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# Recent Developments in Australian and New Zealand Age Discrimination Law: A Comparative Perspective

ALYSIA BLACKHAM*

## Abstract

As individuals live longer, healthier lives, both Australia and New Zealand are experiencing a dramatic demographic shift. In an effort to support older workers' increasing participation in the labour market, and recognise the dignity of workers of all ages, both jurisdictions have introduced age discrimination laws that prohibit discrimination on the basis of age in employment. However, ageism remains a serious challenge facing older workers in both jurisdictions. This article draws on comparative legal analysis of recent developments in age discrimination law in Australia and New Zealand, focussing particularly on developments in 2016, to consider emerging issues in the two jurisdictions. It argues that recent developments in age discrimination law in Australia and New Zealand reveal problematic tensions in the prohibition of age discrimination, that are likely to recur in years to come.

## I. Introduction

As individuals on average live longer, healthier lives, both Australia and New Zealand are experiencing a dramatic demographic shift. Figure 1 illustrates the substantial growth in the 'elderly' (that is, those over the age of 65) as a proportion of the population in both countries since 1970. While longer life expectancy is something to be celebrated, demographic ageing also brings with it a number of challenges,[1] including in relation to the sustainability of the labour market and pension systems. To manage these risks in both Australia and New Zealand, changes to pensions have been introduced to encourage (or compel) older workers to remain in employment for longer.[2] As Figure 2 illustrates, pension and labour market reforms have been fairly successful at increasing the labour market participation rate for 55-64 year-olds in Australia and New Zealand (though New Zealand has outstripped Australia in this regard since its pension reforms took effect in the early 1990s).

* Dr Alysia Blackham, Senior Lecturer and Discovery Early Career Research Fellow, Melbourne Law School, the University of Melbourne.

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[1] Irene Ryan, Katherine Ravenswood and Judith K Pringle "Equality and Diversity in Aotearoa New Zealand" in Alain Klarsfeld and others (eds) *International Handbook on Diversity Management at Work: Second Edition Country Perspectives on Diversity and Equal Treatment* (Edward Elgar Publishing, Cheltenham, 2014) 175 at 179.

[2] Roger Hurnard *The effect of New Zealand Superannuation eligibility age on the labour force participation of older people* (New Zealand Treasury Working Paper, 05/09, November 2005).

**Figure 1: Elderly (those over 65) as a percentage of the population, Australia and New Zealand, 1970-2014 (Source: OECD Labour Force Statistics)**

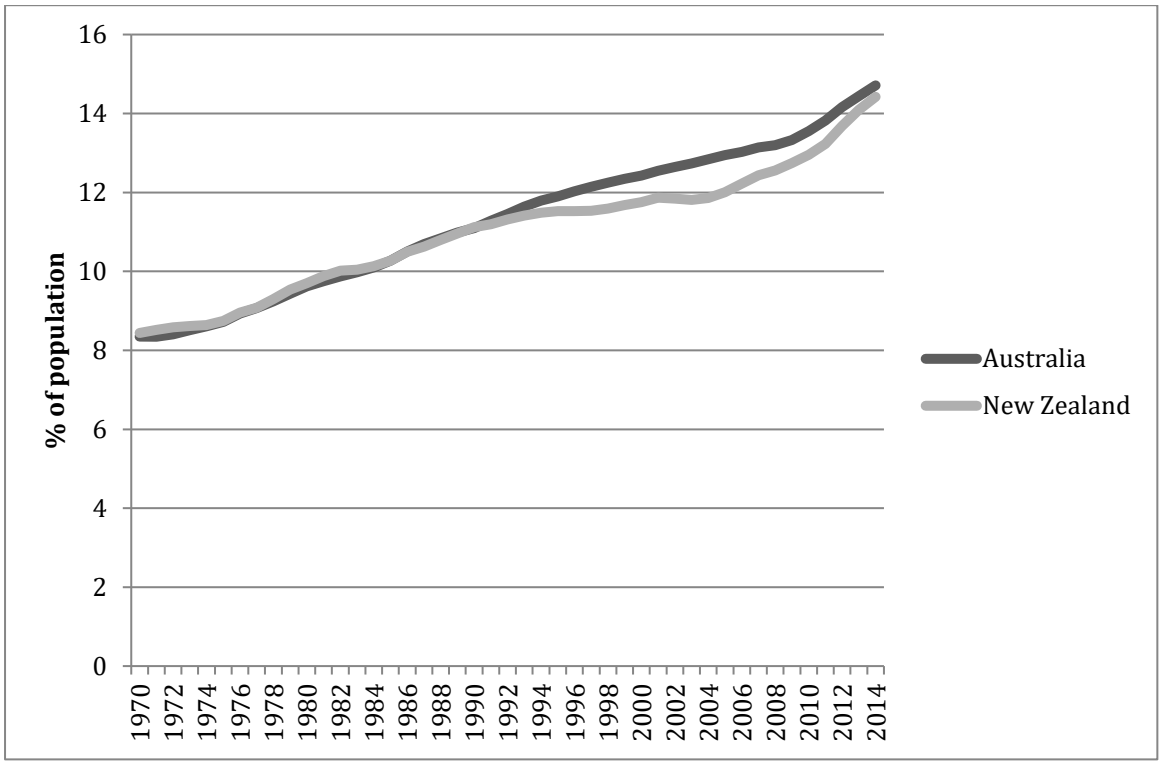
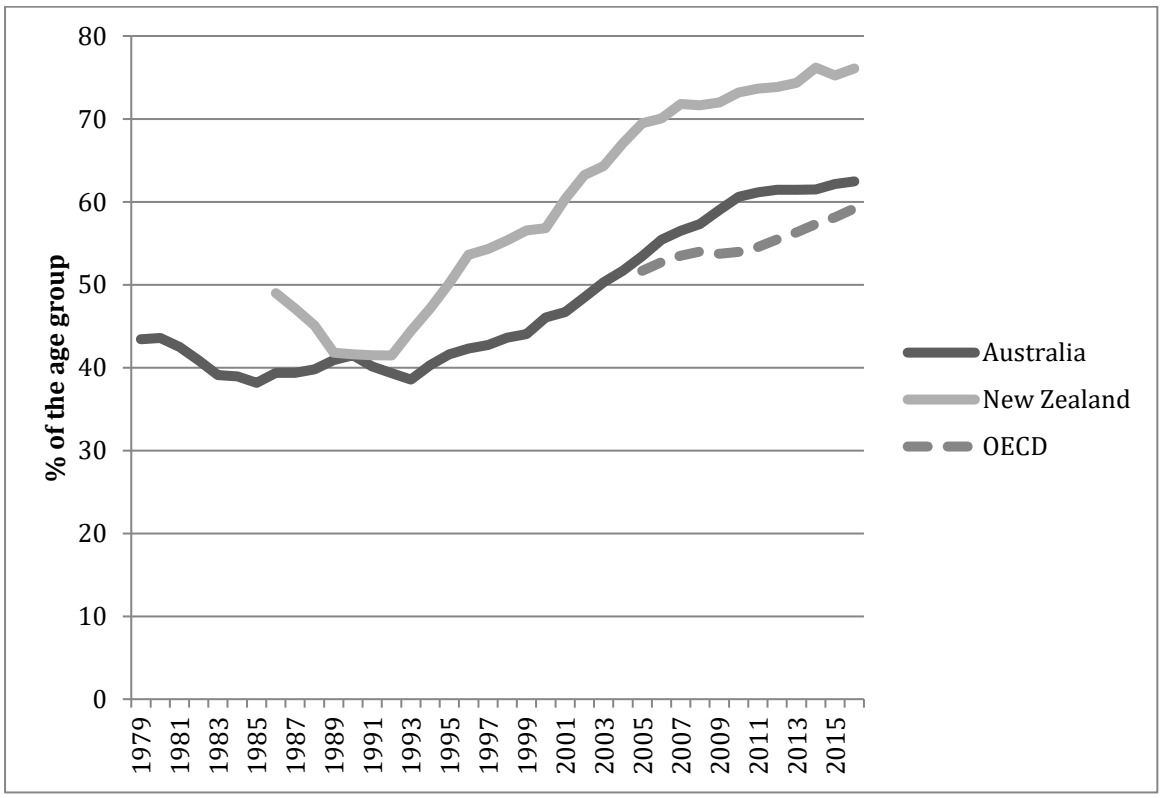



**Figure 2: Employment rate for 55-64 year-olds, per cent of the age group, 1979–2016, by jurisdiction (Source: OECD Labour Market Statistics)**



In an effort to support older workers' increasing participation in the labour market, and recognise the dignity of workers of all ages, both jurisdictions have introduced age discrimination laws that prohibit discrimination on the basis of age in employment. While these laws could potentially have substantial instrumental significance for older workers, and are becoming more important with accelerating demographic change, there has been limited scholarly examination of age discrimination legislation in either New Zealand or Australia.[3] Further, there are substantial questions about the effectiveness of age discrimination legislation in practice. Empirical studies have illustrated that ageism – and gendered ageism in particular – remains a serious challenge facing older workers in both jurisdictions.[4] Age discrimination is particularly evident in recruitment,[5] meaning older workers are likely to spend longer out of work when made redundant;[6] in training;[7] and in persistent stereotypes about older workers held by both employers and older workers themselves,[8] particularly relating to older workers' lack of adaptability.[9]

These empirical studies echo the findings of surveys of older workers in Australia and New Zealand, which have found age discrimination to be widespread. In a 2014 prevalence survey of age discrimination in the workforce, based on telephone interviews with 2,109 Australians aged 50 years and over, 27 per cent of respondents reported experiencing age discrimination in employment in the previous two years.[10] Further, 32 per cent of respondents were aware of other people experiencing

[3] Though, in Australia, see Therese MacDermott "Older workers and extended workforce participation: Moving beyond the 'Barriers to work' approach" (2014) 14 IJDL 83; Therese MacDermott "Challenging age discrimination in Australian workplaces: From anti-discrimination legislation to industrial regulation" (2011) 34 UNSWLJ 182; Therese MacDermott "Affirming age: Making federal anti-discrimination regulation work for older Australians" (2013) 26 AJLL 141; Therese MacDermott "Resolving federal age discrimination complaints: Where have all the complainants gone?" (2013) 24 ADRJ 102; Therese MacDermott "Age Discrimination and Employment Law: The Sky's the Limit" (1998) 11 AJLL 144; Therese MacDermott "The Role of Mandatory ADR and Agency Engagement in Resolving Employment Discrimination Complaints: An Australian Perspective" (2015) 31 IJCLLIR 27; Margaret Thornton and Trish Luker "Age Discrimination in Turbulent Times" (2010) 19 GLR 141; Lynne Bennington "Prime Age Recruitment: The Challenges for Age Discrimination Legislation" (2004) 3 Elder Law Review 27; Patricia Easteal, Channy Hiu Tung Cheung and Susan Priest "Too many candles on the birthday cake: age discrimination, work and the law" (2007) 7 QUTLJ 93; S Encel "Age discrimination in employment in Australia" (1999) 25 Ageing Int 69; S Encel "Age Discrimination in Law and in Practice" (2004) 7 Elder Law Review 13; Sue Field and Carolyn Sappideen "Anti-Discrimination - Some Observations from downunder, the Australian Experience on Age Discrimination" (2009) 3 J Intl Aging L & Poly 169. In New Zealand, see Mark Harcourt, Adrian Wilkinson and Geoffrey Wood "The effects of anti-age discrimination legislation: a comparative analysis" (2010) 26 IJCLLIR 447; Mark Harcourt, Geoffrey Wood and Sondra Harcourt "Do Unions Affect Employer Compliance with the Law? New Zealand Evidence for Age Discrimination" (2004) 42 BJIR 527; Geoffrey Wood, Mark Harcourt and Sondra Harcourt "The effects of age discrimination legislation on workplace practice: A New Zealand case study" (2004) 35 Industrial Relations Journal 359.

[4] J Handy and D Davy "Gendered ageism: Older women's experiences of employment agency practices" (2007) 45 Asia Pac J Hum Resour 85; Michael McGann and others "Gendered Ageism in Australia: Changing Perceptions of Age Discrimination among Older Men and Women" (2016) 35 Economic Papers 375; Sondra Harcourt and Mark Harcourt "Do Employers Comply with Civil/Human Rights Legislation? New Evidence from New Zealand Job Application Forms" (2002) 35 J Bus Ethics 205. Historically, see MS Singer and Christine Sewell "Applicant Age and Selection Interview Decisions: Effect of Information Exposure on Age Discrimination in Personnel Selection" (1989) 42 Personnel Psychology 135.

[5] Handy and Davy, above n 4; McGann and others, above n 4; Harcourt and Harcourt, above n 4; Wood, Harcourt and Harcourt, above n 3. Historically, see Singer and Sewell, above n 4.

[6] Keith A Macky "Organisational Downsizing and Redundancies: The New Zealand Workers' Experience" (2004) 29 NZJER 63 at 82.

[7] Lance Gray and Judy McGregor "Human Resource Development and Older Workers: Stereotypes in New Zealand" (2003) 41 Asia Pac J Hum Resour 338.

[8] Judy McGregor and Lance Gray "Stereotypes and Older Workers: The New Zealand Experience" [2002] 18 Social Policy Journal of New Zealand 163; Gray and McGregor, above n 7.

[9] McGregor and Gray, above n 8; Gray and McGregor, above n 7.

[10] 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*

discrimination because of their age in the workplace in the last two years.[11] Discrimination was more likely to be experienced by those seeking paid work (58 per cent) than by those who worked for a wage or salary (28 per cent) or those who were self-employed (26 per cent),[12] implying that discrimination in recruitment is a particular problem in Australia.

The comparable figures in New Zealand are lower than those in Australia (though also more dated). For example, in a survey of 2137 New Zealand workers over the age of 55, conducted in 2000, 11.6 per cent of respondents said they had experienced less favourable treatment at work on the basis of age,[13] most commonly in relation to selection for training.[14] Similarly, in Statistics New Zealand's Survey of Working Life, which was a supplement to the Household Labour Force Survey in the December 2012 quarter, 10 per cent of older workers said they had experienced harassment, discrimination, or bullying at work in the last 12 months.[15] Older workers experienced less harassment, discrimination and bullying than the 35-54 age group but more than the 15-34 age group.[16] This is broadly consistent with the results of the New Zealand General Social Survey, conducted in 2010, which found that those over the age of 55 were least likely to experience discrimination in the last 12 months (see Table 1).

**Table 1: Experience of discrimination in the last 12 months by age (Source: New Zealand General Social Survey, 2010)**

| | Total | Age group (years) | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | 15–24 | 25–34 | 35–44 | 45–54 | 55–64 | 65–74 | 75+ |
| Experienced discrimination in last 12 months (per cent) | 10.4 | 14.2 | 11.6 | 12.0 | 11.5 | 8.5 | 3.9 | 2.8 |

This article presents comparative legal analysis of recent developments in age discrimination law in Australia and New Zealand, focussing particularly on developments in 2016. This comparison stems from a 'problem-solving' or sociological approach to comparative law, which examines how different legal systems have responded to similar problems (here, the challenges of demographic ageing and age discrimination in employment).[17] I commence with a brief discussion of the statutory framework in each jurisdiction for addressing age discrimination (Part II), before presenting an analysis of recent case law in each country (Part III). Finally in Part IV, I discuss the tensions that are emerging in the prohibition of age discrimination, which are likely to recur in future years.

*older* (Australian Human Rights Commission, 2015) at 18. Respondents were asked: '…during 2013 and 2014, have you at any time during those two years, been treated less favourably than other people in a similar situation because of your age or because of assumptions made about older people?': at 79.

[11] At 23.

[12] At 19.

[13] Gray and McGregor, above n 7, at 345.

[14] At 346.

[15] Statistics NZ "Workers aged 55+ keen to stay working full-time" (22 October 2013) Stats NZ < http://archive.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/workers-aged-55plus-article.aspx>.

[16] Statistics NZ, above n 15.

[17] Esin Örücü "Developing comparative law" in Esin Örücü and David Nelken (eds) *Comparative law: a handbook* (Hart, Oxford, 2007) 43 at 52.

## II. Statutory Frameworks for Addressing Age Discrimination in Employment

In both jurisdictions, age discrimination in employment is regulated by both industrial statutes (in New Zealand, the Employment Relations Act 2000 (ERA); and, in Australia, the Fair Work Act 2009 (Cth) [FWA]); and human rights or equality statutes (in New Zealand, the Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993 (HRA); in Australia, the Age Discrimination Act 2004 (Cth) (ADA) and equivalent state and territory legislation). Thus, claimants in both jurisdictions must choose between pursuing a claim under workplace law or equality/human rights law.[18] However, this choice is further complicated in Australia by the presence of equivalent equality statutes at the state and territory level, meaning claimants must also choose whether to pursue a claim in the Federal or state system.

### *a. Statutory Frameworks in New Zealand*

The New Zealand BORA establishes a general right to freedom from discrimination on the grounds listed in the HRA (which include age).[19] BORA only applies to acts by the government or those performing public functions, powers or duties.[20] While BORA does not allow courts to declare other statutes to be invalid or impliedly repealed,[21] an interpretation that is consistent with BORA is to be preferred.[22] Though a breach of the BORA discrimination provisions does not create individual rights, it does breach the HRA,[23] which can then lead to direct orders and individual remedies.[24]

The HRA prohibits discrimination in employment,[25] and includes age as a prohibited ground of discrimination.[26] However, 'age' in this context does not extend to those under the age of 16, and has only included those after 'superannuable' age since 1999. The HRA includes exceptions to the prohibition of age discrimination for acts authorised or required by enactment or law,[27] crews of ships or aircraft (if they are not New Zealand ships or aircraft) if they are engaged or applied for work outside New Zealand,[28] for reasons of national security if the individual is aged under 20 and secret or top secret security clearance is required,[29] for reasons of authenticity if being a certain age is a genuine occupational qualification,[30] for domestic employment in a private household,[31] where age is a genuine occupational qualification (for safety or any other reason),[32] for youth wages for those under 20,[33] and for retirement benefits in force prior to 1999.[34] Measures to ensure equality, if done in good faith, are also exempt.[35]

[18] See Employment Relations Act 2000, s 112; Human Rights Act 1993, s 79A. For claims relating to dismissal, claimants must use the personal grievance provisions in the Employment Relations Act: s 113.
[19] Bill of Rights Act 1990, s 19(1).
[20] Section 3.
[21] Section 4.
[22] Section 6.
[23] Human Rights Act 1993, ss 20I, 20L.
[24] Section 92I.
[25] Section 22.
[26] Section 21(1)(i).
[27] Section 21B(1).
[28] Section 24.
[29] Section 25(2).
[30] Section 27(1).
[31] Section 27(2).
[32] Section 30(1).
[33] Section 30(2).
[34] Section 30A.
[35] Section 73.

The HRA is expressly aimed at achieving the earliest resolution of disputes. The objects of Part 3 of the HRA (which relates to enforcement) include: [36]

> …establish[ing] procedures that … recognise that disputes about compliance … are more likely to be successfully resolved if those disputes can be resolved promptly by the parties themselves; and recognise that, if disputes about compliance … are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available to the parties to those disputes.

Consistent with these objects, the Human Rights Commission (the Commission) receives complaints made under the HRA,[37] and is tasked with offering mediation and problem-solving assistance.[38] Mediation is confidential[39] and cannot be used as evidence in later proceedings.[40] The Commission must use best endeavours to assist the parties to achieve a settlement.[41] The Commission may take further action with a complaint,[42] including via information gathering.[43]

Following these attempts at resolution, the aggrieved party, complainant or Commission itself may proceed to the Human Rights Review Tribunal.[44] However, the Tribunal must refer the matter back to the Commission unless satisfied that additional attempts at resolution would not contribute constructively to resolving the complaint, would not be in the public interest, or would undermine the urgency of the proceedings.[45] The Tribunal may refer matters back to the Commission at any time.[46]

In 2015-16, the Human Rights Commission managed 1274 complaints of unlawful discrimination under the HRA, 84 per cent of which were successfully resolved.[47] Ten percent of complaints were not resolved and were referred to the Human Rights Review Tribunal.[48] Age was the fourth most common ground raised, relating to 136 complaints.[49] Forty of these complaints were against government, and 96 related to the private sector.[50]

The ERA creates a route for pursuing personal grievances[51] relating to employment, including those relating to discrimination[52] on the grounds of age.[53] The ERA adopts the exceptions to the prohibition of discrimination in the HRA, including those specifically relating to age.[54] The ERA creates a

[36] Section 75.
[37] Section 76.
[38] Sections 76, 77.
[39] Section 85.
[40] Section 86.
[41] Section 83(2).
[42] Section 80.
[43] Section 82.
[44] Section 92B.
[45] Section 92D(1)(b).
[46] Section 92D(2).
[47] NZ Human Rights Commission *Annual Report: Pürongo ä Tau 2015/16* (November 2016) at 11, 18, 21.
[48] At 21.
[49] At 20.
[50] At 21.
[51] For a summary of the literature on personal grievances, see Department of Labour *Issues with the Personal Grievance System in New Zealand? A review of the literature* (February 2010).
[52] Sections 102, 103(1)(c). "Discrimination" is defined in s 104.
[53] Section 105(1)(i).
[54] Employment Relations Act 2000, s 106; Human Rights Act 1993, s 30.

rebuttable presumption of discrimination where an employee can establish that the employer took any action that falls within the definition of discrimination under the ERA.[55]

The objects of the ERA explicitly include building "productive employment relationships", "promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards", and "reducing the need for judicial intervention".[56] Similarly, the objects of Part 9 of the ERA, which establishes the personal grievance process, include recognising that: "in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures"; and "employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship".[57] Understandably, then, there is a particular focus on internal organisational dispute resolution under the ERA, with a secondary emphasis on mediation where internal resolution is unsuccessful. For example, claimants must raise a personal grievance with their employer within 90 days.[58] No similar provision exists in Australia. Concerns have been raised, however, that internal organisational processes may be ineffective in many cases,[59] disadvantaging claimants and undermining the personal grievance provisions.

After an employee has raised a personal grievance with their employer, they have three years to begin proceedings in the Employment Relations Authority (the Authority) or Employment Court.[60] The Authority is an investigative body, "that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities."[61] The Authority has an ongoing duty to consider whether mediation of a matter is appropriate, and must direct mediation of matters unless it will not "contribute constructively to resolving the matter",[62] is not in the public interest, will undermine the urgency of proceedings, or is otherwise impractical or inappropriate.[63] The Authority also has a duty to prioritise previously mediated matters.[64] Where the Authority directs mediation, parties must comply with that direction and "attempt in good faith to reach an agreed settlement of their differences".[65] Proceedings are suspended until the parties have complied with the direction.[66] Thus, if parties wish to pursue a claim with the Authority, mediation can become, in effect, compulsory. Mediation is confidential[67] and can be binding with the parties' agreement.[68]

Unsurprisingly, then, mediation has become the primary means of resolving disputes in New Zealand since the ERA was introduced.[69] Limited data is available regarding the operation of mediation, the Authority, and the Employment Court in New Zealand: while there has been some historical analysis

[55] Employment Relations Act 2000, s 119.
[56] Section 3(a).
[57] Section 101.
[58] Section 114.
[59] Bernard Walker and RT Hamilton "The Effectiveness of Grievance Processes in New Zealand: A Fair Way to Go?" (2011) 53 JIR 103.
[60] Employment Relations Act 2000, s 114(6).
[61] Section 157(1).
[62] Section 159(1)(b)(i).
[63] Section 159(1).
[64] Section 159A.
[65] Section 159(2).
[66] Section 159(2).
[67] Section 148.
[68] Section 150.
[69] Peter Franks "Employment mediation in New Zealand" (2003) 6 ADR Bulletin 1 at 1.

of personal grievance statistics,[70] there has been no large scale empirical analysis of mediation services and Authority data.[71] However, a Department of Labour report on the first two years of the ERA provides a statistical picture of mediation services under the ERA: over this period, the Department received 15,336 requests for mediation services, with personal grievances accounting for 61.7 per cent of mediation applications.[72] Mediators completed 14,357 applications over the two years: 68.2 per cent were settled, 12.8 per cent were not settled, and 19 per cent decided not to proceed or were withdrawn.[73] Thus, few matters will proceed beyond mediation to the Employment Court: across all areas, only 185 new cases were filed with the Employment Court in 2016.[74]

### *b. Statutory Frameworks in Australia*

In Australia, age discrimination is prohibited in employment by the FWA; the ADA at the Federal level; and equivalent state and territory equality legislation (such as the Equal Opportunity Act 2010 (Vic)). There is no bill of rights in Australia, and age equality is not embedded in any constitutional instruments.

The FWA prohibits adverse action on the grounds of age,[75] which includes dismissal, injuring an employee in employment, prejudicial altering of an employee's position, or discriminating between the employee and other employees.[76] The prohibition does not extend to discrimination which is not unlawful under an anti-discrimination law (such as the ADA); that taken because of the 'inherent requirements' of the position; or for staff members of religious institutions, where it is done in good faith "to avoid injury to the religious susceptibilities of adherents of that religion or creed."[77] Under s 361 of the FWA, the burden of proof is reversed in relation to adverse action claims: adverse action will be presumed to be action taken for a prohibited reason unless the employer proves otherwise.

The Fair Work Commission (FWC) is given powers to deal with disputes,[78] including via mediation or conciliation, or by expressing an opinion or making a recommendation,[79] and may direct a person to attend a conference.[80] For a non-dismissal dispute, those affected may apply to the FWC to deal with the dispute[81] and, if the parties agree, the FWC must conduct a conference.[82] For disputes relating to dismissal, those affected *must* apply to the FWC before proceeding to court.[83] If the FWC is "satisfied that all reasonable attempts to resolve the dispute" [84] have been, or will be, unsuccessful, then it must issue a certificate to that effect.[85] Once a certificate has been issued for dismissal-related

[70] Dianne Donald and Joanna Cullinane "An Analysis of Personal Grievance Statistics in New Zealand From 1984 to 1998" [1998] Labour, Employment and Work in New Zealand 184.
[71] Department of Labour, above n 51, at 14.
[72] Franks, above n 69, at 4.
[73] At 4.
[74] Courts of New Zealand "Annual statistics Specialist Courts and Tribunals December 2016" <https://www.courtsofnz.govt.nz/publications/annual-statistics/latest-december-2016/specialist-courts-and-tribunals>.
[75] Fair Work Act 2009 (Cth), s 351(1).
[76] Section 342.
[77] Section 351(2).
[78] Section 595(1). In relation to dismissal, see s 365; in relation to other forms of adverse action, see s 372.
[79] Section 595(2).
[80] Section 592.
[81] Section 372.
[82] Section 374.
[83] Section 370.
[84] Section 368(3).
[85] Section 368(3)(a).

disputes, a person affected by a contravention of the adverse action provisions may apply to the Federal Court or the Federal Circuit Court[86] for the making of "any order the court considers appropriate".[87]

The ADA prohibits direct and indirect discrimination on the basis of age in employment, including in appointments, terms and conditions of employment, access to opportunities or benefits, dismissal, or any other detriment.[88] Exceptions are created for domestic duties, the inherent requirements of a position,[89] partnerships with less than six partners,[90] youth wages,[91] positive discrimination,[92] charities,[93] religious bodies,[94] superannuation and insurance,[95] direct compliance with laws,[96] and Commonwealth employment programs.[97]

Written complaints alleging a breach of the ADA may be lodged with the Australian Human Rights Commission (AHRC).[98] Complaints are referred to the President of the AHRC,[99] who may inquire into the complaint, terminate it or attempt to conciliate it,[100] including by holding a conference that the parties may be invited or required to attend.[101] The President must terminate a complaint if satisfied that there is no reasonable prospect of the matter being settled by conciliation.[102] If a complaint is terminated, the person affected may apply to the Federal Court or Federal Circuit Court for such orders as the court thinks fit.[103]

Age discrimination complaints may, therefore, be received by federal, state and territory equality commissions, as well as the FWC. The number of complaints received in 2015-16 by jurisdiction is depicted in Table 2. The FWC does not provide statistics broken down by ground in its annual report.

**Table 2: Age discrimination complaints in Australia, 2015–16, by jurisdiction (Source: Annual reports of equality bodies) (* = not reported)**

| | AHRC | Vic | NSW | SA | Qld | NT | WA | Tas | ACT | Total |
|---|---|---|---|---|---|---|---|---|---|---|
| 2015–16 | 161 | 123 | 77 | * | 24 | 45 | 26 | 23 | 2 | **481** |

## III. Recent Case Law Developments

Given mediation and alternative dispute resolution redirect most matters away from the courts in both jurisdictions, it is unsurprising that few age discrimination cases are heard and determined in any given year. Thus, doctrinal analysis of age discrimination laws is fraught in both countries. However, a few trends can be seen in the case law that has emerged.

[86] Sections 370, 539.
[87] Section 545.
[88] Age Discrimination Act 2004 (Cth), s 18.
[89] Section 18.
[90] Section 21.
[91] Section 25.
[92] Section 33.
[93] Section 34.
[94] Section 35.
[95] Section 37.
[96] Section 39.
[97] Section 41A. For further on exceptions, see Alysia Blackham "A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK" (2018) 41(3) Melbourne University Law Review 1085.
[98] Australian Human Rights Commission Act 1986 (Cth), s 46P.
[99] Section 46PD.
[100] Section 46PF.
[101] Section 46PJ.
[102] Section 46PH(1B)(b).
[103] Section 46PO.

In New Zealand, two cases were handed down in 2016 relating to age discrimination. The first, *New Zealand Basing Ltd v Brown (Brown)*[104] was a Court of Appeal decision relating to the compulsory retirement at age 55 of pilots working for Cathay Pacific. For the Court of Appeal, *Brown* was, at its core, about choice of jurisdiction to resolve a contractual issue: Mr Brown's employment contract specified that the law of Hong Kong should apply; Hong Kong law contains no prohibition of age discrimination. As the ERA was not seen as an 'overriding' statute, the question for the Court of Appeal, then, was whether it would be contrary to public policy to allow that choice of jurisdiction,[105] and whether Hong Kong law (in omitting any prohibition on age discrimination) would be unjust or unconscionable to apply. Thus, the issue was whether recognition of Hong Kong law by the New Zealand courts would "shock the conscience of a reasonable New Zealander".[106]

The Court of Appeal ultimately held that it would not be contrary to public policy to recognise Hong Kong law. The Court held that the right to be free from age discrimination in New Zealand was not "absolute",[107] particularly given the "flexibility of New Zealand's statutory recognition of the right to freedom from age discrimination."[108] Unlike other grounds of discrimination, age is not protected under international human rights law, which "is largely silent on age discrimination."[109] Thus, protection against forced retirement did not "reflect an absolute value that must trump transnational contracting."[110] Instead, "the treatment of ageing persons is linked to and reflects a range of fiscal, social and cultural factors,"[111] implying that protection from age discrimination is not an absolute or key value that must be upheld. In summary, then:[112]

> The right to be free from age discrimination is not an absolute value, as is confirmed by New Zealand's statutory framework, but is a flexible concept linked to and reflecting a range of fiscal, social and cultural factors. And the absence of a protection under Hong Kong law against enforcement of a contractual obligation to retire at 55 years of age would not shock the conscience of a reasonable New Zealander or violate an essential principle of our justice or moral interests.

Thus, the Court of Appeal's decision was grounded in an assumption that protection from age discrimination is of lesser importance than protection from other types of discrimination. Prohibiting age discrimination is not an "absolute value",[113] but just a cultural decision. This stands in marked contrast to the decision of Corkill J in the Employment Court, who saw human rights law generally as "a fundamental law",[114] and the prohibition of age discrimination as reflecting "deeply held values that bear on the very essence of human identity."[115]

The Court of Appeal decision in *Brown* was appealed to the New Zealand Supreme Court.[116] Overruling the Court of Appeal, the Supreme Court held that the ERA applies to employees who work

[104] *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93.
[105] At [64].
[106] At [67].
[107] At [71].
[108] At [73].
[109] At [74].
[110] At [74].
[111] At [74].
[112] At [83].
[113] At [83].
[114] *Brown v New Zealand Basing Ltd* [2014] NZEmpC 229, (2014) 10 NZELC 79-047 at [109].
[115] At [111].
[116] *Brown v New Zealand Basing Ltd* [2017] NZSC 12.

within the territorial limits of New Zealand, regardless of the choice of law in their employment contract.[117] This was based on a purposive interpretation of the ERA.[118] Unlike the Court of Appeal, the Supreme Court did not see rights to protection from discrimination under the ERA as being contractual in nature:[119] for William Young and Glazebrook JJ, the employment contract provided the context in which legislatively proscribed conduct occurred; however, it was not the origin of the rights themselves,[120] which are "free-standing".[121] Employment is about relationships and status, and not just contract.[122] There was, therefore, no reason to confine the ERA to employment relationships governed by the law of New Zealand.[123] Further, William Young and Glazebrook JJ explicitly refused to distinguish age discrimination from other forms of discrimination.[124] Similarly, Elias CJ, O'Regan and Ellen France JJ held that the employment relationship was not just a matter of contract,[125] and that it would be "very odd" to construe the ERA in a way that allowed parties to discriminate via a choice of law.[126] The Supreme Court decision in *Brown* places discrimination rights on a more secure footing than the Court of Appeal decision, and implies that protection from age discrimination cannot be seen as inferior to other discrimination rights.

The second New Zealand case, *Wang v New World Market Ltd (Auckland)*,[127] was an Authority decision relating to the dismissal of a warehouse worker. The claimant proceeded on the basis of age and disability discrimination (having Asperger Syndrome) and unfair dismissal under the ERA. While Mr Wang was successful in his claim, this was likely due to the blatant evidence of the employer's preferences for employees of particular ages. When Mr Wang's job was advertised, the employer specifically sought a warehouse worker '50 years or below'.[128] As the Authority recognised, "This clearly indicates a discriminatory preference for recruitment based on an applicant's age which is a prohibited ground of discrimination".[129] Mr Wang gave evidence that, at a later meeting, he was told that the employer "wanted to employ a person in their 40s".[130] This evidence was found to be credible, including on the basis that "the advertisement placed in December 2014 indicated an ignorance of age as a prohibited ground of discrimination."[131] Thus, age discrimination was found to be a factor in the decision to dismiss Mr Wang.[132] Mr Wang was awarded lost wages and NZ$5000 compensation for hurt and humiliation.

While it may seem unusual to have only two cases on age discrimination handed down in 2016 in New Zealand, this actually *exceeds* the number of substantive decisions in Australia in 2016. A survey of 2016 case law across all Australian jurisdictions indicates that the vast majority of decisions relating

[117] *Brown v New Zealand Basing Ltd* [2017] NZSC 139 at [8] per William Young and Glazebrook JJ.
[118] At [8] per William Young and Glazebrook JJ.
[119] At [68] per William Young and Glazebrook JJ.
[120] At [68], [69] per William Young and Glazebrook JJ.
[121] At [69] per William Young and Glazebrook JJ.
[122] At [56] per William Young and Glazebrook JJ.
[123] At [68] per William Young and Glazebrook JJ.
[124] At [69] per William Young and Glazebrook JJ.
[125] At [77] per Elias CJ, O'Regan and Ellen France JJ.
[126] At [91] per Elias CJ, O'Regan and Ellen France JJ.
[127] *Wang v New World Market Ltd (Auckland)* [2016] NZERA Auckland 124.
[128] At [92].
[129] At [93].
[130] At [94].
[131] At [95].
[132] At [96].

to age discrimination concerned procedural matters,[133] interlocutory applications to strike out claims and/or for summary dismissal,[134] and applications to bring matters out of time.[135]

The only substantive decision on age discrimination delivered in 2016 in Australia was in Victoria, in *Udugampala v Essential Services Commission*.[136] In that case, a job applicant argued that the requirement to respond to key selection criteria in writing when applying for a job was unfairly onerous for someone with bipolar disorder. The Victorian Civil and Administrative Tribunal held that no evidence had been provided of this.[137] The applicant also argued that he had been discriminated against on the basis of age, as the employer: [138]

> …considered his age as a negative factor when assessing his application; that as a 48 year old man he was at a disadvantage as the [selection] panel would be drawn to applicants of lesser years; that the application process was not open and transparent; and that there may have been applicants earmarked for the positions.

Again, evidence was not produced to support any of these claims,[139] and the claim failed. The applicant was unrepresented in this matter, perhaps explaining why so little relevant evidence was produced.[140]

Beyond this one substantive decision, a number of the procedural cases involved an assessment of the merits of the claim; however, it was rare for the claims to be found to have sufficient substance to proceed further.[141] In *Sun v EP2 Management Pty Ltd*, the Federal Circuit Court doubted the merits of using summary dismissal applications in this way to effectively determine the rights of the parties and the merits of the claim: [142]

> The respondent argued that the purpose of the powers of summary dismissal is to reduce costs and delay. That much may be accepted; however, it is often the case … that an application for summary dismissal achieves precisely the opposite: increased costs and further delay. In this matter, for example, the matter could readily have been finally

[133] Under the ADA: *Cavar v Green Gate Pty Ltd* [2016] FCA 82. In NSW, *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117; *Coady v Sutherland Shire Council* [2016] NSWCATAD 95; *Hayne v YMCA NSW* [2016] NSWCATAD 14.

[134] Under the ADA: *Cavar v Greengate Management Services Pty Ltd (No.2)* [2016] FCCA 3358; *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905. In Victoria, *Shore v Max Employment Solutions* [2016] VCAT 2200. Under the FWA, *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381.
In 2017, see also *Winters v Fogarty* [2017] FCA 51.

[135] *Sternberg v Gables Reception Pty Ltd* [2016] FWC 7892; *Robb v Bond University Ltd* [2016] FWC 1552; *Armstrong v Police Citizens Youth Clubs* [2016] FWC 766.

[136] *Udugampala v Essential Services Commission* [2016] VCAT 2130.

[137] At [107].

[138] At [108].

[139] At [108].

[140] Had this claim been brought under NSW law, it is unlikely that leave to be heard before the Tribunal would have been granted: see *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117; *Coady v Sutherland Shire Council* [2016] NSWCATAD 95; *Hayne v YMCA NSW* [2016] NSWCATAD 14, which all related to applications for leave to proceed. Victoria is the only state in which claims can proceed directly to the Tribunal: Equal Opportunity Act 2010 (Vic), s 122.

[141] See *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117; *Coady v Sutherland Shire Council* [2016] NSWCATAD 95; *Hayne v YMCA NSW* [2016] NSWCATAD 14; *Cavar v Greengate Management Services Pty Ltd (No. 2)* [2016] FCCA 3358; *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905; *Shore v Max Employment Solutions* [2016] VCAT 2200; *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381; *Robb v Bond University Limited* [2016] FWC 1552; *Armstrong v Police Citizens Youth Clubs* [2016] FWC 766.

[142] *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381 at [10].

> determined in the same amount of time and with the same amount of effort as this application. That said, the application has been made and must be determined.

Only one decision on an application for summary dismissal provided a detailed examination of the case in question as it related to age discrimination. In *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW),*[143] Ms Travers argued that she was discriminated against on the basis of age when working as a casual exam supervisor. Ms Travers alleged that she was told she was "too old to work", "forgetful", and told to "f*** off and don't come back".[144] In an application for summary dismissal, the Federal Circuit Court was asked to consider whether Ms Travers had a reasonable prospect of success under the ADA.

Drawing on the decision of the High Court of Australia in *Purvis v State of New South Wales (Department of Education & Training),*[145] the Court held that the relevant comparator in this case[146] would likely be a general exam supervisor who did not have Ms Travers's disabilities or was a different age.[147] With that comparator, Ms Travers had "no reasonable prospects of establishing that, in circumstances not materially different … [the comparator] would have been treated more favourably".[148] The "only reasonable construction"[149] for the Board's decision not to re-engage Ms Travers, and for the "sharp rebuke"[150] regarding her age, was because the Board considered that Ms Travers had "failed in her task of properly supervising the examinations."[151] 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.[152] A comparator in similar circumstances would not have been treated any better.

Two additional trends can be identified in the Australian case law. First, most cases have been brought by those who claimed (or could have claimed) multiple grounds of discrimination; most commonly, sex, age, disability and/or ethnicity. This is depicted in Table 3. This flags the importance of recognising intersectionality in equality law – that is, where discrimination is experienced on the basis of more than one protected characteristic, but is so interwoven that it cannot be broken down into its constituent parts:[153] a new form of discrimination occurs at the intersection of two or more protected characteristics.[154] As Chen notes, in cases of intersectionality a claimant's experiences "will be misrepresented by discrimination conceived along a single axis line", such as gender or age.[155]

Second, the vast majority of claimants were unrepresented at hearing (again, depicted in Table 3). In one case, the court's decision noted that the claimant had tried (but failed) to obtain pro bono legal

[143] *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905.
[144] At [16].
[145] *Purvis v State of New South Wales (Department of Education & Training)* [2003] HCA 62, (2003) 217 CLR 92.
[146] The need for a comparator is imported by s 14 of the ADA, which defines direct discrimination as treating or proposing to treat someone 'less favourably than, *in circumstances that are the same or are not materially different*, the discriminator treats or would treat a person of a different age' (emphasis added) and doing so because of age.
[147] *Travers v New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905 at [47].
[148] At [49].
[149] At [49].
[150] At [49].
[151] At [49].
[152] At [51].
[153] Mai Chen "Multiple ground discrimination" (2016) 902 LawTalk.
[154] Beth Goldblatt, "Intersectionality in International Anti-Discrimination Law: Addressing Poverty in its Complexity" (2015) 21(1) Australian Journal of Human Rights 47.
[155] Mai Chen "Multiple ground discrimination" (2016) 902 LawTalk.

assistance.[156] It appears that a more sophisticated drafting of the claim, or assistance with identifying relevant information, might have led to a different outcome in some cases.[157] Thus, a lack of representation may have significant consequences for the outcome of claims in practice: indeed, in *Sun v EP2 Management Pty Ltd*, the Court noted that "The applicant is unrepresented in the proceedings and has not expressed his claims with the greatest clarity."[158]

**Table 3: Australian age discrimination case law by grounds and representation, 2016**

| Case | Age | Sex | Ethnicity | Disability | Represented? |
|---|---|---|---|---|---|
| *Cavar v Greengate Management Services Pty Ltd (No. 2)*[159] | X | | X (nationality) | | No |
| *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)*[160] | X | | | X (diabetic) | No |
| *Udugampala v Essential Services Commission*[161] | X (48) | | X | X (bipolar disorder) | No |
| *Shore v Max Employment Solutions*[162] | X (42) | | | | No |
| *Vye v Secretary, Department of Finance, Services and Innovation*[163] | X (60) | | | | Yes |
| *Coady v Sutherland Shire Council*[164] | X (over 50) | X (male) | | X (lower back problem) | No |
| *Hayne v YMCA NSW*[165] | X (mid-50s) | X (male) | | | No |
| *Sun v EP2 Management Pty Ltd*[166] | X (nearly 60) | | X (Chinese ethnicity) | X (high blood pressure) | No |
| *Sternberg v Gables Reception Pty Ltd*[167] | X | | | | No |
| *Robb v Bond University Ltd*[168] | X | | | | No |
| *Armstrong v Police Citizens Youth Clubs*[169] | X | | | | No |

## IV. Discussion

Recent developments in age discrimination law in Australia and New Zealand reveal problematic tensions in the prohibition of age discrimination that are likely to recur in years to come. First, the Court of Appeal decision in *Brown* offers a telling case study of how one New Zealand court regards

[156] *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905 at [23].
[157] See, for example, *Cavar v Greengate Management Services Pty Ltd (No. 2)* [2016] FCCA 3358. In 2017, see also *Winters v Fogarty* [2017] FCA 51.
[158] *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381 at [11].
[159] *Cavar v Greengate Management Services Pty Ltd (No. 2)* [2016] FCCA 3358.
[160] *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905.
[161] *Udugampala v Essential Services Commission* [2016] VCAT 2130.
[162] *Shore v Max Employment Solutions* [2016] VCAT 2200.
[163] *Vye v Secretary, Department of Finance, Services and Innovation* [2016] NSWCATAD 117.
[164] *Coady v Sutherland Shire Council* [2016] NSWCATAD 95.
[165] *Hayne v YMCA NSW* [2016] NSWCATAD 14.
[166] *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381.
[167] *Sternberg v Gables Reception Pty Ltd* [2016] FWC 7892.
[168] *Robb v Bond University Ltd* [2016] FWC 1552.
[169] *Armstrong v Police Citizens Youth Clubs* [2016] FWC 766.

age discrimination: age discrimination was seen as a less serious form of discrimination, which was less morally repugnant than discrimination on other grounds. While the Supreme Court rejected this approach, the decision reveals problematic attitudes towards age discrimination held by some members of the judiciary. This is similarly seen in the Australian case of *Travers*, where Ms Travers allegedly being told she was "too old to work", "forgetful", and to "f*** off and [not] come back"[170] was not even contemplated as a potential form of age-based harassment.[171] Categorising these comments as a "sharp rebuke",[172] which was impliedly justified due to Ms Travers's failure to supervise an exam, does not appear to place a particularly high priority on protecting older workers from age-based harassment or age discrimination. This, then, appears to place a similar (limited) value on age equality to that in the Court of Appeal decision in *Brown*.

The limited value placed on age equality by some judges and courts may reflect the economic rationale that underlies the prohibition of age discrimination in many jurisdictions: if age discrimination is prohibited largely in order to promote the workforce participation of older workers, then it is less problematic to undermine age equality than if the prohibition is based primarily on recognising the inherent dignity and worth of workers of all ages. As argued elsewhere,[173] the enduring ambivalence towards age and ageing evident in most age discrimination law reflects a different social value placed on age equality: age equality is arguably less socially valuable than other types of equality. The limited valuing of age equality by legislatures and courts may perpetuate and reinforce negative social norms towards ageing, undermining both the instrumental and intrinsic aims of age discrimination law.

Second, the general absence of case law in both jurisdictions reinforces the success of alternative dispute resolution as a means of redirecting claims away from the court system. Alternative dispute resolution offers the possibility of a more efficient, less costly and less adversarial system for resolving complaints of discrimination. However, it also risks undermining legal development, as few cases proceed beyond conciliation and mediation. Indeed, the cases emerging in Australia appear to suggest that strong discrimination claims are settled well before court proceedings are commenced, meaning weaker claims are more likely to be the basis for the development of legal jurisprudence. This may not offer the best opportunity for courts to develop the statutory framework through legal interpretation.

Third, the Australian cases in particular demonstrate the legal and procedural hurdles in place for discrimination claimants. Procedural rules in Australia appear to be manifesting in multiple hearings on procedural issues in some cases; in several instances, these procedural hearings effectively operated to resolve the substantive issues at hand. It is debatable whether this is an efficient approach to the resolution of disputes, particularly where the hearing of an application for summary dismissal is as involved as a full hearing of the matter.

Relatedly, the decision in *Travers* illustrates the legal complexity of the comparator requirement under the ADA – that is, that the treatment occurs "in circumstances that are the same or are not materially different"[174] – at least as it has been interpreted by the Australian High Court in *Purvis*.[175] In *Travers*,

[170] At [16].
[171] This is discussed further in Alysia Blackham "Defining 'Discrimination' in UK and Australian Age Discrimination Law" (2017) 43(3) Monash University Law Review 760.
[172] At [49].
[173] Alysia Blackham *Extending Working Life for Older Workers* (Hart Publishing, Oxford, 2016) at ch 9.
[174] Age Discrimination Act 2004 (Cth), s 14(a).
[175] *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62, (2003) 217 CLR 92. 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 FL Rev 111; Kate Rattigan "Purvis v New South Wales (Department of Education and Training): A case for amending the Disability Discrimination Act 1992 (Cth)" (2004) 28 MULR 532.

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."[176] This is an extraordinarily narrow interpretation of discrimination laws and the comparator requirement, which likely undermines their purposive intent.[177]

The decision in *Travers* (and, indeed, *Purvis*) can be compared with that in the New Zealand Supreme Court case of *McAlister v Air New Zealand Ltd*.[178] In that case, the airline demoted pilots after the age of 60, in keeping with age-based rules in place in some airspaces like the USA. The question for the Supreme Court was whether the comparator in this case should be a pilot under the age of 60; or a pilot under the age of 60 who was unable to fly to destinations like the USA (due to visa requirements or other conditions). The Court held that the latter comparator was "too much",[179] as it would mean that the occupational requirements exception in the ERA would have no work to do; for the joint judgment, adopting such a comparator would "appear to lead to an obvious result"[180] in this case (and, indeed, in most other discrimination cases), moving the balance of the inquiry too far away from a finding of discrimination.[181] Tipping J similarly held that a comparator requirement that artificially ruled out discrimination at an early stage of the inquiry would be inappropriate.[182] The latter comparator was artificial in this case, as it failed to reflect the policy of the statute, which was to take a purposive and non-technical approach to discrimination, then allow discrimination to be justified if an exception applied.[183] For Tipping J, the comparator was likely to be a person in exactly the same circumstances as the complainant, but without the feature that was the prohibited ground (here, age).[184] It would be contrary to the purposes of the statute to add additional restrictions to the comparator (i.e. the holding or not holding of a US visa).[185] Thus, New Zealand courts adopt a dramatically different approach to Australian courts in the selection of a comparator in age discrimination claims. This may mean that claims are more likely to succeed in New Zealand.

Fourth, the Australian cases in particular reinforce the importance of intersectionality in discrimination complaints, and the potential overlap between age, sex, disability and ethnicity discrimination. Neither the Australian nor New Zealand statutes explicitly provide for instances of intersectional or dual discrimination in their terms. It is debatable whether this would undermine discrimination complaints in practice[186] and intersectionality was not mentioned in any of the cases studied. However, this is an issue that is likely to recur in future proceedings.

Fifth, and finally, the cases flag the importance of pilots and airlines in the ongoing development of age discrimination law in both jurisdictions. Pilots have featured prominently in case law in New

[176] At [49].
[177] See further Belinda M Smith "From Wardley to Purvis — How Far has Australian Anti-Discrimination Law Come in 30 Years?" (2008) 21 AJLL 3.
[178] [2009] NZSC 78, [2010] 1 NZLR 153.
[179] At [37] per Elias CJ, Blanchard and Wilson JJ.
[180] At [37] per Elias CJ, Blanchard and Wilson JJ.
[181] At [37] per Elias CJ, Blanchard and Wilson JJ.
[182] At [51] per Tipping J.
[183] At [51] per Tipping J.
[184] At [52] per Tipping J.
[185] At [54] per Tipping J. Compare McGrath J in dissent, who held that while the comparator must exclude age, they must have any other features which are necessary to establish if an employer's actions are discriminatory on account of age or some other (justifiable) basis: at [133]. In this case, that included not meeting the requirements to fly into US airspace: at [135] per McGrath J.
[186] In New Zealand, see Mai Chen "Multiple ground discrimination" (2016) 902 LawTalk.

Zealand (despite or perhaps because of the fact that pilots were exempt from the HRA until 1999)[187] and Australia,[188] and even further afield, as in the EU.[189] This may reflect the strength of collective representation in the airline industry, with strong unions representing the interests of pilots and other aircrew, and the enduring presence of age-based criteria in international air standards.[190] Key Australian and EU cases relate to the interpretation of occupational or inherent requirements exceptions, as does the earlier New Zealand case of *McAlister*. Thus, *Brown* differs from the existing Australian case law in considering whether domestic discrimination law can be excluded entirely from the employment relationship via a choice of jurisdiction.[191] As many people are now employed in New Zealand on foreign terms and conditions,[192] this is likely to be an issue of practical importance, with significance for a growing proportion of the workforce and implications for the efficacy of discrimination law as a whole.

## V. Conclusion

Demographic ageing in Australia and New Zealand is going to require renewed attention to the efficacy of age discrimination law in facilitating older workers' participation in the labour market. Ageism remains a serious challenge facing older workers in both jurisdictions, and comparative legal analysis reveals problematic tensions in the prohibition of age discrimination in each country. These tensions are likely to recur in years to come; thus, courts and legislatures should be particularly attuned to any tendency to treat age equality as less important, and age discrimination as less serious, than other forms of discrimination; the risk that alternative dispute resolution may impair legal development of age discrimination law; the burden that legal procedural rules and the comparator requirement place on complainants; and the importance of intersectionality. Addressing these issues effectively is likely to require legislative reform: judicial interpretation alone cannot resolve these tensions. That said, the comparative analysis in this article demonstrates that courts could adopt a more sympathetic and less restrictive interpretation of existing laws, providing a potential path to improve the effectiveness of age discrimination law.

[187] *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153 at [20]–[21] per Elias CJ, Blanchard and Wilson JJ; *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93.
[188] *Qantas Airways Ltd v Christie* [1998] HCA 18, (1998) 193 CLR 280, which related to the "inherent requirements" exception.
[189] Case C-447/09 *Prigge v Deutsche Lufthansa AG* [2011] Eq LR 1175, which related to the 'genuine occupational requirement' exception.
[190] See, for example, International Civil Aviation Organization, *Safety — Frequently Asked Questions* <https://www.icao.int/safety/aviation-medicine/Pages/medFAQ_en.aspx#age>.
[191] In the UK, see similarly *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823 (referred to extensively in *Brown*); *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWHC 1953 (Admin), [2015] IRLR 827. In the EU, see similarly C-168/16 *Nogueira v Crewlink Ireland Ltd* [2017] WLR(D) 599.
[192] *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [69].