Superannuation (Salary) Regulations (Amendment) 1994 No. 18

EXPLANATORY STATEMENT

STATUTORY RULES 1994 No. 18

Issued by the authority of the Minister for Finance

Superannuation Act 1976

Superannuation (Salary) Regulations (Amendment)

The *Superannuation Act 1976* (the Act) makes provision for and in relation to an occupational superannuation scheme for Commonwealth employees and for certain other persons. That scheme is referred to as the Commonwealth Superannuation Scheme (CSS).

Section 168 of the Act provides that the Governor-General may make regulations for the purposes of that Act.

Section 5 of the Act provides that the regulations may make provision in relation to amounts to be treated as salary for the purposes of the Act. Regulations for the purposes of section 5 are contained in the Superannuation (Salary) Regulations (the Principal Regulations). Amounts which are received regularly and uniformly are automatically salary for the purposes of the Act, subject to exclusion by the Principal Regulations. Other amounts may be included in salary by the Principal Regulations.

The Regulations amend the Principal Regulations in relation to Senior Officers' allowance which became payable under the Agreement of December 1992 between the Commonwealth Government and public sector unions known as "Improving Productivity, Jobs and Pay in the Australian Public Service 1992-1994".

Senior Officers' allowance received in respect of a person's substantive position is automatically treated as salary because the person is guaranteed regular receipt of the allowance. However, where a person is receiving the allowance on a temporary basis, the point at which the allowance has been received regularly by the person needs clarification. The Regulations clarify the circumstances in which the allowance, when received on a temporary basis, is to be included in salary for the purposes of the Act. The test adopted is the same as that applying to other allowances received on a temporary basis which are allowances which may be treated as salary for the purposes of the Act. Should any contributor to the scheme under the Act have received Senior Officers' allowance on a temporary but regular basis before the commencement of the Regulations, the introduction of this test for regularity will not remove any existing recognition of the allowance as salary.

The Regulations also amend the Principal Regulations to clarify that performance pay payable under the above-mentioned Agreement and payments that are bonuses or commissions are not salary for the purposes of the Act. These amounts are 'at risk' payments and are not automatically paid on a regular basis.

Arrangements are in place outside the scheme provided for under the Act under which employees may contribute a part of their performance pay to the Australian Government Employees Superannuation Trust (AGEST) in accordance with the *Superannuation (Productivity Benefit) Act 1988.*

In respect of bonuses and commissions, such amounts have not been treated as salary for the purposes of the Act although the Principal Regulations include special arrangements in respect of some cases where bonuses and commissions are received. The Regulations clarify the intention that, in the unlikely event that bonuses or commissions are received regularly by a group of members, they are not to be treated as salary for the purposes of the Act. Again, because of the prospective application of the amendments, should anyone have received bonuses or commissions on a regular basis before the commencement of the Regulations, the amendments will not remove any existing recognition of such amounts as salary.

The amendments contained in the Regulations are explained in the Attachment. The Regulations commence on gazettal.

ATTACHMENT

SUPERANNUATION (SALARY) REGULATIONS (AMENDMENT)

BACKGROUND

The rate of contribution payable under the Act by a member of the CSS is expressed as a percentage of the member's fortnightly rate of salary. The rate of pension payable is expressed as a percentage of the member's final annual rate of salary. The terms "fortnightly rate of salary" and "final annual rate of salary" are both defined in subsection 3(1) of the Act by reference to the member's annual rate of salary.

Subsection 5(1) of the Act provides that "salary" includes any allowance that, in accordance with the regulations, is to be treated as salary for the purposes of the Act and excludes any part of salary or wages that, in accordance with the regulations, is not to be treated as salary for the purposes of the Act. In accordance with subsection 5(2), a member's annual rate of salary for the purposes of the Act on a particular day is the amount per annum of his or her salary payable on that day.

THE AMENDMENTS

<u>REGULATION 1</u>

This provides that the Principal Regulations are amended as set out in the Regulations. The Regulations commence on gazettal.

<u>REGULATION 2</u>

This amends the Principal Regulations by inserting a new Part 2G (regulations 8V to 8Z) to make provision for the treatment of Senior Officers' allowance in the CSS.

New regulation 8V

Subregulation 8V(1) defines the term 'Senior Officers' allowance' as the allowance payable under the Agreement of December 1992 between the Commonwealth Government and public sector unions known as "Improving Productivity, Jobs and Pay in the Australian Public Service 1992-1994".

Subregulation 8V(2) provides assistance in interpreting the provisions of Part 2G in their application to unattached officers. An unattached officer will be treated as though he or she holds an office which is the same classification as the classification of the unattached officer and a reference in Part 2G to an office held by an unattached officer will include a reference to the classification of that officer.

New regulation 8W

This regulation provides that, subject to the provisions of new regulations 8Y and 8Z, Senior Officers' allowance is to be treated as salary for the purposes of the Act only in the following circumstances:

(a) where it is payable in respect of an office held by the contributor (ie, the contributor's substantive office); or

(b) where it is taken, under regulation 8X, to be payable to the contributor on a regular basis (regulation 8X deals with cases where the allowance is received in respect of duties performed on a temporary basis in an office of higher classification than the person's substantive classification); or

(c) where a contributor who is entitled to receive Senior Officers' allowance in respect of the office held has elected not to do so in respect of that office, but receives Senior Officers' allowance while temporarily performing the duties of another office that is classified at the same level as the office he or she holds. (This caters for those situations provided for in the Agreement where certain classes of senior officers may elect to continue to receive overtime payments in lieu of Senior Officers' allowance.)

New regulation 8X

This regulation specifies the situations where Senior Officers' allowance is taken to be payable on a regular basis.

The regulation provides that, in respect of contributors performing higher duties, Senior Officers' allowance received in respect of the performance of those duties is to be treated as salary for the purposes of the Act only where the associated higher duties allowance is received on a regular basis and therefore recognised as salary for the purposes of the Act. In so doing it refers to regulation 6 and subregulation *7(2)* of the Principal Regulations.

Regulation 6 of the Principal Regulations provides for a regular basis test in respect of allowances of a prescribed kind, including higher duties allowance. Subregulation *7(2)* provides that, while an allowance may have been received on a regular basis in accordance with regulation 6, in some circumstances the rate of the allowance which will be recognised as salary will be lower than that being received by the person. This is the case where the allowance has been received at different rates because the person temporarily held a number of offices of different classification in the immediately preceding 12 months period (or, if the allowance has not been received for 12 months, such lesser period during which it has been received continuously). The amount of the allowance to be included in salary is the rate of the allowance payable in respect of the performance of the duties of the office of lowest classification for which the person received the allowance during that period.

Regulation 8X provides that Senior Officers' allowance is received on a regular basis in the following circumstances:

(a) a contributor who holds an office in respect of which Senior Officers' allowance is payable temporarily performs the duties of a higher office in respect of which both higher duties allowance and senior officer allowance are payable and the higher duties allowance is included in salary by virtue of regulation 6;

(b) a contributor who holds an office in respect of which Senior Officers' allowance is not payable temporarily performs the duties of another office in respect of which both the allowance and higher duties allowance is payable and the higher duties allowance is included in salary by virtue of regulation 6 and is not excluded by subregulation 7(2);

(c) a contributor who is temporarily performing the duties of an office in respect of which higher duties allowance and Senior Officers' allowance is payable performs the duties of a higher office in respect of which higher duties allowance is payable and Senior Officers' allowance is payable at the same or higher rate and the higher duties allowance for the second higher duties position is included in salary by virtue of regulation 6 and is not excluded by subregulation 7(2).

New regulation 8Y

This regulation provides that, in certain circumstances, Senior Officers' allowance will be included in salary for the purposes of the Act at the rate payable in respect of the performance of the duties of the office of lowest classification for which the person received the allowance during a particular period.

This will be the case where Senior Officers' allowance that is taken to be payable on a regular basis (ie as outlined in regulation 8X) has been paid at a lower rate during the period because, during that period, the person temporarily performed the duties of an office in respect of which the allowance was payable at a lower rate. The period is the previous 12 month period or such lesser continuous period during which the allowance has been received.

New regulation 8Z

This regulation deals with Senior Officers' allowance which has been received on a regular basis as provided for in regulation 8X and is therefore to be treated as salary but has not been received for a continuous period exceeding 12 months. The regulation provides that, should a person in receipt of Senior Officers' allowance in these circumstances cease to be a contributor on the grounds of age or early retirement, the amount of the Senior Officers' allowance (or a higher rate of that allowance which is received on a regular basis, where applicable) is not to be included in the person's final annual rate of salary for the purposes of the calculation of retirement benefits.

REGULATION 3

This inserts a new regulation 23 in the Principal Regulations. Subregulation 23(1) clarifies that amounts paid or payable as performance pay, bonuses or commissions are not to be treated as salary for the purposes of the Act. Subregulation 23(2) provides that subregulation 23(1) does not apply to the arrangements described in paragraphs 5(b) or 5(c) or regulation 22 of the Principal Regulations or to an increment to the salary of a contributor that is paid only on condition of a satisfactory performance appraisal.