

COMMONWEALTH OF AUSTRALIA.

Circ. No: G.3/1949.
(BA.42/4699B)

Department of the Treasury,
Canberra, A.C.T.
20th June, 1949.

To All Departments.

Superannuation Act, Section 4(5) - Temporary Employees.

Under Section 4(5) of the Superannuation Act, a person who is temporarily employed may become a contributor to the Superannuation Fund provided that he has been employed continuously for 5 years and the Permanent Head of the Department certifies that that person's employment is likely to be continued for a further period of at least 10 years. The decision of the Permanent Head is subject to appeal to the Treasurer.

2. The rights of a permanent employee under the Act are protected because he is required to elect, after his period of probation, whether he will contribute for pension at 60 or 65 years. The temporary employee is not so protected and receives no official advice that he may apply to his Permanent Head for consideration whether he may contribute under the Act.

3. In cases where the applicant for admission to the Fund has already reached the age of 55 years the Permanent Heads have been unable, in view of the normal retiring age of 65 years, to certify to the likelihood of a further 10 years' employment. In some cases the delay in applying for admission until after the age of 55 years has been due to the applicant's ignorance of his rights under the Act. Again, in other cases where application has been made in due time but not determined until after the employee has attained the age of 55 years, the delay has been attributable to omissions within the Department concerned.

4. On a strict interpretation of Section 4(5) of the Act, the period of 10 years should be from the date of the Permanent Head's certificate and in view of the retiring age of 65 years the Permanent Head would have difficulty in giving the required certificate. However, in the case of temporary employees, retirement at 65 is not always applied rigidly and it would be practicable for the Permanent Head to take into consideration two factors, viz:

- (i) that the applicant had completed 5 years' continuous service for some period before attaining the age of 55 years; and
- (ii) that his employment can possibly continue after he attains the age of 65 years.

5. In the circumstances as indicated above, the Treasurer has now directed that a temporary employee who has attained the age of 55 years may be gazetted as an employee, subject to the following conditions:-

- (a) that the employee makes immediate application;
- (b) that he attained the age of 55 years on or after 6th October, 1942 when superannuation benefits were conferred on temporary employees;
- (c) that he had completed 5 years' continuous service before attaining the age of 55 years;
- (d) that the Permanent Head now certifies, in the light of present circumstances, that the applicant's employment is likely to be continued for a period of 10 years from 6th October 1942 or the date on which he completed 5 years' continuous employment, whichever date is the later;

2.

- (e) that this concession be terminated within 3 months of the date of this circular; and
- (f) that in future every temporary employee who is under 55 years of age on completion of five years' continuous service be advised in the following terms of the provisions of the Superannuation Act:-

"Section 4(5) of the Superannuation Act 1922-1948 provides:-

Where -

- (a) a person employed by the Commonwealth otherwise than in a permanent capacity is by the terms of his employment required to give his whole time to the duties of his employment;
- (b) that person has had not less than five years' continuous service; and
- (c) the prescribed officer or, on appeal from the prescribed officer, the Treasurer, certifies that that person's employment is likely to be continued for a period of at least ten years,

the Treasurer may, by notice published in the Gazette, direct that that person shall be deemed to be an employee within the meaning of this section, and that person shall be deemed to be such an employee as from the date of the publication of the notice."

Having been gazetted as an employee, and having obtained a certificate from a Commonwealth Medical Officer that he is of sound bodily health and free from physical defects, he may contribute to the Superannuation Fund for pension in accordance with the provisions of the Superannuation Act. If he is over 45 years of age and his contribution for 2 units of pension under the age 65 Schedule exceeds 5% of his salary he may elect to contribute to the Provident Account.

Where an employee fails to obtain the abovementioned medical certificate, he shall contribute to the Provident Account.

The rate of contribution to the Provident Account is 5% of annual salary.

6. Will you please take action accordingly so far as temporary employees in your Department are concerned.

Assistant Secretary.

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The Chief Accountant, - Australian National Airlines Commission, Manchester Unity Buildings, 339 Swanston Street, Melbourne.

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- Department of Commerce and Agriculture - Canberra
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Australian Wheat Board, 515 Collins Street, Melbourne.

Department of Social Services - Melbourne
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	- Department of Shipping and Fuel, 125 Swanston St., Melbourne.	

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Australian Government

Comcover

[REDACTED]

Dear Mr [REDACTED]

Your Superannuation Enquiry

The Department of Finance and Deregulation (Finance) is currently processing claims from people who state they were given incorrect advice about their eligibility to seek to join an Australian Government superannuation scheme. These claims constitute a potential cause of action in negligent misstatement and could potentially be pursued by way of court proceedings.

The High Court in *Cornwell vs the Commonwealth* held that a cause of action in negligent misstatement only becomes available when the person satisfies the statutory criteria for the payment of a benefit. In this case it would be a superannuation benefit and in most cases, the date for the cause of action will be the date of the person's retirement.

The effect of the High Court's decision is that a claim of negligent misstatement in relation to superannuation must be brought within six years of the person receiving the superannuation benefits.¹ A claim brought after six years is statute barred. This means that the claim cannot be pursued in court proceedings unless the court first grants an extension of time.

We have conducted a review of your circumstances based on the information you provided to Finance on 26 May 2007.

As you accessed your superannuation on 20 August 2000 you had until 20 August 2006 to bring a claim. Under the statute of limitations legislation any claim you may have had is now statute barred, and has been so for two years.

¹ Except in the Northern Territory where such a claim must be brought within three years of that date.


As any potential claim you may have had against the Commonwealth is statute barred, Finance proposes to take no further action with respect to your enquiry. If you wish to make any additional comments that you think Finance should take into account, please do so within 28 days from the date of this letter to:

Comcover
Superannuation Claims Management
Department of Finance and Deregulation
John Gorton Building
King Edward Terrace
PARKES ACT 2600

If Finance has heard nothing further from you within that time, we will consider the matter closed. You should of course feel free to seek independent legal advice including about any potential to commence legal proceedings and to apply to the court for an extension of time.

Yours sincerely,




Claims Manager
Comcover
Department of Finance and Deregulation
12 August 2008