
Chapter Three

Employer Attitudes Towards Mature Age Workers

Introduction

3.1 This chapter examines age retirement legislation in Australia. Only in Tasmania and the Northern Territory does legislation allow discrimination on the grounds of age. The chapter also examines evidence that despite legislation largely prohibiting compulsory retirement of mature age employees, some employers nevertheless discriminate against mature age employees.

Age retirement legislation in Australia

3.2 Only a selected group of employees can be compulsorily retired in Australia. Tasmania and the Northern Territory are the only states or territories that allow discrimination on the grounds of age. In addition, there are some professions where the public seems to demand compulsory retirement for reasons of safety such as airline pilots.

3.3 However, in its written submission, the WA Department of Community Development noted legislation at the state level which enforce a notion of fixed retirement, although this is contrary to a labour system based on ability and merit and not age. The Department highlighted:

- a) The *WA Workers Compensation and Rehabilitation Act 1981*, which treats workers under the age of 65 more favourably than those aged 65 or over.
- b) The *WA Judges Retirement Act 1937*, the *District Court of Western Australia Act 1967* and other acts that require the judiciary to retire at age 65.¹

3.4 In its written submission, DEWR provided a summary of federal and state legislation on compulsory age retirement. This is repeated below.

Federal

3.5 Mandatory retirement has been abolished by legislation. The *Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001* contains a schedule with a listing of a number of amendments to Commonwealth acts which contained

1 *Submission 22*, WA Department of Community Development, pp. 1,3. See also *Submission 45*, ACCI, p. 5.

provisions prescribing a compulsory retirement age (usually 65). The Act came into effect on 29 October 2001.

3.6 The government removed the compulsory retirement age for the Australian Public Service (APS) when it enacted the *Public Service Act 1999*. This Act does not provide for a maximum retirement age for APS employees. The Act replaced the *Public Service Act 1922*, which provided maximum retirement ages – usually age 65 – for various classes of APS employees. The *Public Service Act 1999* presently provides for a minimum retirement age of 55 which may be varied by regulation.

New South Wales

3.7 Under section 49ZE of the *Anti-Discrimination Act 1977*, it is against the law to compulsorily retire an employee on the ground of the employee's age. It applies to all employees in New South Wales whether or not employed under an award or agreement. An employee can still choose to stop working at any age, but in general, it must be their choice not their employer's choice when they retire.

3.8 The only people employed in NSW that can be compulsorily retired are:

- people employed under a federal award that specifically provides for a compulsory retirement age;
- judges and magistrates;
- state police officers; and
- an officer, not appointed for a fixed term, who can only be removed from office by either or both Houses of Parliament.

Victoria

3.9 The *Equal Opportunity Act 1995* prohibits compulsory retirement, with the exception of people working as judicial officers and public sector workers (those covered by the *Police Regulation Act 1958*, *Teaching Service Act 1981*, *Public Sector Management Act 1982* and *Health Services Act 1988*).

Queensland

3.10 Queensland's *Anti-Discrimination Act 1991*, s.15, prescribes that a person must not discriminate in dismissing a worker (dismissing explicitly includes forced retirement). In s.106A it states that:

- (1) This Act has no effect on the imposition of a compulsory retirement age on:
 - a) a Supreme Court judge; or
 - b) a District Court judge; or
 - c) a magistrate; or
 - d) a member of the Land Court; or

- e) the President of the Industrial Court; or
- f) an industrial commissioner; or
- g) a fire officer within the meaning of the *Fire and Rescue Service Act 1990*; or
- h) the chief executive of Queensland Railways; or
- i) an employee of Queensland Railways; or
- j) a police officer; or
- k) a staff member within the meaning of Statute No. 14 (staff tenure) made under the *University of Queensland Act 1965* while provisions under the Statute about compulsory retirement age are in force; or
- l) a director of a public company or subsidiary of a public company; or
- m) another person prescribed by regulation.

South Australia

3.11 Under the *Equal Opportunity Act 1994*, s.85B, it is unlawful to discriminate against an employee on the ground of age by dismissing an employee unless there is a genuine occupational requirement that a person be a certain age.

Western Australia

3.12 The *Equal Opportunity Act 1984* prohibits compulsory retirement. It states that it is unlawful for a person to discriminate on the grounds of age by dismissing an employee. There are exceptions to this provision, namely that the person can be offered participation in a voluntary phased-in retirement scheme, voluntary retirement scheme, retirement incentives scheme, severance scheme or other like scheme. Exceptions to this provision are:

- a) Judges within the meaning of the *Judges' Retirement Act 1937*;
- b) Masters within the meaning of the *Supreme Court Act 1935*;
- c) District Court Judges within the meaning of the *District Court of Western Australia Act 1969*;
- d) Family Court Judges or acting Family Court Judges within the meaning of the *Family Court Act 1997*;
- e) Judges or magistrates within the meaning of the *Children's Court of Western Australia Act 1988*;
- f) Stipendiary magistrates within the meaning of the *Stipendiary Magistrates Act 1957*;

- g) Presidents or Commissioners within the meaning of the *Industrial Relations Act 1979*;
- h) Judges within the meaning of the *Liquor Licensing Act 1988*; and
- i) Solicitor-Generals or acting Solicitor-Generals within the meaning of the *Solicitor-General Act 1969*.

Tasmania

3.13 Tasmania's *Anti-Discrimination Act 1991* says that a person must not discriminate on the grounds of age, although s.35 states that a person may discriminate against another person on the grounds of age in relation to voluntary or compulsory retirement.

Australian Capital Territory

3.14 Section 10 of the ACT *Discrimination Act 1991* states that it is unlawful for an employer to discriminate against an employee on the grounds of age by dismissing the employee. Exceptions include people employed for the purpose of theatre, photography, art and other similar occupations where a person of a certain age is required for reasons of authenticity. Additionally, it is lawful to discriminate on the grounds of age when an employee is providing a welfare service which can be more effectively provided by someone of a certain age.

Northern Territory

3.15 Section 36 of the *Anti-Discrimination Act 1992* states that a person may discriminate on the grounds of age by imposing a standard age for commencement of work or a standard retirement age.

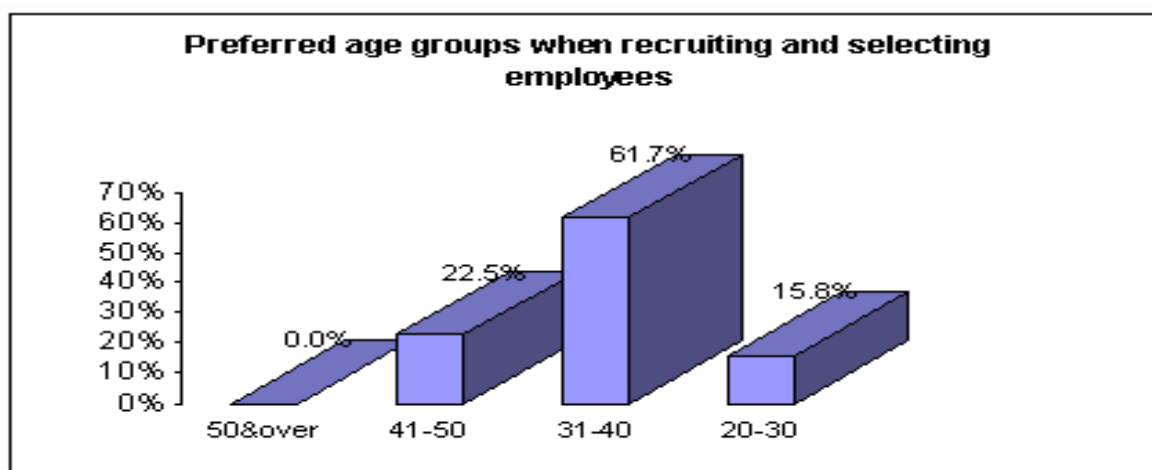
Employer discrimination against mature age employees

3.16 Despite the evidence noted above that only a selected group of employees can be compulsorily retired in Australia, the Committee was nevertheless presented with evidence during the inquiry that employers prefer employing younger workers over mature age workers.

3.17 In its written submission to the inquiry, ASFA cited research conducted by Drake International in 1999 of 500 executives and human resource managers which showed that mature age workers were least preferred for recruitment and most preferred for retrenchment. Drake found that the preferred age group when recruiting employees is 31-40, while the preferred age group when retrenching employees is 50 and over.² This is shown in Charts 3.1 and 3.2 below.

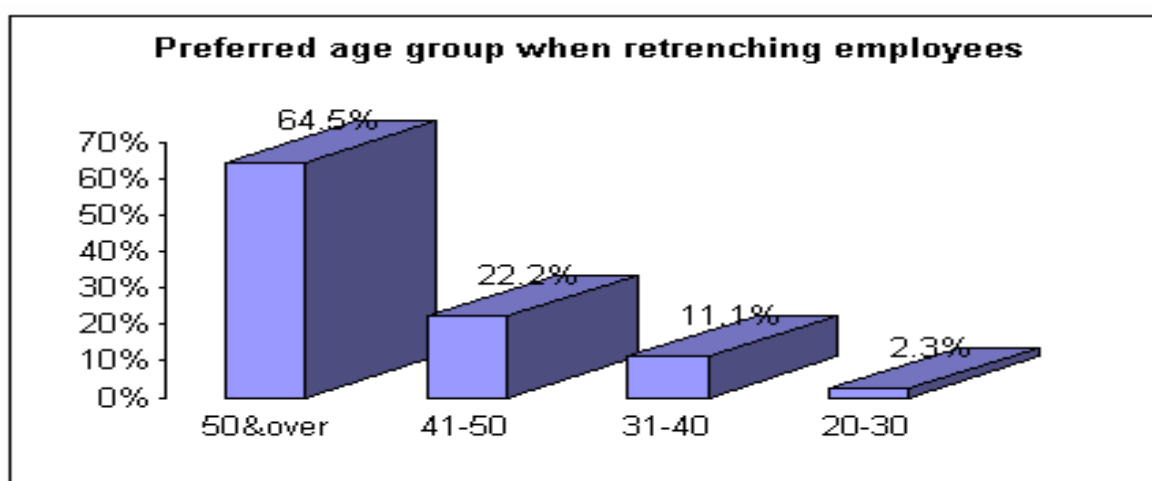
2 *Submission 33, ASFA, pp. 8-9.*

Chart 3.1: Preferred age groups when recruiting and selecting employees



Source: Drake Personnel Limited, 1999.

Chart 3.2: Preferred age groups when retrenching employees



Source: Drake Personnel Limited, 1999.

3.18 This evidence was reiterated by Dr Linklater from the NSW Committee on Ageing in the Committee's public hearing on 5 May 2003:

I guess the flip side of this that we found is that, when a company wishes to downsize or cut its staff, the attitudinal thing comes out in that they feel it is more acceptable, culturally and socially, to keep the younger people on; they have got growing families. They feel that the older people have greater access to savings and superannuation and are going to retire soon anyway. So you have that attitudinal, cultural thing appearing there as well.³

3.19 The Australian Council of Trade Unions (ACTU) and Professor Lowther also noted a study by the Australian Centre for Industrial Relations Research and Training

3 *Committee Hansard*, 5 May 2003, p. 84.

(ACCIRT), which found that mature age workers are perceived by employers on two levels:

- On one level they are perceived as being more experienced and mature, having a better work ethic, being more committed to their jobs, and being more reliable and loyal (evidenced by their lower rates of absenteeism and turnover).
- However, they can also be perceived as inflexible and rigid, with fewer abilities (physical and psychological), unreceptive to new technology, more resistant to organisational change, lacking appropriate skills, difficult to retrain, and lacking energy and enthusiasm.⁴

3.20 The ACTU also noted a report published by the Consultative Committee on Ageing which found that it was “fairly clear” that employers used downsizing as a way of eliminating mature age workers. ACCIRT agreed, stating that industry restructuring has been seen as a way of ridding the workforce of mature age workers by targeting them for redundancy.⁵

3.21 The Committee also notes the research of Professor Peetz, who cited considerable evidence that older people face disadvantage in the labour market. Professor Peetz cited a Morgan and Banks survey from December 1997 which indicated that Australian companies regarded the ideal age for employees as between 25 and 35, and that almost a third of bosses believed the workers over 40 to be less flexible in their work practices.⁶ In addition, Professor Peetz cited a range of studies showing that despite the existence of laws prohibiting discrimination on the basis of age, employers are reluctant to take on older employees.⁷

3.22 These concerns were also reiterated by Ms Fogg from the NSW Committee on Ageing in relation to recruitment agencies during the hearing on 5 May 2003. She observed:

There is certainly anecdotal evidence that recruitment agencies are some of the worst offenders of disguised age discrimination against mature workers. What is required is a change in attitudes about the performance and potential of mature age workers, their ability to retrain and the value of their existing skills.⁸

3.23 However, on a more positive note, the Committee notes the evidence of Mr Free from the NSW Committee on Ageing that Westpac recently sought to recruit

4 ACCIRT, *Productivity of Mature and Mature age workers: Employers' Attitudes and Experiences*, University of Sydney, 1996.

5 S.Encel & H.Studencki, *Job Search Experience of Mature age workers* Consultative Committee on Ageing, Sydney, 1995

6 D.Peetz, 'Retrenchment and Labour Market Disadvantage: The Role of Age, Job Tenure and Casual Employment', p. 1.

7 See VandenHeuvel, 1999; O'Brien, 2000; Athanasou, Pithers & Petoumenos, 1995.

8 *Committee Hansard*, 5 May 2003, p. 80.

people in the 55-plus age bracket specifically to deal with people of that age group who were looking at safe ways to invest lump sums and other funds for retirement.⁹

Federal age discrimination legislation

3.24 During the federal election in 2002, the Government made a commitment to introduce federal legislation to prohibit age discrimination. In December 2002, the Attorney-General's Department released an information paper on the proposals for Commonwealth age discrimination reform. The paper invited comments by 12 February 2003.

3.25 In the executive summary to the paper, the Government indicated that its proposed age discrimination legislation would prohibit discrimination based on age in a range of areas of public life:

- in employment;
- in the provision of goods, services or facilities;
- in access to premises, places or transport;
- in the administration of Commonwealth laws and programs;
- in education;
- in the provision of accommodation;
- in dealings with land; and
- in requests for information on which age discrimination might be based.

3.26 However, the Government also indicated that there would be some exemptions from the prohibition on age discrimination, which would be specified in the legislation, including:

- a) Positive discrimination: This would allow favourable treatment for people of a particular age group.
- b) Exemptions to comply with other laws: It was proposed that compliance with state and territory laws would over-ride the Commonwealth prohibition on age discrimination, subject to a power to prescribe exceptions to that exemption in particular cases. For example, this would mean that state laws about the minimum age for driving would not be affected by the proposed Commonwealth age discrimination legislation. It was also proposed that compliance with age-based provisions in specified Commonwealth laws would not be affected by the age discrimination legislation.
- c) Exemptions for employment: It was proposed that it would be permissible to discriminate on the basis of age where the

9 *Committee Hansard*, 5 May 2003, p. 85.

discrimination was based on the inherent requirements of the job. As the Government announced at the time of its commitment to age discrimination legislation, youth wages would also continue to be permitted. It was also proposed to allow discrimination in employment in order to comply with industrial awards or workplace agreements.

- d) Exemptions for goods and services: Some exemptions were proposed that related to the provision of goods, services or facilities. One exemption in this area was for discrimination in superannuation that arises from compliance with age criteria under the Commonwealth superannuation regime. This exemption would recognise that retirement income policy is necessarily age-based to ensure that funds are accrued during working life for use in retirement.¹⁰

3.27 The Committee notes that in its written submission to this inquiry, the COTA National Seniors Partnership welcomed the Government's commitment to introducing federal age discrimination legislation, but indicated that it has expressed a number of concerns to the Attorney-General.

3.28 Most notable amongst these concerns, the COTA National Seniors Partnership argued that by exempting much Commonwealth legislation from the provisions of age discrimination legislation, the Commonwealth provides a negative role model to the community. Accordingly, the COTA National Seniors Partnership argued that Commonwealth legislation and regulations should be reviewed and amended to eliminate their discriminatory provisions.

3.29 The full details of the COTA National Seniors Partnership's objections to the proposed age discrimination legislation are reproduced at **Appendix Five**.¹¹

3.30 The Committee also notes the submission from the Australian Chamber of Commerce and Industry (ACCI) in which it opposed the introduction of federal age discrimination legislation, on the basis that employers should be able to make a judgment about the abilities of individuals in their workplace. ACCI made a number of points, including:

- There is no significant evidence of Australian industry applying policies or practices that improperly discriminate against people on the grounds of age such as to warrant a new national regulatory regime;
- In any event, there are multiple existing anti-age discrimination laws in the states and territories and in federal workplace relations legislation which are more than sufficient to provide regulatory controls and redress in particular cases; and

10 Attorney-General's Department, 'Proposals for Commonwealth Age Discrimination Legislation', Information Paper, December 2002.

11 *Submission 31*, COTA National Seniors Partnership, pp. 13-14.

- If there is to be a national age discrimination law, this should be in substitution for existing state and territory laws, and not in addition. Employers should not be exposed to an additional layer of regulation on an already regulated topic, creating multiple and different rights and obligations, confusion and complexity.¹²

12 *Submission 45, ACCI, pp. 13-14.*