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Superannuation for People Primarily Over 65 Years of Age

Introduction

This Research Note summarises when a superannuation fund may accept contributions for persons aged over 65 years under the *Superannuation Industry (Supervision) Act 1993* (SIS) and the SIS Regulations.

The number of people affected by these rules is summarised in the following table.[1]

Segment of population	Number
People over 65 years	2 359 013
Proportion of population over 65 years	12.3%
Proportion of workers who receive superannuation	88.7%

Preservation rules were intended to ensure that superannuation is used for retirement purposes only. Accordingly, there is an age limit (70 years) on or after which contributions generally cannot be accepted.

The rules on acceptance of contributions depend on whether or not contributions are 'mandated employer contributions.'

Mandated Employer Contributions

Generally, mandated employer contributions are:

- Superannuation Guarantee (SG) contributions and
- Contributions made under an award made, or agreement certified, by an industrial authority.

Persons over the age of 70 are not eligible for SG contributions.[2] Industrial awards may contain age limits on superannuation contributions. Apart from these limits, superannuation funds may accept mandated employer contributions for a person *regardless of the age* of the person or the number of hours (if any) they are working.

Non–mandated Employer Contributions

The rules on acceptance of non–mandated employer contributions (ie all contributions other than mandated employer contributions) vary according to the person's employment status, age, health, and whether the contributions are eligible spouse contributions.

Gainful Employment

As the ability to contribute to superannuation is affected by a person's work status, employment tests must be met for non–mandated employer contributions. These tests are based on the number of hours that a person is gainfully employed in each week. 'Gainfully employed' means employed or self–employed for gain or reward.[3]

Part-time employment is gainful employment for at least 10 hours and less than 30 hours each week. A person is in full-time gainful employment where they are employed for 30 or more hours each week. There is no scope to average the hours worked over a period of time. Bona fide sick, recreation or other leave (but not long-term parental leave) constitutes hours in employment for the purposes of these tests.

Age Limits

Subject to age limits,[4] a trustee of a superannuation fund may accept non–mandated employer contributions in respect of a person who is gainfully employed on at least a part–time basis.

Where a member is aged 65 but less than 70, the fund must be satisfied that the member is gainfully employed for a minimum of 10 hours each week in respect of which they accept non–mandated employer contributions. The fund must have arrangements in place to determine whether the gainful employment test in met each week.

Non–mandated employer contributions cannot be accepted for members aged 70 or over in any circumstances.

Members aged less than 65 may contribute if they have been gainfully employed on at least a part time basis within the previous two years. Once such a member has worked in *bona fide* gainful employment for at least 10 hours in a particular week, they may contribute to a superannuation fund at any time during the next 2 years, under the '2 year rule.' The '2 year rule' allows trustees to accept non–mandated employer contributions in respect of a new or existing member who is not yet 65.[5] This is provided the member has at any time in the previous two years been gainfully employed for at least 10 hours each week.

In accepting contributions under the '2 year rule,' it does not matter if the member has already received a benefit from a fund, e.g. a benefit on retirement at age 55.

Gainful Employment Tests Not Met

There are circumstances where a trustee may accept non–mandated employer contributions for a person who is not yet 65 and who is either unemployed, retired or working less than 10 hours each week.

One such circumstance is the payment of non–mandated employer contributions for a parent if the parent is on 'parental leave,' defined as leave to look after his or her children.[6] This is circumstance does not apply to people over the age of 65 years.

The circumstance most likely to apply to people over the age of 65 years involves the payment of 'eligible spouse contributions.'

From October 1997, to allow and encourage a greater level of superannuation contributions, a superannuation fund may accept "eligible spouse contributions," as defined in section 159TC of the *Income Tax Assessment Act 1936*.[7]

Eligible spouse contributions are made by a person (a contributing taxpayer) on behalf of his or her spouse. 'Spouse' is defined to include a person who, although not legally married to the taxpayer, lives with the taxpayer on a *bona fide* domestic basis as the husband or wife of the taxpayer. The definition does not include a person who lives separately and apart from the taxpayer on a permanent basis.

Eligible spouse contributions may be accepted regardless of whether the spouse meets the gainful employment test, until the spouse is 65 years of age. However, eligible spouse contributions may only be made on behalf of a spouse who is aged 65 but less than 70 provided the spouse is also gainfully employed on at least a part-time basis. Eligible spouse contributions cannot be accepted in any circumstances after the spouse has attained 70 years of age.

There are no age limits or employment tests applicable in respect of the contributing taxpayer in relation to eligible spouse contributions.

Proposed Changes

A Senate Committee[8] examined the enforcement of the Superannuation Guarantee Charge and recommended that the current age limits and work tests that apply to SG contributions for individuals over 70 years be repealed.

During the 2001 election campaign, the Government released a number of proposed reforms to superannuation.[9]

The majority of these proposals are to change the tax treatment of superannuation through changes to rebates and tax deductibility, which are generally applicable to all individual taxpayers irrespective of age.

The Government made a specific promise targeted to people over the age of 65. In recognition of the fact that some people choose to work past the age of 70, the Government promised that, if re–elected, it would increase from 70 to 75 the age up to which working members of superannuation funds can make personal superannuation contributions. It is proposed that this will take effect from 1 July 2002.[10]

David Kehl
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1. Australian Bureau of Statistics Cat. No. 3201.0 and *Year Book Australia 2001*, p. 239.
2. *Superannuation Guarantee Administration Act 1992* sec 27(1)(a).
3. SIS Regulation 1.03, 7.04.
4. SIS Regulation 7.04.
5. SIS Regulation 7.04(1)(b)(i).
6. SIS Regulation 7.04(1)(b)(iii) and 7.04(1A). Conditions include parental leave must have been for less than seven years; person must have been a member of the fund prior to the start of the leave or the employer must be a standard employer-sponsor of the fund; the leave must be approved by the employer, authorised law, or authorised by an award/ agreement certified, by an industrial authority; and the person must have a statutory or contractual right to return to employment at the end of the leave.
7. SIS Regulations 7.04(1)(c), 7.04(1B).
8. Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, 27 April 2001.
9. Liberal Party of Australia, *A Better Superannuation System*, November 2001.
10. ibid., p. 7.