

Age Discrimination And Superannuation

Superannuation trust deeds may need to be reviewed following a change to anti-discrimination legislation in NSW.

New South Wales has recently amended its Anti-Discrimination Act 1977* to cover retirement age provisions. It is unlawful for a person to retire an employee, to require an employee to retire, to threaten an employee with retirement, or to engage in conduct with a view to causing a person to retire from employment, on the ground of the employee's age.

Part 4E of the Act currently applies, with some exceptions, to public sector employees. Employees with county councils and local councils will be covered by Part 4E from 1 January 1992 and all other employees in New South Wales will be covered from 1 January 1993.

One of the consequences of the new Part 4E is that employers are not in a position to be able to require employees to retire at a particular age. Nor are employers permitted to engage in conduct with a view to causing a person to retire from their employment at a particular age. Part 4E is not restricted in its application to an employer—a trustee of a superannuation fund who engages in proscribed conduct could also be in breach of the Act.

Most employer sponsored superannuation funds in Australia contemplate retirement at a predetermined age. In many cases, service after that age does not count for the formula benefit. Furthermore, the regulations prescribed under the federal Occupational Superannuation Standards Act 1987 (Standards Regulations) prohibit a superannuation fund from receiving contributions towards a superannuation pension or an eligible termination payment for a person who has attained age 65, unless: the rules of the fund require the person to retire within 12 months after the person turns 65 and the person has not reached the age at which he or she must retire; or the contribution has been made in accordance with a prescribed agreement or award.

Standards Regulations also prescribe that benefits are to commence to be paid at age 65 unless a person is in part-time or full-time employment. Benefits must commence to be paid to a member who is aged 70 unless he or she is in full time employment.

Penalties under the Act

The Equal Opportunity Tribunal may order offenders under the NSW Act to pay damages not exceeding \$40,000 for each complaint.

Trust deeds should be reviewed

It seems that there is a conflict between the policy embraced in the NSW Act and the federal Standards Regulations. On the one hand the NSW legislation makes it unlawful for persons to be retired at a particular age, whilst the Standards Regulations limit benefit accruals for persons who have attained a particular age.

Superannuation fund trust deeds should be reviewed to

ensure that they do not contain provisions which could be said to prejudice the position of a person who continues in employment after any particular age. Such provisions could be seen as part of conduct which would "cause a person to retire" from employment.

*Section 49ZV of Part 4E of the Act.

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