Ibid* [12].

discrimination.²⁵⁰ Age was still a substantial reason for the workers' dismissals in this case.²⁵¹ Unlike *Thompson*, though, the connection between age-based treatment and dismissal was clear in *Skinner*: the employer engaged two, younger replacements for the older workers who had been dismissed.

This has similarities to the UK case of *Perrin v Fred Christophers and Sons Ltd* ('*Perrin*'),²⁵² where the claimant was dismissed from her employment as a receptionist at an undertaker at age 63.²⁵³ The employer argued that Ms Perrin's role had been made redundant, and a new position created, for which the claimant was unsuited.²⁵⁴ The claimant was told that she 'was not up to it' (the new role).²⁵⁵ The Tribunal found that this comment was not 'an isolated, age-related comment, but when seen in the context of the Claimant's dismissal and her concern that it was on the grounds of her age, indicated to us a general discriminatory attitude on the Second Respondent's part in respect of age.'²⁵⁶

The Tribunal held that the claimant had established facts from which, in the absence of non-discriminatory reasons, it could conclude age discrimination had occurred, including that 'there were no substantial differences between the old and ... new ... positions'; there was no evidence of under-performance; and that it accepted the claimant's evidence of age-related comments made by the employer, such as 'don't worry, I'll get rid of her', that he would replace her with a 'young, fit, blonde' and 'I don't have a problem with her leaving. She has served her purpose'; and that mocking of the claimant's typing was a reference to her arthritis.²⁵⁷ Thus, the burden of proof shifted to the employer.²⁵⁸

While these cases show a similar desire for younger workers on the part of the employers, Ms Thompson's failure to establish that age discrimination was at least a reason for the change to her working arrangements contrasts markedly to the decisions in *Perrin* and *Skinner*. Again, this demonstrates the narrow approach to age discrimination adopted by some Australian courts, and the importance of the shifting of the burden of proof to the outcome of these sorts of cases.

E Age-Based Harassment and Termination

Finally, Australian courts have also taken a conservative and narrow approach to cases of age-based harassment and termination. In *Travers v New South Wales* ('*Travers*'),²⁵⁹ Ms Travers argued that she was discriminated against on the basis

250 Ibid [13], [16].

251 Ibid [15].

252 (Unreported, Employment Tribunal, Judge O'Rourke, Ms Richards and Ms Corrick, 17 March 2015).

253 Ibid [16].

254 Ibid.

255 Ibid [24].

256 Ibid [26].

257 Ibid [28].

258 Ibid [29].

259 [2016] FCCA 905 (27 April 2016).

of age when working as a casual exam supervisor.²⁶⁰ Ms Travers alleged that she was told she was 'too old to work', 'forgetful', and told to 'f ... off and don't come back'.²⁶¹ In an application for summary dismissal, the FCCA was asked to consider whether Ms Travers had a reasonable prospect of success under the *ADA*.²⁶²

The FCCA noted the need for a 'causal chain operating through the reasons for which the alleged discriminator has engaged in the discriminating conduct', which is inherent in the words 'because of' in s 14 of the *ADA*.²⁶³ Further, it outlined the relevant comparator test, based on the decision in *Purvis*.²⁶⁴

Drawing on *Purvis*, the FCCA held that Ms Travers had no reasonable prospects of establishing that the relevant comparator would be anyone other than a general exam supervisor who did not have her disabilities or was a different age.²⁶⁵ With that comparator, Ms Travers was seen as having 'no reasonable prospects of establishing that, in circumstances not materially different ... [the comparator] would have been treated more favourably'.²⁶⁶ The 'only reasonable construction' for the Board's decision not to re-engage Ms Travers, and for the 'sharp rebuke' regarding her age, was because the Board considered that Ms Travers had 'failed in her task of properly supervising the examinations'.²⁶⁷ The detriment Ms Travers suffered could only reasonably be inferred to have arisen due to the Board's dissatisfaction with how Ms Travers supervised the examination.²⁶⁸ A comparator in similar circumstances would not have been treated any better.

This reveals the serious consequences of the requirement under the *ADA* that the treatment occurs 'in circumstances that are the same or are not materially different', and how this has been interpreted in *Purvis*.²⁶⁹ In this context, Ms Travers's difficulties (in needing to eat and go to the toilet due to her diabetes) were directly related to her disability; despite this, her comparator would be someone who had also 'failed in her task of properly supervising the examinations'.²⁷⁰ This

260 *Ibid* [1].

261 *Ibid* [16].

262 *Ibid* [28].

263 *Ibid* [43], quoting *ADA* s 14.

264 *Travers* [2016] FCCA 905 (27 April 2016) [39]; *Purvis* (2003) 217 CLR 92.

265 *Travers* [2016] FCCA 905 (27 April 2016) [47].

266 *Ibid* [49].

267 *Ibid* [49].

268 *Ibid* [51].

269 *Purvis* (2003) 217 CLR 92. This decision has been extensively criticised: see Campbell, above n 43; Rattigan, above n 43.

270 *Travers* [2016] FCCA 905 (27 April 2016) [49].

is an extraordinarily narrow interpretation of discrimination laws, which clearly undermines their purposive intent.²⁷¹

Further, dismissing the comments to Ms Travers as a ‘sharp rebuke’, which were impliedly justified due to her failure to supervise an exam, demonstrates a fundamental misunderstanding of age-based harassment, and the harm that age discrimination of this kind can cause. A younger worker who failed to perform in this way would be unlikely to be treated in this manner: again, as noted above, they would likely be counseled, trained and performance managed to do better in the future. Thus, the FCCA ignored the blatantly ageist undertones of this case.

This may be contrasted with UK case law on age-based harassment. In *Roberts v Cash Zone (Camberley) Ltd*,²⁷² Ms Roberts argued that the use of the words ‘teenager’ and ‘kid’ by her manager to describe her (at age 18) amounted to harassment.²⁷³ The manager, Ms Peters, variously described Ms Roberts as ‘a kid’, ‘stropky kid’ and ‘stropky little teenager’.²⁷⁴ Ms Roberts was eventually dismissed. The Tribunal held that the language used by Ms Peters amounted to age-based harassment. While the word ‘teenager’ was technically accurate to describe Ms Roberts, it had the effect of belittling her,²⁷⁵ and was used ‘in accordance with a stereotype’ related to age.²⁷⁶

The decision in *Travers* may also be contrasted with *Perrin* (discussed above),²⁷⁷ where telling the claimant she ‘was not up to it’ (the new role) was held to constitute age-based harassment: the Tribunal had ‘no doubt that a 63-year-old woman [sic], who seemingly had been performing well, to date, would find it humiliating to have that said to her.’²⁷⁸

Both *Perrin* and *Roberts* led to findings of age-based harassment on the basis of conduct that was far more innocuous than that alleged in *Travers*. This implies a far greater willingness by UK Tribunals to empathise with claimants, and to try to understand the potential impact of age discrimination on individuals. This

271 See also Smith, above n 19. Similar issues with identifying the comparator (and the legacy of *Purvis*) can be seen in *Shirley v Director-General, Department of Education and Training [No 2]* [2009] NSWADT 235 (15 September 2009). In that case, which related to a decision not to appoint the complainant as he lacked the required qualifications, the relevant comparator was held to be an applicant of a different age, who also did not have the required qualifications. The Tribunal held that the appointment panel would have treated the hypothetical teacher ‘in exactly the same way that it treated Mr Shirley, that is, he or she would have been culled from the selection process.’ This was the case even if the Panel had ‘misapplied or misconstrued’ the selection criteria: at [40]–[41].

272 (Unreported, Employment Tribunal, Judge Lewis, Mrs Watts-Davies and Mr Selby, 23 April 2013).

273 Ibid [22.31]–[22.32].

274 Ibid [22.31].

275 Ibid [22.38].

276 Ibid [22.36]. This may be contrasted with *Vaughan v S & GM Bryden* (Unreported, Employment Tribunal, Employment Judge Emerton, 2009) [30], cited in L D Irving, *Challenging Ageism in Employment: An Analysis of the Implementation of Age Discrimination Legislation in England and Wales* (PhD Thesis, Coventry University, 2012) 188 <<https://core.ac.uk/download/pdf/30618010.pdf>>, where the Tribunal held that asking the 18-year-old claimant ‘not to behave like a petulant and delinquent teenager’ did not constitute harassment, as ‘this could be asked of anyone, whatever their age’.

277 (Unreported, Employment Tribunal, Judge O’Rourke, Ms Richards and Ms Corrick, 17 March 2015).

278 Ibid [26].

highlights the serious limitations of Australian case law on age discrimination under the *ADA*.

V DISCUSSION

In UK scholarship on age discrimination, there is concern that age discrimination is seen as 'less important' than other types of discrimination, both due to the potential 'double bind' and tension between the inherent dignity of individuals and organisational efficiency; and due to a societal disfavouring and de-prioritising of age equality.²⁷⁹ This is arguably manifested in the ability to justify direct age discrimination in the UK as a proportionate means of achieving a legitimate aim; and in the limited scrutiny that courts and tribunals have used in applying this test.²⁸⁰

However, the apparent trends in Australian case law on the *ADA* go beyond just a de-prioritising of age equality. Rather, they demonstrate a fundamental misunderstanding of the potential link between established organisational practices and age discrimination, and an apparent disregard for the potential damage done by age-based harassment and discrimination. Thus, Gaze's argument that the Australian judicial 'elite' may have limited understanding of disadvantage or discrimination, making it difficult for judges to recognise the seriousness of discrimination,²⁸¹ receives additional support from these case studies of decisions under the *ADA*. It also supports Smith's call for more sensitivity towards implicit bias in organisational decision-making.²⁸²

These case studies also illustrate the fundamental importance of the burden of proof in age discrimination cases. The shifting of the burden of proof under the *EqA* appears to have been determinative in a large number of these cases. Similar provision in the *ADA* would dramatically change the playing field in Australian age discrimination law, and could significantly alter many of the case outcomes above. This is consistent, then, with Allen's call for the shifting of the evidentiary burden of proof in Australia once the complainant has established a *prima facie* case of direct or indirect discrimination.²⁸³

That said, in advocating for a shifting of the burden of proof, it is important to recognise the differences in the legislative schemes in Australia and the UK. Unlike in Australia, it is possible to objectively justify direct age discrimination in the UK. Thus, even if the shifting of the burden of proof might assist claimants to make out their case, employers may still have a straightforward defence to justify useful employment practices. Many UK age discrimination cases therefore turn on whether the conduct can be justified, rather than whether the

279 See Blackham, *Extending Working Life for Older Workers*, above n 8, 48–9.

280 *Ibid* ch 3.

281 Gaze, above n 7, 338.

282 Smith, above n 19, 27.

283 Allen, above n 66, 605.

conduct is discriminatory. The availability of an objective justification defence may make UK Tribunals more willing to accept that behaviour is discriminatory. Conversely, the lack of any such defence in Australia may mean courts are less likely to hold that behaviour is discriminatory.

This, however, is not enough to justify introducing the ability to objectively justify direct age discrimination in Australian law.²⁸⁴ The ability to objectively justify direct age discrimination may lead to the retention of a number of age-discriminatory employment policies, including mandatory retirement provisions (known as employer-justified retirement ages or ‘EJRAs’), where that is considered to be a proportionate means of achieving a legitimate aim.²⁸⁵ The UK Supreme Court has identified two broad categories of legitimate aims that might support mandatory retirement ages: first, *intergenerational fairness*; and, second, *dignity*²⁸⁶ (that is, ‘the avoidance of unseemly debates about capacity’).²⁸⁷ Retirement provisions have been retained by UK employers such as the University of Oxford, the University of Cambridge and British Airways.²⁸⁸ This may have significant consequences in practice for employment terms and conditions. In sum, then, while an objective justification defence might facilitate a finding of age discrimination, it is likely to have other (undesirable) social consequences, as has been experienced in the UK.

VI CONCLUSION

Dramatic demographic change, and the potential economic costs of an ageing population, have brought age discrimination laws and their effectiveness to the front of governments’ minds. Through case studies of age discrimination decisions in Australia and the UK, this study has illustrated the very real challenges facing the implementation of the *ADA*. These cases demonstrate the narrow, conservative and unempathetic approach of Australian courts to claims of age discrimination. The case law that exists on this issue shows that Australian courts fall a long way short of promoting a purposive, *paideic* interpretation of the *ADA*, and are failing to realise the educative or progressive potential of age discrimination legislation.²⁸⁹ Thus, this paper confirms the findings in relation to other forms of discrimination in Australia. As Australians live longer, healthier lives, there is an increasing economic and intrinsic imperative to eliminate age

284 Cf Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 23.

285 Blackham, *Extending Working Life for Older Workers*, above n 8, ch 3.

286 *Seldon v Clarkson Wright & Jakes* [2012] 3 All ER 1301, 1322 [56]–[57].

287 *Ibid* 1322 [58]. See further Blackham, *Extending Working Life for Older Workers*, above n 8, ch 3.

288 University of Cambridge Human Resources, *Retirement Policy* (2017) University of Cambridge <https://www.hr.admin.cam.ac.uk/files/retirement_policy_2017_-_web.pdf>; University of Oxford Personnel Services, *Retirement for Academic and Academic-Related Staff* (29 June 2017) University of Oxford <<https://www.admin.ox.ac.uk/personnel/end/retirement/acrelretire/>>; British Airways Pensions, *Glossary*, British Airways <<https://www.mybapension.com/aps/scheme/glossary>>.

289 Thornton, ‘Sex Discrimination, Courts and Corporate Power’, above n 58, 56.

discrimination in employment. As it is currently framed, the *ADA* is not fit for purpose to achieve this end.

Going beyond judicial interpretation of the *ADA*, far more could be done to enhance the statute's effectiveness in practice. The *ADA* could be subject to multi-faceted reforms to improve its effectiveness, some of which have been identified by the AHRC.²⁹⁰ More particularly, reducing the reliance on individual enforcement of discrimination law would substantially change the landscape of equality law in Australia. Governments could also adopt more substantive efforts to promote age equality in organisations, such as through information and persuasion, sanctions and incentives, and duties to achieve equality.²⁹¹

More specifically, though, the *ADA* could be reformed to embody a firm governmental commitment to achieving age equality in practice. This could be achieved through the incorporation of a clear objects or interpretation section, to guide judicial interpretation of the statute. To be effective in practice, this would need to offer a clear statement regarding what the statute is seeking to achieve, rather than just offering a vague reference to 'equality'. Reform could also be achieved through a review of the extensive exceptions to age equality which have been included in the *ADA*, and which import fundamental ambivalence into the statutory sections. While Australian courts may well be adopting a narrow, conservative, and unempathetic approach to claims of age discrimination, this likely reflects the ambivalence and ambiguity at the heart of the *ADA*: ultimately, rectifying this is the task of legislators and Parliament, not the courts.

290 See Australian Human Rights Commission, *Willing to Work*, above n 11.

291 For detailed discussion of some of these options, see Blackham, *Extending Working Life for Older Workers*, above n 8, ch 8.