

LEGAL PROTECTIONS FOR MATURE WORKERS

1. INTRODUCTION

Older Australians are a vital part of the workforce and economy. Almost 20% of Australian workers are over the age of 55 (OECD, 2018) and as the population ages, this proportion will continue to rise.

Mature workers face unique challenges. Many experience age discrimination in the workplace or when looking for work. This is occurring despite a lack of evidence that older workers are less productive.

2. AN AGEING WORKFORCE

Australia's workforce is ageing faster than the overall population. This is because older people are making up a greater share of Australians and more of them are in the workforce.

The share of the adult Australian population aged 55+ increased from about a quarter in the early-1990s to over a third now (34%; Figure 1). By 2050, the figure is expected to increase to about 37% (ABS 2018a).

Such population ageing naturally drives an increase in older workers, but this has been magnified by rising mature labour force participation rates (Figure 2).

About 42% of men aged 55+ are now part of the workforce, compared to 34% in the 1990s. Participation has increased even more among women aged 55+, from 12% in the early-1990s to 30% by 2018.

A major source of mature labour force participation increases has been from people aged 55-64, particularly women, who saw rates increase from 25% to 59% over the period.

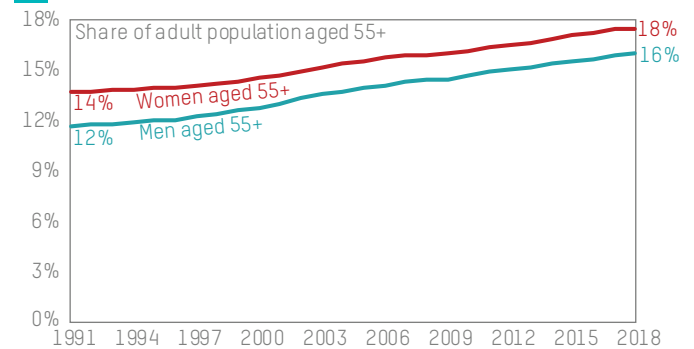
There are many reasons for this trend (see Chomik and Piggott 2012 on mature worker trends). Some choose to work longer because of improved health (e.g., see Chomik et al. 2018a summarising CEPAR research on cognitive ageing) or because of age pension eligibility changes (e.g., see Chomik et al. 2018b and 2018c on pension policy trends).

Technological change and a shift to service jobs means fewer jobs require physical strength: Labourers made up 14% of workers in 1990, but by 2018 the figure had reduced to 10% (ABS 2018b). Some older workers have taken a flexible approach, and have remained in the labour market on a part time basis.

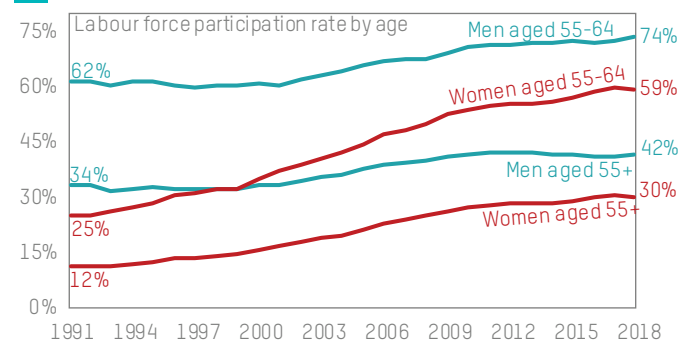
Mature workers often juggle work and caring responsibilities, which are less well recognised than the typical caring role faced by younger workers.

This fact sheet outlines the national and state legislation that protects mature workers from discrimination and upholds their right to seek flexible work arrangements. It also addresses the way workplace health and safety laws can be uniquely relevant to older Australians.

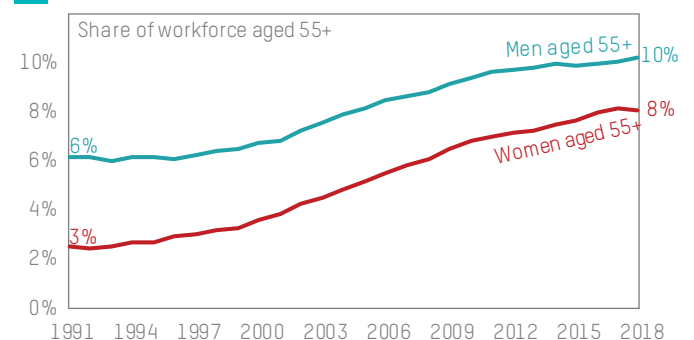
1 MORE OLDER PEOPLE



2 GREATER LABOUR MARKET ENGAGEMENT



3 AN AGEING WORKFORCE



Source: ABS 2018a, 2018b

3. THE CHALLENGE AHEAD

While participation rates indicate that older people are increasingly more engaged in the labour market, many challenges remain.

Indeed, Australian participation rates trail those seen in other economies like Sweden and New Zealand by over 10 percentage points (OECD 2019a). And many older people find the labour market an unwelcoming environment.

Unemployment rates have tended to be low for older people, since they are more likely to disengage from the labour market and retire early. For those who don't retire, periods of unemployment tend to be longer than for younger age groups. Of the 67,000 increase in people receiving unemployment benefits between 2013 and 2018, three quarters consisted of people aged 55+ (DSS, 2018).

Two major barriers to older individuals remaining in or re-entering the workforce are ageism and rigid work contracts that don't enable flexible arrangements.

35% of Australians 55-64 have experienced ageism, with 67% of this discrimination relating to employment (AHRC, 2013). Most people are aware of this too. 77% of individuals believe that someone over 55 is more likely to be made redundant and 67% believe they would be less likely to be promoted (O'Loughlin et al., 2017).

Older Australians are also disproportionately primary carers for the elderly and those with a disability (ABS, 2015). In 2015, the average age of a primary carer in Australia was 55 years. Combining such care with work is hard. The labour force participation rates for primary carers was more than 20% below that of the general population.

Policy-makers have recognised that mature workers need special protections, particularly with respect to discrimination, flexible work, and health and safety. Such legislative measures are outlined in this fact sheet. Entitlements available more broadly, but which may be especially relevant to mature workers, are also summarised.

4. DISCRIMINATION AT WORK

Age discrimination legislation is relevant to all stages of the employment process: recruitment and selection, employment terms and conditions, training and development, promotion and transfers, and termination of employment.

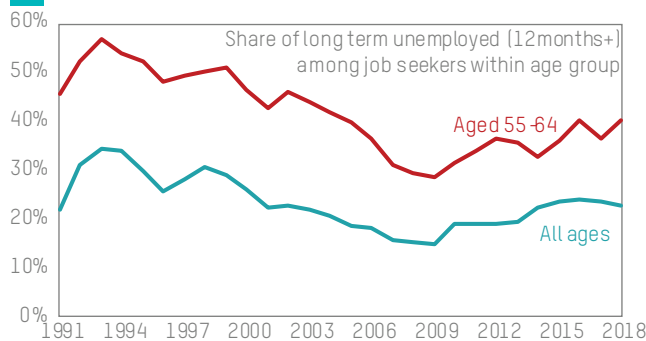
The following is a general summary of legislation aimed at preventing age discrimination in employment.

ANTI-DISCRIMINATION LEGISLATION

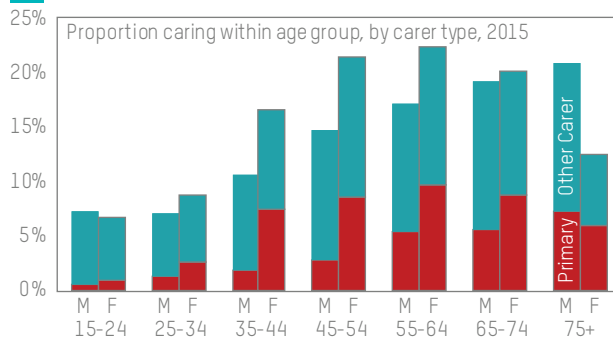
Workplace discrimination based on age is prohibited at the national level by several laws: the Australian Human Rights Commission Act (1986), the Age Discrimination Act (2004), and the Fair Work Act (2009). States and territories also have anti-discrimination laws (See Figure 8).

Over 70% of Australian employees are covered by the Fair Work Act (FWA). Those who aren't, predominantly state and local government employees, are covered by state industrial relations laws.

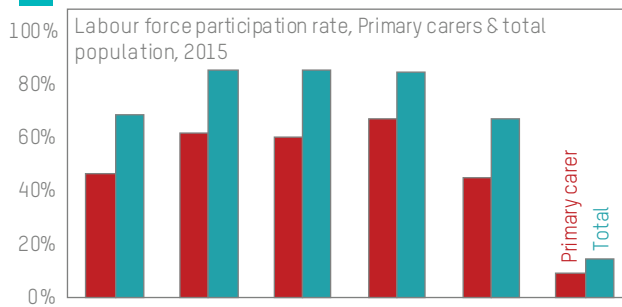
4 RECRUITMENT CAN BE MORE CHALLENGING



5 CARE RESPONSIBILITIES ARE GREATER

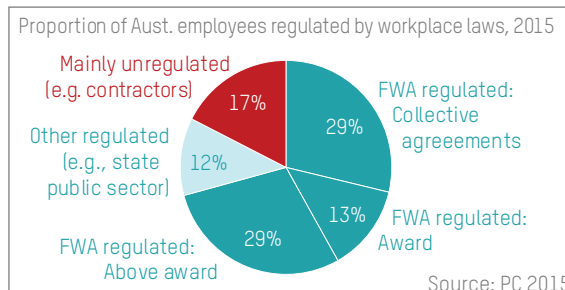


6 WORKING AND CARING IS A CHALLENGE



Source: ABS 2018b, 2015

7 MOST WORKPLACES ARE REGULATED



Source: PC 2015

WHAT CONSTITUTES DISCRIMINATION?

Age discrimination under the Age Discrimination Act 2004 (Cth) includes direct discrimination – where a person of a particular age is treated unfavourably compared to others of a different age in a similar situation. Or it can be indirect discrimination – where policies and practices appear to be the same for everyone, but are unreasonable for certain people because of their age. For example, requiring every

job applicant to pass a physical fitness test, when it is not necessary to perform the job, could discriminate against older applicants. One exemption is if the attribute is a legitimate requirement for the job. Bartending jobs, for example, are age-restricted.

Similarly, under section 351 of the Fair Work Act (2009), an employer must not take adverse action against a person who is an employee, or prospective employee, because of a person's age, sex, disability, carer's responsibilities, and a number of other grounds. These adverse actions include firing, changing an employee's job to their disadvantage, and treating them differently, or offering different and unfair terms and conditions. It also includes indirect actions.

WORKPLACE BULLYING

The Fair Work Act has special provisions with the aim of preventing bullying at work, which in some workplaces may be age-based. The Fair Work Commission has the authority to deal with allegations of bullying and issue cease and desist orders to perpetrators.

TERMINATION

Section 117 of the Act also states that the termination of employment or redundancy of employees over the age of 45 comes with the entitlement to an additional week of notice if they have over two years of service with the employer.

5. FLEXIBILITY AT WORK

The Fair Work Act (2009) provides certain individuals with the right to request flexible work arrangements from their employers. These arrangements may include changes in their hours of work, patterns of work, or location of work.

WHO HAS THE RIGHT TO REQUEST FLEXIBLE WORK?

A worker's eligibility to make a request for flexible work is outlined in section 65 of the Act. Mature workers have the right to request based primarily on their age, although they may also fit other criteria such as having a disability, or having caring responsibilities.

That is, this right arises where the employee is:

- a person responsible for the care of a child of school age or younger;
- a carer (see Carer Recognition Act 2010 definition, below);
- a person with a disability;
- aged 55 or older; or
- experiencing domestic violence, or providing care and support to a member of their immediate family or household who is experiencing domestic violence.

Permanent employees must have been continuously working for an employer for over 12 months to request flexible work. Casuals employed for over 12 months can request flexible work but must also have a reasonable expectation of ongoing employment on a regular and systematic basis with the employer.

FLEXIBLE WORK REQUESTS: EMPLOYER OBLIGATIONS

Employers must seriously consider requests for flexible working arrangements but can refuse based on reasonable

HOW CAN AN EMPLOYEE TAKE ACTION?

Workers should seek advice if they feel they have been treated unfavourably or a policy disadvantages them due to their age. Advice can be obtained from the Australian Human Rights Commission, the Fair Work Ombudsman, or from state/territory anti-discrimination bodies.

Complaints about breaches of anti-discrimination legislation can be made in writing to the Australian Human Rights Commission, or state/territory body, which will attempt to conciliate the matter. If this is unsuccessful a worker can take legal action in the courts.

Complaints for breaches of the Fair Work Act should be made to the Fair Work Commission, which will attempt to conciliate matters before they can proceed to court. Dismissed workers can take an unlawful dismissal action against the employer, again to the Fair Work Commission, or directly to court. Damages for this are uncapped and the employer has to prove that the termination was lawful. The Fair Work Ombudsman sometimes will take court action on a worker's behalf, at no cost to the worker, in matters such as adverse action, unlawful dismissal and non-compliance with the NES.

Despite the apparent widespread nature of age discrimination, statistics suggest few people take action. In 2018, only 8% (170 cases) of discrimination complaints to the AHRC were age related. Half of these involved an individual aged 55+; 57% related to employment (AHRC, 2018).

business grounds (section 65). These grounds include that:

- the arrangement would be too costly;
- the arrangement would likely result in a significant loss in efficiency or productivity;
- the arrangement would likely result in a significant negative impact on customer service;
- there is no capacity to make the change; or
- it would be impractical to change the working arrangements of other employees or recruit new employees.

Regardless of whether the employer grants or refuses the request, it must provide the employee with a written response within 21 days.

EMPLOYER OBLIGATIONS UNDER MODERN AWARDS

In 2018, a new set of employer obligations was added to modern awards (which provide minimum terms and conditions of employment for many Australian workers). This was in response to concerns that the right to request flexible work under section 65 of the Fair Work Act was difficult to enforce.

Employers are now obliged to discuss an employee's request with them prior to providing a formal response and to genuinely seek to reach an agreement. They must consider the employee's needs, the consequences for the employee if the request is refused, and any reasonable business grounds for refusing the request. If the employer refuses the request, its written response must address the reasons for refusal, including the business grounds and their applicability, as well as the details of alternative working arrangements the business is able to offer.

LEGAL CHALLENGES AHEAD?

While their reasonable business grounds cannot be challenged, employers must demonstrate they have genuinely followed the new protocols. Failure to do so may lead to employees disputing employers' decisions with the Fair Work Commission.

For example, in a 2019 case (prior to the new award provisions), the Full Bench of the Fair Work Commission found that Victoria Police did not have a valid reason for refusing a senior policeman's request to work a compressed work week (5 days into 4) to aid his transition to retirement. It considered that this would have "no significant impact" on its operations. (*Victoria Police v The Police Federation of Australia* [2019] FWCFB 305).

INDIVIDUAL FLEXIBILITY ARRANGEMENTS

The Fair Work Act also allows employers and employees to agree on an individual flexibility arrangement (IFA). IFAs are variations of awards (s144) and enterprise agreements (s202) agreed upon by both the employer and an individual employee, which can provide more flexibility in working conditions. It is important to note that because modern awards provide the minimum (safety net) conditions for workers, an IFA cannot be used to disadvantage the employee compared to the award, or compared to their enterprise agreement if they have one. Instead, the worker must be "better off overall".

However, because the employer is responsible for ensuring the employee is better off overall, and there is no oversight of IFAs by the Fair Work Commission, there is little data available on whether IFAs in practice provide the flexible working arrangements that benefit workers, rather than employers.

All modern awards and enterprise agreements must contain at a minimum the model IFA clause which allows variation to an employee's overtime rates, penalty rates, allowances, leave loading, and arrangements about when work is performed. It is evident that the clause mainly stipulates wage-related working conditions, although hours of work is the condition which could most frequently benefit mature workers and/or carers. For example, an IFA

6. TAKING LEAVE FROM WORK

Employed Australians are entitled to paid leave through the National Employment Standards in the Fair Work Act. These include provisions for annual leave, sick leave, personal/carer's leave and compassionate leave.

For example, personal/carer's leave can be taken to deal with personal illness, caring responsibilities and family emergencies. It consists of up to 10 paid days per year (pro-rated for part time employees) and 2 unpaid days for each occasion. All employees are entitled to a minimum 4 weeks' annual leave per year.

Compassionate Leave consists of 2 paid days for each occasion when a member of an employee's immediate family or household dies, or contracts or develops a life-threatening illness or injury.

could stipulate that a carer is allowed a longer break in the middle of the day to assist with taking a family member to medical appointments, combined with an earlier start time or later finishing time.

WHAT DEFINES A CARER?

For a carer to have the right to request flexible work they must fit the definition in section 5 of the Carer Recognition Act (2010). The Act defines a carer as an individual who provides care, support and assistance to another individual because that person has a disability, has a medical condition (including a terminal or chronic illness), has a mental illness, or is frail and aged.

Although a person may be caring for their spouse, partner, parent, child, relative, or cohabitor, they are not considered to be a carer under law if they are being paid to provide care, or are doing so as part of voluntary work, or as requirements for a course of education and training.

CARER LEGISLATION

Carers are recognised at the Commonwealth level in the Carer Recognition Act (2010). Most states and territories have also enacted legislation to protect carer rights. The exceptions are the ACT, which has endorsed the Carers' Charter 2011, and Tasmania, which has committed to its Carer Policy 2016 (see Figure 8).

Many of these pieces of legislation extend beyond simple recognition and definition. The NSW Act, for example, establishes the NSW Carers Charter, provides the legislative basis for the NSW Carers Advisory Council, and sets obligations for public sector agencies and human service agencies.

NSW public sector agencies are legally obliged to ensure their staff and agents understand the NSW Carers Charter. They also must consult with carers, or their representatives, when developing policies that impact carers. Lastly, their internal human resources policies must be developed with the NSW Carers Charter in mind in so far as the policies may significantly affect a member of staff's external role as a carer.

In addition, all Australian states and territories have long service leave legislation which entitles long-standing employees to 6-13 weeks of paid leave after 7-10 years of service with the same employer (depending on jurisdiction).

Mature workers can use their paid leave entitlements to recover from illness, care for family or household members, and to achieve a better work-life balance. For example, long service leave could be taken in smaller blocks of time with the employer's agreement, such as one day per week, to enable an employee to work a reduced work week.

Workers with less secure employment, such as those who have casual contracts or are self-employed, do not have access to the same leave entitlements as permanent employees, which remains an outstanding social and policy concern.

8 EMPLOYMENT, ANTI-DISCRIMINATION, CARERS, AND WH&S LAWS AND REGULATIONS, AND RELEVANT BODIES



- Fair Work Act 2009 (Cth) (see exemptions by state)
- Age Discrimination Act 2004 (Cth)
- Australian Human Rights Commission Act 1986 (Cth)
- Fair Work Ombudsman
- Australian Human Rights Commission
- Comcare



- Fair Work Act 2009 (Cth) (exempts state public sector and local gov't employees)
- Anti-Discrimination Act 1977 (NSW)
- Carers (Recognition) Act 2010 (NSW)
- Work Health and Safety Act 2011 (NSW)
- Work Health and Safety Regulation 2017 (NSW)
- Anti-Discrimination Board of NSW
- SafeWork NSW



- Fair Work Act 2009 (Cth) (exempts state gov't employees in essential services of core gov't)
- Equal Opportunity Act 2010 (Vic)
- Carers Recognition Act 2012 (Vic)
- Occupational Health and Safety Act 2004 (Vic)
- Occupational Health and Safety Regulations 2017 (Vic)
- Vic. Equal Opportunity and Human Rights Commission
- WorkSafe Victoria



- Fair Work Act 2009 (Cth) (exempts State public sector and local government employees)
- Anti-Discrimination Act 1991 (Qld)
- Carers (Recognition) Act 2008 (Qld)
- Work Health and Safety Act 2011 (Qld)
- Work Health and Safety Regulation 2011 (Qld)
- Queensland Human Rights Commission
- Workplace Health and Safety Queensland



- Fair Work Act 2009 (Cth) (exempts state public sector and local gov't employees)
- Equal Opportunity Act 1984 (SA)
- Carers Recognition Act 2005 (SA)
- Work Health and Safety Act 2012 (SA)
- Work Health and Safety Regulations 2012 (SA)
- SA Equal Opportunity Commission
- SafeWork SA



- Fair Work Act 2009 (Cth) (exempts state public sector and local gov't employees; employees of sole traders, partnerships, other unincorporated entities and non-trading corporations)
- Equal Opportunity Act 1984 (WA)
- Carers Recognition Act 2004 (WA)
- Occupational Safety and Health Act 1984 (WA)
- Occupational Safety and Health Regulations 1996 (WA)
- draft Work Health and Safety Bill has been introduced but not yet legislated
- WA Equal Opportunity Commission
- Worksafe WA



- Fair Work Act 2009 (Cth) (exempts state public sector employees)
- Anti-Discrimination Act 1998 (Tas)
- Tasmanian Carer Policy 2016
- Work Health and Safety Act 2012 (Tas)
- Work Health and Safety Regulations 2012 (Tas)
- Equal Opportunity Tasmania
- WorkSafe Tasmania



- Fair Work Act 2009 (Cth) (no exemptions)
- Discrimination Act 1991 (ACT)
- Carers' Charter
- Work Health and Safety Act 2011 (ACT)
- Work Health and Safety Regulation 2011 (ACT)
- ACT Human Rights Commission
- WorkSafe ACT



- Fair Work Act 2009 (Cth) (no exemptions)
- Anti-Discrimination Act 1996 (NT)
- Carers Recognition Act 2014 (NT)
- Work Health and Safety (National Uniform Legislation) Act 2011 (NT)
- Work Health and Safety (National Uniform Legislation) Regulation 2011 (NT)
- NT Anti-Discrimination Commission
- NT WorkSafe

7. SAFETY AT WORK

Workplace health and safety (WH&S) is important for mature workers. Australia has a harmonised system of WH&S legislation which means most states and territories, and the Commonwealth, have essentially uniform laws.

Legally, persons conducting a business or undertaking (PCBUs) have an absolute duty, as far as is reasonably practicable, to eliminate (or if this is not possible, minimise) risks to health and safety arising from the work.

WH&S duties are also imposed on people who carry out work in any capacity for a PCBU including employees, contractors, subcontractors, self-employed persons, outworkers, apprentices and trainees, work experience students and volunteers. In other words, these persons have a duty to keep themselves and others safe at work.

To uphold their duty, PCBUs may need to accommodate any declining physical ability of mature employees. They may also perceive that a conflict exists between their duty to keep workers safe and their employment of older individuals. Some state and territory regulatory bodies (see Figure 8) have published guidelines for PCBUs with mature employees.

These explain that many of the stereotypes about older Australians are not founded in evidence. For example, these workers are no more likely to suffer an injury in the workplace than workers overall (WorkSafe Tasmania, 2014).

WorkSafe Tasmania also points out that small, inexpensive changes in the workplace can make a big difference for older workers (and have benefits for younger workers too). For example, glare reduction, increasing font size in printed materials, eliminating unwanted noise to prevent hearing loss, and minimising night shift work where possible may all help.

WORKPLACE, HEALTH AND SAFETY LEGISLATION

While most states and territories, and the Commonwealth, have harmonised their WH&S legislation, Victoria has not. Western Australia has indicated it intends to proceed with harmonisation. There are consistencies in the harmonised and non-harmonised regimes but some differences, for example, the term PCBU is used only in the harmonised legislation. Enforcement of the legislation remains with the relevant state or territory.

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ABOUT CEPAR

CEPAR is a unique collaboration between academia, government and industry, committed to delivering solutions to one of the major challenges of the 21st century. CEPAR's Chief Investigators are based at UNSW Sydney, ANU, Curtin University, University of Melbourne, and University of Sydney.

The *Organisations and the Mature Workforce Stream* focuses on the impact of various work designs on worker wellbeing at older ages and investigates barriers to mature workforce participation, especially age discrimination and caring responsibilities.

See more at: cepar.edu.au.

The material in this fact sheet is intended for general information purposes only and does not constitute legal advice.

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