SGR 2008/D2 - Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'

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Draft Superannuation Guarantee Ruling

Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'

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Preamble

This document is a draft for public comment. As such, it represents the preliminary, though considered, views of the Commissioner.

Superannuation Guarantee Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than this ruling indicates, the fact that you acted in accordance with this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion in regards to the imposition of penalties.

What this Ruling is about

1. This Ruling explains what is 'ordinary time earnings' (OTE) as defined in subsection 6(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA). The definition of 'ordinary time earnings' is relevant to employers for the purpose of calculating the minimum level of superannuation support required for individual employees under the SGAA.

2. As a consequence of amendments to the SGAA which apply from 1 July 2008[1] the amount against which an employer calculates the contribution necessary to meet their superannuation guarantee obligations in respect of an employee is standardised to ordinary time earnings for all employees.[2]

3. This draft Ruling also explains the meaning of 'salary or wages' as defined in section 11 of the SGAA. The definition of 'salary or wages' is relevant to employers in calculating the superannuation guarantee shortfall of individual employees where an employer has not provided the required minimum level of superannuation support.

4. Unless otherwise stated, all legislative references in this Ruling are to the SGAA.

[1] *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004*.
[2] See Explanatory Memorandum to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004.

Previous Rulings

5. It is proposed that when the final Ruling is issued, it will replace Superannuation Guarantee Rulings SGR 94/4 and SGR 94/5 which will be withdrawn from the date of issue of the final Ruling.

6. This draft Ruling takes into account any changes to the SGAA up until the date of issue of this draft Ruling.

Ruling

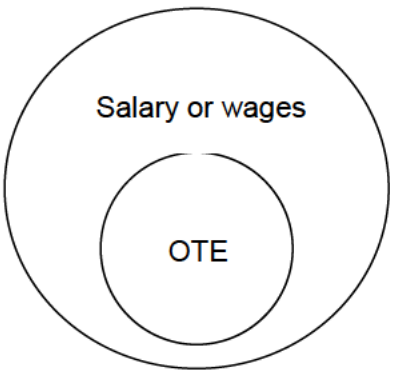
Relationship between 'ordinary time earnings' and 'salary or wages'

7. Payments that are included in OTE are also included in 'salary or wages'. 'Salary or wages' as defined in the SGAA is a broader concept than OTE and includes payments that do not otherwise constitute OTE.

8. Payments which are not 'salary or wages' because they do not constitute remuneration paid to employees for their services as employees are not considered OTE.

9. Payments specifically excluded from OTE are not necessarily excluded from 'salary or wages' (for example, a lump sum payment in lieu of unused annual leave and unused long service leave made to the employee on termination of employment).

10. The following diagram illustrates the relationship between OTE and salary or wages.



Part A – Ordinary time earnings

Definition of 'ordinary time earnings'

11. *Ordinary time earnings*, in relation to an employee, is defined in subsection 6(1) as:

> (a) the total of:
>
> (i) earnings in respect of ordinary hours of work other than earnings consisting of a lump sum payment of any of the following kinds made to the employee on the termination of his or her employment:
>
> (A) a payment in lieu of unused sick leave;
>
> (B) an unused annual leave payment, or unused long service leave payment, within the meaning of the *Income Tax Assessment Act 1997*; and
>
> (ii) earnings consisting of over-award payments, shift-loading or commission; or
>
> (b) if the total ascertained in accordance with paragraph (a) would be greater than the maximum contribution base for the quarter – the maximum contribution base.

12. The SGAA does not specifically define the terms 'earnings' or 'ordinary hours of work' in the definition of OTE. Accordingly, these terms take their ordinary meanings within the context of the Act.

Meaning of 'earnings'

13. In the context of the SGAA, the word 'earnings' refers to the remuneration paid to an employee, as a reward for the services of the employee.

Meaning of 'in respect of'

14. The phrase 'in respect of' requires a discernable rational link between the two subject matters.

Meaning of 'ordinary hours of work'

15. An employee's 'ordinary hours of work' for the purposes of the definition of OTE are the hours of work during which it is usual for the employee to work. The word 'ordinary' means 'regular, normal, customary, usual.' The expression 'ordinary hours of work' in relation to an employee is understood as meaning the hours the employee normally, usually, regularly or customarily works in his or her employment.

16. For an employee who works in accordance with terms and conditions that are specified by awards or industrial agreements, the standard working hours that are prescribed therein are the 'ordinary hours of work' in relation to that employee.

17. For an employee whose terms and conditions of employment are not solely governed by an award or industrial agreement and who has entered into a workplace agreement[3] (including an agreement that incorporates by reference, terms of an award and overrides any terms of an award to the extent of any inconsistency), the standard working hours prescribed in the workplace agreement are the employee's 'ordinary hours of work.'

18. Any hours worked in excess of those standard working hours prescribed in an award, industrial agreement or workplace agreement (commonly described as overtime) are not considered the 'ordinary hours of work' in relation to the employee for the purposes of the SGAA except in a case where paragraph 19 of this draft Ruling applies.

19. Where it is manifestly evident from an objective evaluation of the regular work pattern of an employee that the span of hours actually worked are consistently different to the standard working hours provided in an award or an agreement, the employee's 'ordinary hours of work' for the purposes of the definition of OTE are established by that regular work pattern. These hours are considered the employee's regular, normal, customary and usual hours, even if these hours may be remunerated at overtime or penalty rates.

20. If the ordinary hours of work are not specified or agreed, or if the offer of employment specifies only the minimum hours that an employee will be called upon to work, the 'ordinary hours of work' for superannuation guarantee purposes will be the hours actually worked in addition to any hours of paid leave.

21. 'Ordinary hours of work' are not limited to hours between 9am to 5pm, Monday to Friday. They could include night and weekend shifts.

Maximum contribution base

22. The total of OTE in respect of an employee for a quarter cannot exceed the maximum contribution base for the quarter under the definition of OTE in paragraph 6(1)(b).

Payments specifically included in the definition of 'ordinary time earnings' in subsection 6(1)

23. Earnings consisting of over-award payments, shift-loading or commission are specifically included in the definition of OTE under subparagraph 6(1)(a)(ii). An over-award payment is a payment made at a rate above the minimum rate set for a particular classification in the award. An allowance which is paid to a worker for having to work outside the usual span of time for day workers is specifically included as shift-loading for the purposes of the definition of OTE.

[3] Under the *Workplace Relationships Amendment (Workchoices) Act 2005*.

24. Over-award payments, shift-loadings and commissions do not have to be paid in respect of ordinary hours of work. They are specifically included within the definition of OTE irrespective of whether or not they are earnings in respect of 'ordinary hours of work.'

Payments specifically excluded from the definition of 'ordinary time earnings' in subsection 6(1)

25. Specifically excluded from the definition of 'ordinary time earnings' in subsection 6(1) of the SGAA is any lump sum paid to the employee on the termination of his or her employment, being:

- a payment in lieu of unused sick leave; and
- an unused annual leave payment or unused long service leave payment within the meaning of the *Income Tax Assessment Act 1997*.

Principles to be applied to determine whether an amount or payment constitutes OTE

26. For a payment to fall within the expression 'earnings in respect of ordinary hours of work', there are two elements in the definition to be satisfied:

'Earnings': in order to fall within the definition of 'ordinary time earnings' the payment has to constitute the 'earnings' of the employee.

- In order to determine whether a payment is included in the earnings of an employee in relation to a particular quarter of the year, it is necessary to ask the question 'What is the payment to the employee for?' The payment has to be given as a reward for services of the employee. It is necessary to ascertain what the payment is for in substance, rather than merely characterising the payment by reference to the label given to it.

'In respect of ordinary hours of work': in order to fall within the definition of 'ordinary time earnings' the earnings have to be made in respect of ordinary hours of work of the employee, irrespective of the label or applicable rate of the payment.

In order to determine whether the earnings are 'in respect of' 'ordinary hours of work', the payment has to satisfy one of the following:

- Is attendance or services of the employee during ordinary hours of work a reason or one of the reasons for the amount earned by that employee?

- Does the amount earned represent an entitlement that has accrued as a result of attending or providing services during the employee's ordinary hours of work?

A payment that is wholly unconnected with attendance or services of the employee, or alternatively, such attendance or services is only an incidental reason for the payment is not OTE.

Other payments considered to be 'ordinary time earnings'

Allowances

27. All allowances (other than an expense allowance or an allowance that is a fringe benefit under the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)) paid in relation to an employee's ordinary hours of work are part of OTE, being amounts given by reason of their services. Where an allowance is received in respect of services outside ordinary hours, for example, an overtime meal allowance, it does not form part of OTE.

28. An allowance is a payment of a definite predetermined amount to cover an estimated expense and is paid regardless of whether the employee incurs the expected expense. Other allowances are those that are paid to an employee to compensate for particular working conditions during ordinary hours of work (for example, a site allowance). As the allowances are paid as a reward for services to the employer they are 'earnings in respect of ordinary hours of work' and are included in OTE for the purposes of the SGAA.

29. However, expense allowances are not included in OTE, as explained in paragraph 34 of this draft Ruling.

Bonuses

30. A bonus received by an employee as a reward for the services provided to the employer is 'earnings' for the purposes of the definition of OTE under the SGAA. If the employee's services provided during ordinary hours of work contributed to the achievement of certain results or outcomes which resulted in the bonus being paid, the payment is 'earnings in respect of ordinary hours of work'. Although the bonus may also be in recognition of the long hours the employee has had to work, this does not prevent the bonus being paid in respect of ordinary hours of work.

Piece rates

31. All wage payments made on a piece-rate basis are included in an employee's OTE. As the number of units or items completed is the basis for calculating the payment, the hours actually worked that resulted in the completion of the units or items are the employee's 'ordinary hours of work.'

Leave

32. Leave is a statute based right afforded to employees. Leave payments are not paid for actual attendance at work, rather the payments are an entitlement that arises from an employee's overall service, provided during ordinary hours of work, and the rate of pay applicable to leave payments reflects these ordinary hours of service.

33. All forms of paid leave count as service by the employee. The statutory rights to leave can only be exercised in terms of service by the employee. Therefore all leave payments are considered OTE.

Other payments not considered to be 'ordinary time earnings'

34. An expense allowance, that is, an allowance paid to an employee where there is a reasonable expectation that the money will be fully expended by the employee in the course of providing services is not OTE as it is not given as a reward for services. Neither is a reimbursement which compensates an employee for an expense that they have incurred on behalf of the employer.

35. Allowances that are fringe benefits under the FBTAA are not 'salary or wages' and therefore not OTE.

36. Overtime payments which are for work performed outside an employee's ordinary hours of work are not OTE. However, an employee's ordinary hours of work can include regularly worked hours paid at overtime rates as explained at paragraph 19 of this Ruling. If an employee's ordinary hours of work include these additional hours and they are paid at overtime, penalty or some other rate, the full amount of these payments is included in OTE as these amounts are earned during an employee's ordinary hours of work.

Part B – Salary or wages

Definition of 'salary or wages'

37. *Salary or wages*, for the purposes of the SGAA, is defined in section 11(1):

> 11(1) In this Act, *salary or wages* includes:
>
> (a) commission; and
>
> (b) payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate; and
>
> (ba) payments under a contract referred to in subsection 12(3) that are made in respect of the labour of the person working under the contract; and
>
> (c) remuneration of a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory; and

(d) payments to a person for work referred to in subsection 12(8); and

(e) remuneration of a person referred to in subsection 12(9) or (10).

38. Under subsections 11(2) and 11(3) of the SGAA certain payments are excluded from being salary or wages:

11(2) Remuneration under a contract for the employment of a person, for not more than 30 hours per week, in work that is wholly or principally of a domestic or private nature is not to be taken into account as salary or wages for the purposes of this Act.

11(3) Fringe benefits within the meaning of the *Fringe Benefits Tax Assessment Act 1986* are not salary or wages for the purposes of this Act.

39. The SGAA defines 'salary or wages' inclusively in section 11. Payments are included in the definition of 'salary or wages' if they satisfy the ordinary or common law meaning of that term. Payments are also included in salary or wages if they fall within the extended definition in subsection 11(1).

40. The salary or wages of an employee do not necessarily have to be paid by the employer; they also may be paid on behalf of the employer by another party.

Payments specifically included in the definition of 'salary or wages' in section 11

41. Commission payments are 'salary or wages' under paragraph 11(1)(a). A commission includes any payments made to an employee on the basis of performance criteria (for example, a payment based on percentage of sales).

42. Payments for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate are included as 'salary or wages' under paragraph 11(1)(b).

43. Payments in respect of the labour portion of a contract within the meaning of subsection 12(3), that is wholly or principally for the labour of the person working under the contract, are 'salary or wages' under paragraph 11(1)(ba).

44. Remuneration of a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory are 'salary or wages' under paragraph 11(1)(c).

45. Paragraph 11(1)(d) includes within the definition of 'salary or wages':

- payments to persons who perform, present, participate in or provide services in connection with any music, play, dance, entertainment, sport, display or promotional activity involving the exercise of intellectual, artistic, musical, physical or other personal skills; and

- payments to persons who perform or provide services in connection with the making of any film, tape or disc or of any television or radio broadcast.

46. The remuneration of a person who holds or performs the duties of an appointment, office or position under the Constitution or a law of the Commonwealth, of a State or a Territory or is otherwise in the service of the Commonwealth, of a State or of a Territory, or who is a member of an eligible local governing body, constitute 'salary or wages' under paragraph 11(1)(e).[4]

Payments specifically excluded from the definition of 'salary or wages'

47. Remuneration under a contract for the employment of a person, for not more than 30 hours per week, in work that is wholly or principally of a private or domestic nature is excluded under subsection 11(2). The SGAA does not define the terms 'domestic' and 'private' and so these terms take their ordinary meanings. Work of a domestic or private nature means work relating personally to the individual making payment for the work or to the person's home, household affairs or family organisation.

48. Fringe benefits as defined in the FBTAA are excluded under subsection 11(3) of the SGAA.[5]

49. Remuneration of a person who holds office as a member of a local government council is excluded as that person is not an employee of the council under subsection 12(9A).

Principles to determine whether a payment fits in the definition

50. Whether a payment satisfies the common law meaning of 'salary or wages' has to be determined in the circumstances of each case, having regard to relevant case law. At common law it is accepted that the term 'salary or wages' constitutes remuneration paid to employees for their services as employees. That is, it presupposes an employment relationship. Therefore, the common law meaning of 'salary or wages' turns also on common law concepts of employment. The expressions 'employee' and 'employer' are defined for superannuation guarantee purposes in section 12 and have both their ordinary meaning and an extended meaning.[6]

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[4] See Taxation Ruling TR 2002/21 Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses or allowances paid to office holders for guidance in determining whether a person falls into one of these categories.

[5] See Miscellaneous Taxation Ruling MT 2030 Fringe Benefits Tax: living-away-from-home allowance benefits for examples of fringe benefits.

[6] The Commissioner's view on who is an employee under the SGAA is contained in Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee?

51. 'Salary or wages' (and therefore OTE, which is a subset of 'salary or wages' in the context of the SGAA) is not limited to payments made to employees in cash or cash equivalent but can include payments made in kind to the employee.

52. Payments to an employee which are not given as a reward for their services are not included in 'salary or wages'. For example, if the payment is for reimbursing the employee's out of pocket expenses.

53. Payments to an employee are included in 'salary or wages' if the employee has the entitlement to receive the money for themselves. For example, an advance given to an employee to enable the employee to expend the money on behalf of the employer is not 'salary or wages'.

Other payments considered to be 'salary or wages'

54. Discussed below are other types of remuneration provided to employees which are considered to be 'salary or wages' apart from those payments specifically included under section 11 of the SGAA. These types of remuneration would also form part of OTE provided they are earned in respect of the ordinary hours of work of the employee.[7] For the purposes of the SGAA, all allowances, except expense allowances and allowances that are fringe benefits under the FBTAA, received by an employee, are included in 'salary or wages'. Expense allowances are dealt with under paragraph 61 of this draft Ruling.

55. A bonus constitutes 'salary or wages' where it is paid to an employee by reason of their services as an employee and not on a personal basis.

56. All leave payments are directly related to services provided as an employee and are considered 'salary or wages'. The statutory rights to leave can only be exercised in terms of service by the employee.

57. Any workers compensation payments received by an injured employee where the employee performs work or is required to attend work forms part of 'salary or wages'. In contrast, where the employee has terminated employment the payment would be characterised as compensation for loss of employment rather than 'salary or wages'.

58. Lump sum payments for unused annual leave, long service leave and sick leave paid on termination of employment are 'salary or wages' as they are payments for leave entitlements that have accrued to the employee by reason of service. Redundancy and employment termination payments also fall within the ordinary meaning of salary or wages as these payments are a reward for services rendered by an employee.

[7] Except lump sums paid on termination which are specifically excluded from OTE – see paragraph 25 of this draft Ruling.

59. Where a trustee makes a payment under the statutory provisions of the *Bankruptcy Act 1966* to a former employee who has a provable debt for unpaid 'salary or wages', the payment retains its character as 'salary or wages' for the purposes of the SGAA. Similarly, a payment made under the *Corporations Act 2001* by the liquidator of a company by way of a dividend to a former employee who has proved a debt for unpaid salary or wages retains its character as 'salary or wages' for the purposes of the SGAA.

60. If unpaid salary or wages are recovered by way of a settlement of a debt via court order, out of court settlement or negotiated settlement, and that settlement contains an identifiable and quantifiable amount of unpaid salary or wages, that amount retains its character as 'salary or wages' for SGAA purposes. However when the amount is undissected, the whole amount would be characterised as a capital receipt and therefore not salary or wages for the purposes of the SGAA.

Other payments not considered to be 'salary or wages'

61. Expense allowances, that is, those allowances paid to an employee where there is a reasonable expectation that the money will be fully expended by the employee in the course of providing services, do not constitute 'salary or wages' within the meaning of section 11.

62. A reimbursement which compensates an employee for an expense they have incurred on behalf of the employer would also not constitute 'salary or wages'.

63. Payments for unfair dismissal are not 'salary or wages' within the ordinary meaning of those terms, that is, they are not consideration or a reward for services rendered by a former employee to their former employer but rather a remedy for breach of contract and termination of employment. As stated in 'Labour Law' 4th edition, 2005:

> the general purpose of damages award for breach of contract is to place the injured party in the same position as if the contract had been properly performed.

64. A payment made under an arrangement that does not give rise to a payment for services rendered or the provision of labour, such as a bailment arrangement is not 'salary or wages' within the SGAA.

Date of effect

65. When the final Ruling is issued, it is proposed that it will apply from 1 July 2009. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute with the Commissioner agreed to before the date of issue of the final Ruling.

66. If the Ruling, when issued, conflicts with a previous ruling, the Ruling prevails. However, if you have relied on a previous ruling, the fact that you acted in accordance with that earlier ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion in regards to the imposition of any penalties.

Commissioner of Taxation
5 November 2008

Appendix 1 – Examples

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

67. The table below is an index to the examples and provides references to the relevant paragraphs in this draft Ruling. The examples are not exhaustive and are only intended for general guidance.

EG no	Payments to an employee in relation to…	OTE?	Salary or wages?	Paragraph references
Awards and agreements				
1	Occasional overtime under an award	No	Yes	17-18, 68-75, 188-204.
2	Additional hours to award under an agreement	Yes	Yes	17-18, 76-81, 188-204.
3	Additional hours in an agreement over an award's ordinary hours	Yes	Yes	17-18, 82-88, 188-204.
4	Varied ordinary hours in an agreement which includes regularly worked overtime	Yes	Yes	19, 89-96, 188-204.
5	Piece rates – no ordinary hours of work stipulated	Yes	Yes	31, 97-100, 266-270.
6	Piece rates based on 'cents per km' stipulated in award	Yes	Yes	31, 101-106, 266-270.
Allowances				
7	Allowance	Yes	Yes	27-29, 54, 107-109. 240-253.
8	Expense allowance	No	No	34, 61, 110-112, 240-253.
9	Danger allowance	Yes	Yes	27-28, 54, 113-116, 240-253.
10	Retention allowance	Yes	Yes	27-28, 54, 117-120, 240-253.
Employer payments				
11	Reimbursement	No	No	34, 52, 62, 121-123, 254-255.

EG no	Payments to an employee in relation to…	OTE?	Salary or wages?	Paragraph references
12	Petty cash	No	No	34, 52, 62, 124-126, 254-255.
Employer payments				
13	Reimbursement of travel costs	No	No	34, 52, 62, 127-129, 254-255.
14	Payments for unfair dismissal	No	No	63, 130-132.
Leave payments				
15	Annual leave	Yes	Yes	32-33, 56, 133-135, 271-279.
16	Maternity leave	Yes	Yes	32-33, 56, 136-138, 271-279.
17	Jury duty leave	Yes	Yes	32-33, 56, 139-141, 271-279.
18	Release from work duties on full paid leave	Yes	Yes	32-33, 56, 142-144, 271-279.
Bonus				
19	Bonus	Yes	Yes	30, 55, 145-148, 256-262.
20	Accrued bonus	Yes	Yes	30, 55, 149-152, 256-262.
21	Bonus labelled as ex-gratia but in respect of ordinary hours of work	Yes	Yes	30, 55, 153-156, 256-262.
22	Christmas bonus	No	No	30, 55, 157-159, 256-262.
23	Bonus for completing specific training	No	No	30, 55, 160-162, 256-262.
24	Discretionary incentive payment	Yes	Yes	30, 55, 163-165, 256-262.

Awards and agreements

Example 1 – Occasional overtime under an award

68. Grace is employed under an award which stipulates that ordinary hours shall not exceed 38 hours per week. The award also states that all time worked in excess of the ordinary hours for the week shall be deemed to be overtime and paid at a rate of time-and-a-half for the first three hours and double time thereafter.

69. Grace ordinarily works 38 hours each week.

70. Grace's employer requires her to work one particular Saturday morning for three additional hours resulting in her completing 41 hours work for that particular week.

OTE

71. As the payment Grace receives for her work is a reward for services she is providing, it constitutes 'earnings' for the purposes of the definition of OTE in the SGAA.

72. The 38 hours she works during the weekdays are her 'ordinary hours of work.'

73. The three additional hours worked on the Saturday are only worked occasionally. The additional hours worked are not 'ordinary hours of work' for superannuation guarantee purposes.

74. Therefore payment to Grace for 38 hours of work is 'earnings in respect of ordinary hours of work' and is OTE for the purposes of the SGAA. The payment for the additional 3 hours overtime is not 'earnings' in respect of ordinary hours of work' and is therefore not included in OTE for the purposes of the SGAA.

Salary or wages

75. The payment to Grace for the 41 hours worked is paid as a reward for the services she is providing and is therefore 'salary or wages' for the purposes of the SGAA.

Example 2 – Additional hours to award under an agreement

76. Cliff is employed under an award which stipulates that ordinary hours shall not exceed a maximum of 38 hours per week. The award also states that all time worked in excess of the ordinary hours shall be deemed to be overtime and paid at a rate of time-and-a-half for the first three hours and double time thereafter.

77. Cliff and his employer agree under a workplace agreement that he will work 60 hours each week which will be paid at the same hourly rate for all of the 60 hours worked. That rate is inclusive of all allowances and penalties. Cliff regularly works 60 hours each week.

OTE

78. As the payment Cliff receives for working is a reward for services he is providing, it constitutes 'earnings' for the purposes of the definition of OTE in the SGAA.

79. Under the terms of the agreement (which overrides the terms of the award to the extent of any inconsistency), Cliff is engaged to work a different span of hours to those contemplated by the award and these are the hours which Cliff regularly worked. Therefore Cliff's ordinary hours of work for superannuation guarantee purposes are 60 hours per week.

80. Therefore the payment to Cliff for 60 hours of work is 'earnings in respect of ordinary hours of work' and is OTE for the purposes of the SGAA.

Salary or wages

81. The payment to Cliff for the 60 hours worked is paid as a reward for the services he is providing and is therefore 'salary or wages' for the purposes of the SGAA.

Example 3 – Additional hours in an agreement over an award's ordinary hours

82. Eugene is employed under a workplace agreement which incorporates by reference terms from an award. To the extent of any inconsistency between the terms of the workplace agreement and the terms of the award, the former applies.

83. Eugene's workplace agreement provides for a shift roster which requires that employees work an average of 42 hours per week and identifies on the roster the ordinary hours as 38 hours and the overtime hours as 4 hours.

84. The award on the other hand provides that the ordinary hours are an average of 38 hours per week and includes a clause which gives an employer the right to require an employee to work reasonable overtime.

OTE

85. The payment Eugene receives for working is paid as a reward for services he is providing to his employer and it is therefore 'earnings' for the purposes of the definition of OTE in the SGAA.

86. As the workplace agreement requires Eugene to work an average of 42 hours per week, and those are the hours that he actually worked, they are the 'ordinary hours of work' for superannuation guarantee purposes. Eugene's ordinary hours of work are 42 hours per week even though 4 hours of the 42 hours per week are paid at overtime rates.

87. Therefore the full payment to Eugene for 42 hours of work is 'earnings in respect of ordinary hours of work' and is OTE for the purposes of the SGAA.

Salary or wages

88. The payment for Eugene's 42 hours of work is a reward for services provided as an employee of the company and is therefore 'salary or wages' for the purposes of section 11.

Example 4 – Varied ordinary hours in an agreement which includes regularly worked overtime

89. Christopher is employed under an award which includes a clause allowing the ordinary hours of work specified in the award to be varied by mutual agreement between the employer and the individual employee.

90. Christopher has an agreement with his employer that stipulates the ordinary hours are an average of 38 hours per week plus reasonable overtime as requested by the employer.

91. Christopher is regularly rostered on to work five eight-hour shifts totalling 40 hours each week.

OTE

92. The payment Christopher receives for working is paid as a reward for services he is providing and it is therefore 'earnings' for the purposes of the definition of OTE in the SGAA.

93. However, in this example, the hours which have become regular, normal, customary or usual for Christopher are the 40 hours of work per week. This is regardless of whether the additional two hours of work are classified as overtime or are paid at overtime rates. Therefore Christopher's 'ordinary hours of work' are 40 hours per week for superannuation guarantee purposes.

94. Therefore payment to Christopher for 40 hours of work is 'earnings in respect of ordinary hours of work' and is OTE for the purposes of the SGAA.

Salary or wages

95. Payment for the 40 hours of work is a reward for services provided as an employee of the company and is therefore 'salary or wages' for the purposes of section 11.

96. Any payment to Christopher for overtime above the 40 hours will also be a reward for services provided as an employee of the company and is also included in 'salary or wages' for the purposes of section 11.

Example 5 – Piece rates where no ordinary hours of work are stipulated

97. Evan works as a fruit picker for Apple Ltd. Evan is paid $1 for every kilogram of apples that he produces. There are no ordinary hours specified in any contract or agreement. Evan produces 1,000 kilograms of apples in his working hours in the week and is paid $1,000 by Apple Ltd.

OTE

98. The payment Evan receives is a reward for his services to the employer. Therefore the payment is 'earnings' in respect of the definition of OTE under the SGAA.

99. As Evan's ordinary hours of work are not specified in any contract or agreement, his ordinary hours of work are the hours that he actually works. Therefore the $1,000 payment Evan receives is an entitlement accrued as a result of providing services during his ordinary hours of work. The payment received by Evan is therefore 'earnings in respect of ordinary hours of work' and is OTE under the SGAA.

Salary or wages

100. The payment made to Evan is directly related to his services as an employee and is therefore 'salary or wages' for the purposes of the SGAA.

Example 6 – Piece rates based on 'cents per km' stipulated in award

101. Samson is employed as a long-distance truck driver. He is employed under an award which stipulates that the ordinary hours are an average of 40 hours per week.

102. The award provides for the wages payment of regular long distance work (return trips in excess of 500 road kilometres in distance) to be based on a 'cents per kilometre' travelled at the employee's classification level. Provisions within the award also set out a formula for a minimum hourly driving rate that incorporates an overtime rate component. Employees will also be paid additionally for any time worked loading or unloading a vehicle at an hourly rate.

OTE

103. The payment Samson receives is a reward for his services to the employer. Therefore the payment is 'earnings' in respect of the definition of OTE under the SGAA.

104. The incorporation of an overtime rate component in the minimum hourly driving rate under the award implies that the driver's usual, customary hours are in excess of 40 hours per week. If Samson is paid in accordance with the minimum hourly driving rate provisions of the award, then the formula prescribed under the award incorporating the usually worked overtime component (as it is considered that the component represents time so regularly worked that it must be considered part of ordinary hours) would be considered OTE. OTE would also include payments for loading or unloading the truck and any other allowances and payments related to OTE payable under the award.

105. If it can be established that a regular work pattern exists which would evidence an agreement which effectively displaces the award provisions, that work pattern would determine the amount of OTE. For example, Samson may regularly work 46 hours per week. In this circumstance the OTE would be 46 hours times the minimum hourly driving rate which includes the overtime component. If Samson is paid on a cents per kilometre basis the actual kilometres driven at the prescribed rate would be OTE (hours are irrelevant to payment under this method so actual payment is appropriate).

Salary or wages

106. The payment made to Samson is directly related to his services as an employee and would be considered 'salary or wages' for the purposes of the SGAA.

Allowances

Example 7 – Allowance

107. Don is a finance executive of Fresh Pty Ltd. In addition to his usual salary, he is paid $500 per month for entertainment expenses. It is paid regardless of whether or not he spends the $500. He has complete discretion whether to spend the allowance.

OTE

108. The allowance provided to Don is a reward for the services which he is providing as an employee of the company. Therefore the payment is considered 'earnings' for the purposes of the definition of OTE. The allowance is received by reason of services provided by Don during ordinary hours of work. Therefore the monthly payments are 'earnings in respect of ordinary hours of work' and are OTE for the purposes of the SGAA.

Salary or wages

109. The payments made to Don are directly related to his services as an employee and are therefore 'salary or wages' for the purposes of the SGAA.

Example 8 – Expense allowance

110. David is an employee of JJ Investment Pty Ltd. In addition to his usual salary, David is paid $300 per month to cover expenses he is expected to incur while visiting clients. The expenses David incurs are for travel to client sites, maintenance of a mobile phone and internet access to remotely connect to the office. The allowance is a predetermined amount which has been calculated to cover the estimated expense and is given with the expectation that it will be fully expended in the course of the employee providing the services to the employer.

OTE

111. The allowance provided to David is to compensate him for expenses which he incurs in his particular type of work for the company. The allowance is not a reward for the services which he is providing as an employee of the company. Therefore the payment is not considered to be 'earnings' for the purposes of the definition of OTE in the SGAA and the allowance received is not OTE.

Salary or wages

112. As the allowance is not a reward for the services which he is providing as an employee of the company, the payment is not considered to be 'salary or wages' for the purposes of section 11.

Example 9 – Danger allowance

113. Bernie works for an oil company and is working on an offshore oil rig. Bernie is paid an annual allowance of $2,000 to compensate him for the hazardous conditions of working on an oil rig and the varying times in the day during which Bernie's shifts can be scheduled. Bernie regularly works five shifts of ten hours per week under the terms of his workplace agreement. The allowance is not expended in the course of Bernie's work.

OTE

114. The allowance provided to Bernie is paid as a reward for the services he is providing on the oil rig in hazardous conditions and during varying times of the day. It is therefore 'earnings' for the purposes of the definition of OTE in the SGAA.

115. Although Bernie's working times vary, his actual working hours are consistent each week and these are his ordinary hours of work. The allowance provided is an entitlement that has accrued as a result of the services Bernie provides during his ordinary hours of work. Therefore the allowance is 'earnings in respect of ordinary hours of work' and is OTE for the purposes of the SGAA.

Salary or wages

116. The allowance provided to Bernie is paid as a reward for the services he is providing on the oil rig and is therefore 'salary or wages'.

Example 10 – Retention allowance

117. Therese is currently working as an engineer for an aircraft carrier. Due to her specific expertise, Therese is paid a regular allowance of $140 per fortnight in addition to her salary to encourage her to remain with the company in her current position.

OTE

118. The retention allowance received by Therese is paid as a reward for her continuing services. Therefore the payment is included as 'earnings' for the purposes of the definition of OTE in the SGAA.

119. The payment is also made in respect of ordinary hours of work. It is Therese's continuing attendance and services at work which entitles her to earn the allowance. Therefore the allowance is 'earnings in respect of ordinary hours of work' and is OTE for the purposes of the SGAA.

Salary or wages

120. The payment made to Therese is directly related to her services as an employee and is therefore 'salary or wages' for the purposes of the SGAA.

Employer payments

Example 11 – Reimbursement

121. Don travels by train on behalf of his employer and pays for the train ticket for the trip. On his return he provides receipts to his employer totalling $14.50 for the cost of the train ticket. The employer pays Don exactly $14.50 in respect of the receipts.

OTE

122. The payment which Don receives from his employer is not a reward for his services. Rather, the payment is an exact reimbursement of an expense which he has incurred on behalf of the employer which is evidenced by Don vouching for the expenses by providing his employer with a receipt for the cost of the train ticket. As the payment received is not a reward for services, it is not earnings for the purposes of the definition of OTE in the SGAA and payment received is not OTE.

Salary or wages

123. The payment made to Don is not directly for his services as an employee and is therefore not 'salary or wages'.

Example 12 – Petty cash

124. Mary's employer requests her to purchase some office supplies and gives her $100 from petty cash. On the purchase of the supplies, Mary is required to obtain a receipt and to return the change to her employer.

OTE

125. The payment which Mary receives from her employer is not a reward for her services. Rather, Mary's employer is providing her with an advance in order to enable Mary to expend an amount of money. Mary is expending the money as an agent for her employer. Therefore the payment is not 'earnings' for the purposes of the definition of OTE in the SGAA and the payment received is not OTE.

Salary or wages

126. The payment made to Mary of petty cash from her employer is not directly for her services as an employee and is therefore not 'salary or wages'.

Example 13 – Reimbursement of travel costs

127. Tom uses his own car to travel 100 kilometres on behalf of his employer. Tom pays for any expenses such as petrol and incurs wear and tear on his vehicle. On his return, Tom submits a claim for $58 for his travel costs and receives a payment from his employer. Tom has calculated the amount by applying a set rate per kilometre travelled based on the statutory formula in the income tax laws.

OTE

128. The payment received by Tom is not a reward for his services as an employee. Rather, the payment is a reimbursement as the expense amount is calculated on a reasonable basis, being the set rate per kilometre travelled based on the statutory formula in the income tax laws. Therefore the payment is not 'earnings' for the purposes of the definition of OTE in the SGAA and the payment received is not OTE.

Salary or wages

129. The payment made to Tom is not directly for his services as an employee and is therefore not 'salary or wages'.

Example 14 – Payments for unfair dismissal resulting from an order via the Industrial Relations Commission

130. Mary has received a payment from her employer ordered by the Industrial Relations Commission in relation to unfair dismissal. The payment ordered is equal to ten weeks' pay. Mary's employment has been terminated.

OTE

131. The payment ordered by the Industrial Relations Commission is not a reward for Mary's services. Rather it is compensation granted due to the finding of an unfair dismissal. Although the payment ordered is based on ten weeks' pay, Mary has not actually provided any services for those ten weeks. Therefore the payment is not 'earnings' for the purposes of the definition of OTE in the SGAA and is therefore not OTE.

Salary or wages

132. The payment made to Mary for unfair dismissal is not consideration or a reward for services rendered for her former employer but rather a remedy for breach of contract and termination of employment. The payment is in the nature of damages and therefore not 'salary or wages'.

Leave

Example 15 – Annual leave

133. Marissa takes four weeks annual leave which she has accrued as part of her employment package. During her leave Marissa's employer continues to pay Marissa her regular weekly pay.

OTE

134. Although the payments made to Marissa whilst she is on leave is not paid for actual attendance at work or services, the annual leave which Marissa has accrued is given to her as a reward for her attendance and services during ordinary hours of work. Therefore the payments made to Marissa whilst she is on annual leave are a reward for her services during her ordinary hours of work. The leave payments are 'earnings in respect of ordinary hours of work' and therefore OTE for the purposes of the SGAA.

Salary or wages

135. The payments made to Marissa are directly related to her services as an employee and are therefore 'salary or wages' for the purposes of the SGAA.

Example 16 – Maternity leave

136. Maria has been working for her employer for more than 12 months on a continuous basis and accordingly she receives 12 weeks of maternity leave. During her period of maternity leave, Maria receives her regular pay. The period of maternity leave is included in her period of service for her employer.

OTE

137. Although the payments made to Maria whilst she is on leave is not paid for actual attendance at work or services, the maternity leave is an entitlement that is accrued by Maria because of her services as an employee. Therefore the payments made to Maria whilst she is on maternity leave are a reward for her services during her ordinary hours of work and are 'earnings in respect of ordinary hours of work'. Therefore the payments are OTE for the purposes of the SGAA.

Salary or wages

138. The payments made to Maria are directly related to her services as an employee and are therefore 'salary or wages' for the purposes of the SGAA.

Example 17 – Jury duty leave

139. Darius is called to serve jury duty for one week. His employer maintains his regular weekly pay for that week, however Darius is required to return any payment received for his jury service to his employer. The week of jury duty is included in his period of service for his employer.

OTE

140. Although the payment made to Darius is not for services performed for his employer or attendance at work during ordinary hours, this is a payment to put the employee in a financial position as if service was performed for the employer during ordinary hours. The rate of pay applicable also reflects ordinary hours of service. The jury duty leave is given to Darius as an entitlement of his employment. Therefore the payment made to Darius whilst he is on jury duty leave is a reward for his services during his ordinary hours of work and is 'earnings in respect of ordinary hours of work'. Therefore the payment is OTE for the purposes of the SGAA.

Salary or wages

141. The payment made to Darius is directly related to his services as an employee and is therefore 'salary or wages' for the purposes of the SGAA.

Example 18 – Release from work duties on full paid leave

142. Gerard works on various projects on behalf of his employer. At the conclusion of each project, Gerard is asked by his employer to take leave until the commencement of the next project. The leave does not come out of his annual leave entitlements and Gerard continues to receive his ordinary weekly pay.

OTE

143. The weekly pay that Gerard receives is still considered earnings as the entitlement has arisen by reason of his services provided as an employee during ordinary hours of work. Although Gerard is on leave, he could be required to recommence work earlier as necessary. Therefore the amount earned does result from services provided by Gerard as an employee during ordinary hours of work. Therefore the payments are 'earnings in respect of ordinary hours of work' and are OTE for the purposes of the SGAA.

Salary or wages

144. The payments made to Gerard are directly related to his services as an employee and are therefore 'salary or wages' for the purposes of the SGAA.

Bonus

Example 19 – Bonus

145. Tamara is an adviser at a finance company. At the end of the year, Tamara receives a bonus of $5,000 for her exceptional work and results during the year and also for the long hours which she has had to work.

OTE

146. The bonus received by Tamara is a reward for the services she has provided to her employer. Therefore the bonus is 'earnings' for the purposes of the definition of OTE under the SGAA.

147. The services Tamara provided during her ordinary hours of work contributed to the achievement of her work results. Therefore the bonus is 'earnings in respect of ordinary hours of work' for the purposes of the definition of OTE under the SGAA. Although the bonus is also given in recognition of the long hours she has had to work, this does not alter the conclusion that the bonus constitutes 'earnings in respect of ordinary hours of work'. Therefore the bonus is OTE.

Salary or wages

148. The payment made to Tamara is directly related to her services as an employee and is therefore 'salary or wages' for the purposes of the SGAA.

Example 20 – Accrued bonus

149. Carrie provides a typing service for a publishing company. She receives a basic rate of pay for her normal hours but for every 100 pages completed she receives a $10 bonus on top of her ordinary pay. At the end of the week Carrie receives a $100 bonus from her employer.

OTE

150. The bonus received by Carrie is a reward for the services she has provided to her employer. Therefore the payment is 'earnings' for the purposes of the definition of OTE under the SGAA.

151. The bonus given to Carrie is an entitlement which she earns as a result of providing services during her ordinary hours of work. Therefore the bonus is 'earnings in respect of ordinary hours of work' for the purposes of the definition of OTE under the SGAA. Therefore the bonus is OTE.

Salary or wages

152. The payment made to Carrie is directly related to her services as an employee and is therefore 'salary or wages' for the purposes of the SGAA.

Example 21 – Bonus labelled as ex-gratia but in respect of ordinary hours of work

153. Christina is an employee of Tangerine Ltd. As an employee, Christina was entitled to receive a bonus payment which was labelled an 'ex gratia payment' by the employer. This bonus was paid out of a pool of funds from revenue generated by the work completed by the employees. In order to qualify for payment of the bonus, Christina was required to achieve a minimum monthly revenue target. However, the employer was also able to exercise discretion to withhold the bonus on disciplinary grounds or pay a bonus to employees who did not meet the minimum monthly target. Payments were made in recognition of the hard work of the staff.

OTE

154. The payment was in substance given as a reward for services provided in respect of ordinary hours of work despite the label which has been given to the payment by the employer. Although the bonus payment is labelled an 'ex gratia payment', there is a direct connection between the pool of funds from which the bonus is paid and the work completed by the employees. The payment of the bonus was calculated with reference to the work completed by Christina and her performance as an employee. Therefore the bonus is 'earnings' for the purposes of the definition of OTE under the SGAA.

155. The services which Christina provided during her ordinary hours of work contributed to the achievement of her work results. Therefore the bonus payment is 'earnings in respect of ordinary hours of work' and therefore OTE for the purposes of the SGAA.

Salary or wages

156. The payment made to Christina is directly related to her services as an employee and is therefore 'salary or wages' for the purposes of the SGAA.

Example 22 – Christmas bonus

157. Suzie is an employee of Jessri Pty Ltd. At the end of the year the company gives her $250 as a Christmas gift. This is a Christmas bonus paid to Suzie as an expression of the company's goodwill. It is not related to Suzie's performance at work.

OTE

158. The Christmas bonus paid to Suzie is not a reward for her services. Rather it has been paid as a gift by the company as an expression of goodwill. Therefore the payment is not 'earnings' for the purposes of the definition of OTE in the SGAA and is therefore not OTE.

Salary or wages

159. The payment made to Suzie is unrelated to her services as an employee and is therefore not 'salary or wages' for the purposes of the SGAA. It is a minor benefit under the FBTAA.

Example 23 – Bonus for completing specific training

160. Preston is an interpreter for a telecommunications company. On completion of a particular language course, Preston's company provides him with an ex-gratia $300 bonus payment for successful completion of the course.

OTE

161. The bonus received by Preston is not given as a reward for his services. Therefore the payment is not 'earnings' for the purposes of the definition of OTE in the SGAA and is therefore not OTE.

Salary or wages

162. The payment made to Preston is not related to his services as an employee and is not 'salary or wages' for the purposes of the SGAA.

Example 24 – Discretionary incentive payment

163. Tony is an employee of Ketchup Ltd. The employer gives Tony a discretionary incentive payment of $600 to encourage future service. It is not based on any services already rendered, but to encourage services to be rendered in the future. There is no contractual entitlement and the payment is entirely at the discretion of the employer. Although Tony terminates his employment shortly after, this payment is not repayable to the employer.

OTE

164. The bonus received by Tony is to encourage the provision of future services and is therefore 'earnings' for the purposes of the definition of OTE under the SGAA and the payment is OTE.

Salary or wages

165. The payment made to Tony is directly related to his services as an employee and would be considered 'salary or wages' for the purposes of the SGAA.

Appendix 2 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

Legislative context

166. The purpose of the SGAA is to encourage employers to provide a prescribed minimum level of superannuation support for employees.[8]

167. Prior to 1 July 2008, OTE was the default earnings base to be used by an employer in calculating their superannuation obligations. Amendments to the SGAA by the *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004* simplified the earnings base of an employee for superannuation guarantee purposes by removing all alternative earnings bases with effect from 1 July 2008.[9] The effect of the amendments is that, as from 1 July 2008, an employer must use ordinary time earnings in calculating their required contribution.

168. Employers may still use the notional earnings bases specified in legislation or industrial agreements where these are above an employee's 'ordinary time earnings', but the superannuation guarantee liability will only be assessed against 'ordinary time earnings'.

169. The purpose of standardising the amount against which the superannuation guarantee liability has to be assessed was to reduce complexity for employers, ensuring that employers only need to consider OTE as opposed to potentially multiple earnings bases for a variety of employees. It also reduces inequities between employees by ensuring that where employees perform the same work under the same remuneration arrangements, they can expect to receive SG contributions calculated against the same amount.[10]

170. If an employer does not provide the minimum level of contributions in respect of their employees by the prescribed dates, the employer will be liable to pay the superannuation guarantee charge. Whilst the level of superannuation support required to be provided by an employer is calculated as a percentage of 'ordinary time earnings', the liability for the superannuation guarantee charge under section 16 is calculated with reference to an employee's 'salary or wages'. Under section 19, the individual superannuation guarantee shortfall for an eligible employee is calculated to be a certain percentage of the total salary or wages paid by the employer to the employee for the quarter.

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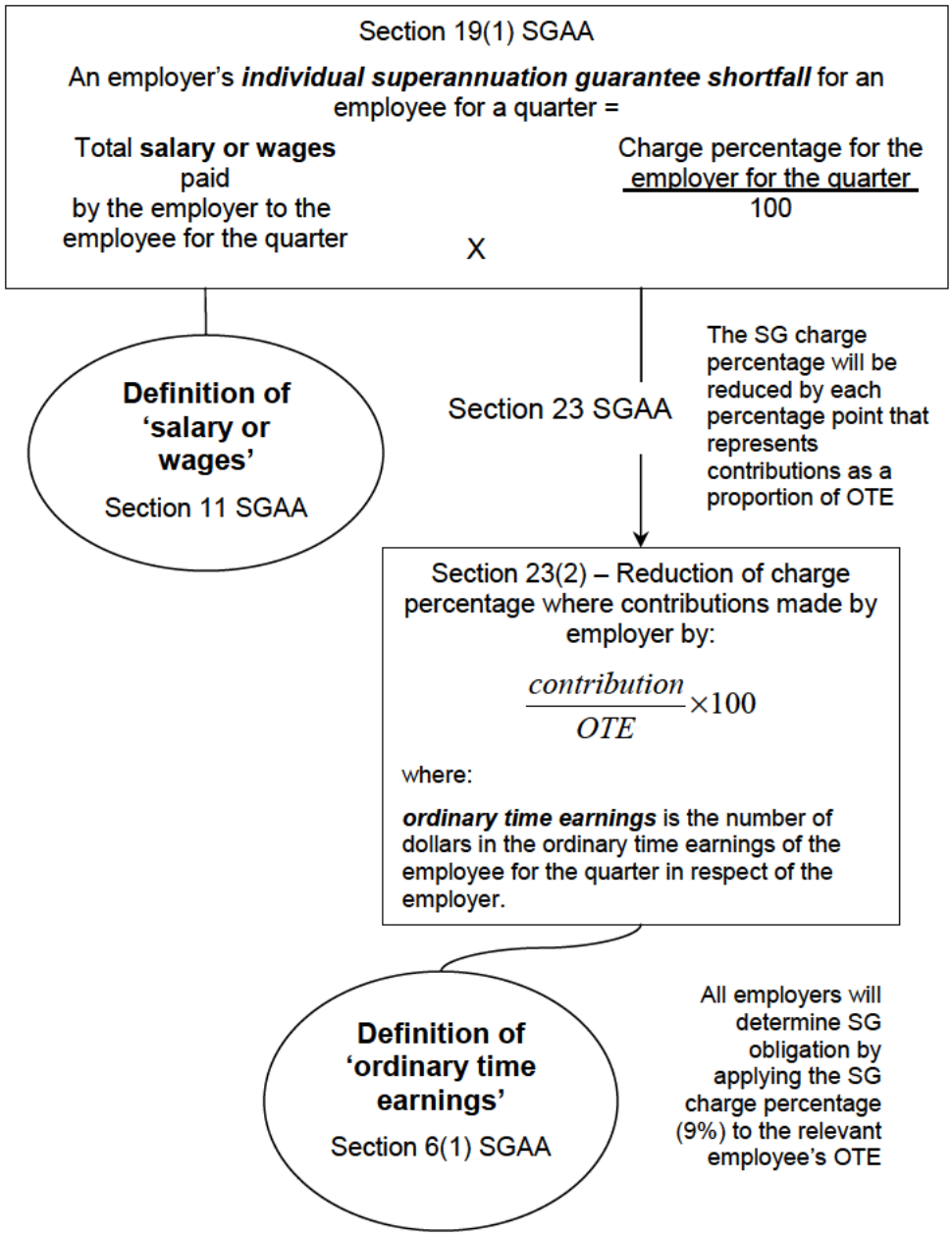
[8] See Explanatory Memorandum to the Superannuation Guarantee (Administration) Bill 1992.
[9] See Explanatory Memorandum to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004.
[10] See Explanatory Memorandum to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004.

171. However, in accordance with subsection 22(2), the charge percentage is reduced to the extent that the employer has made contributions to a defined benefit superannuation scheme for the benefit of that employee.

172. Subsection 23(2) provides for a reduction of the charge percentage according to a formula where the employer has made contributions to an RSA or to a complying superannuation fund other than a defined benefit superannuation scheme for the benefit of that employee. One element of that formula is the percentage of the contribution to the fund as a proportion of the total amount of the employee's 'ordinary time earnings.'

173. The meaning of the phrase 'ordinary time earnings' is therefore relevant in determining whether an employer has satisfied their superannuation guarantee obligations in relation to an eligible employee. Conversely, the meaning of 'salary or wages' is relevant to calculating the individual superannuation guarantee shortfall in a quarter where the employer has not provided, for the benefit of that eligible employee, superannuation contributions to the prescribed percentage of that employee's 'ordinary time earnings'.

174. The interrelationship between OTE and 'salary or wages' in the context of the SGAA supports the views expressed in paragraphs 7 to 9 of this draft Ruling. The following diagram illustrates how the concepts of 'salary or wages' and 'ordinary time earnings' interrelate in the superannuation guarantee scheme in relation to an individual superannuation guarantee shortfall calculation.



Part A – Ordinary time earnings

Earnings in respect of ordinary hours of work

Earnings

175. '*Earnings*' is not defined in the SGAA. Accordingly, it takes its ordinary meaning. *Earnings* is defined in the *Shorter Oxford English Dictionary* as:

> that which is earned by labour, or invested capital; the fact of deserving; what one deserves; gain, profit.

176. The ordinary meaning of 'earnings' is 'money gained as the result of labour, work or services.'[11] A person earns 'whatever he receives by way of remuneration for the services he gives'.[12]

177. In the context of the SGAA, the word 'earnings' in the expression 'earnings in respect of ordinary hours of work' is used as a descriptor of remuneration received by a person who is engaged in the performance of personal services in the capacity of an employee. The word is used in the definition of OTE in subsection 6(1) 'in relation to an employee'. It is also clear from the definition that the component earnings that are either included or excluded in OTE have to be earnings 'made to the employee'.

178. Further, the definition of OTE is relevant in subsection 23(2) for the purpose of reducing the charge percentage where the employer makes superannuation contributions for the benefit of their employee. Accordingly, the term 'earnings' is circumscribed in its ambit so as to embrace only amounts that are paid as 'salary or wages' by the employer to their employee.

179. As the OTE definition restricts 'earnings' to 'earnings in respect of ordinary hours of work', it necessarily follows that OTE in relation to an employee is either a smaller sum, or, alternatively, a sum no larger than the salary or wages paid to that employee. This view is consistent with the overall purpose of the superannuation guarantee scheme, which is that of ensuring the provision of the minimum level of superannuation support to the employee by their employer. This would avoid the obligation that would otherwise arise on the part of the employer to pay to the Tax Office any shortfall which is calculated by reference to the salary or wages paid to the employee.

In respect of

180. The expression 'in respect of' is capable of having a wide meaning, denoting a relationship or connection between two subject matters. However, the expression has to be given a meaning that depends on the context in which it is used.[13]

181. The High Court in *Technical Products Pty Ltd v. State Government Insurance Office (QLD)* [14] considered the expression as requiring 'some discernible rational link' between the two subject matters.

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[11] *Adelaide Fruit & Produce Exchange Co Ltd v. Deputy Commissioner for Taxation (SA)* [1932] SASR 116; (1932) 2 ATD 1.
[12] *Midland Railway Co v. Sharpe* [1904] AC 349.
[13] *Workers Compensation Board of Queensland v. Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654; *Federal Commissioner of Taxation v. Holmes* (1995) 58 FCR 151; 95 ATC 4476; (1995) 31 ATR 71.
[14] (1989) 167 CLR 45 at 47-48.

182. In *Smith v. Commissioner of Taxation of the Commonwealth of Australia*[15] (*Smith*) the High Court dealt with the expression used in former section 26(e) of the *Income Tax Assessment Act 1936* (ITAA 1936). The question before the Court was whether a sum of money paid to the appellant by reason of the successful completion of his course of study was a benefit given to him in respect of, or for, or in relation (directly or indirectly) to any employment of him. Brennan J said:

> … Liability to tax under s 26(e) does not arise merely because the taxpayer is an employee of or has rendered services to the person from whom the allowance is received: e.g., a father's employment of a child does not necessarily make the value of a gift from the father to the child part of the child's assessable income. It is necessary that there be some connexion between the payment of an allowance to the taxpayer and either his employment or services he has rendered.[16]

183. In *Smith*, Brennan J considered that 'some causal relationship' is required between the payment and either his employment or services he had rendered as an employee. His Honour then said:

> The difficult problem which arises under s 26(e) is to identify the nature and degree of the relationship, if any, between the allowing, giving or granting to a taxpayer of an allowance, etc. on the one hand and the taxpayer's employment or the services rendered by him on the other. The difficulty is the greater when the allowance is paid not in discharge of a legal obligation but voluntarily. There is no doubt that voluntary payments may fall within s 26(e): see per McTiernan J in Dixon *[*51*]* . If an allowance is paid under a contract between the payer and the taxpayer, the consideration for the payment is usually decisive of the matter 'in respect of, or for or in relation ... to' which the allowance is paid, but if the allowance is paid voluntarily, it is necessary to inquire 'how and why it came about that the gift was made' (to adopt the words of *Kitto J*. in *The Squatting Investment Co. Ltd. v. F.C.T.* at p.628*)*.[17]

184. Brennan J acknowledged in *Smith* that where an allowance is paid voluntarily by an employer to an employee, the ascertainment of any relationship between the payment and the employment raises evidentiary problems. His Honour went on to say:

> … If the motive of the employer is communicated to the employee or is known by him, the common understanding of the motive for the payment may be cogent evidence of 'how and why it came about that the gift was made'. Again, there may be evidence of external indicia tending to show the reason for (or cause of) the payment.[18]

[15] *Smith* (1987) 164 CLR 513; 87 ATC 4883; (1987) 19 ATR 274.
[16] *Smith* (1987) 164 CLR 513 at 520-521; 87 ATC 4883 at 4887.
[17] *Smith* (1987) 164 CLR 513 at 523; 87 ATC 4883 at 4888.
[18] *Smith* (1987) 164 CLR 513 at 524, 87 ATC 4883 at 4889.

185. After recognising that difficult questions of fact will frequently be involved in *Smith*, Brennan J summed up what he considered to be the appropriate principles governing the operation of former section 26(e):

> …if the employment (or some aspect of the employment) is the reason or one of the reasons why the allowance is paid, the allowance falls within section 26(e). A reason which is an insubstantial cause of the payment is immaterial…[19]

186. In *Prushka Fast Debt Recovery Pty Ltd v. Commissioner of Taxation* [2008] AATA 762, Tribunal Member Fice relied on *Smith* and *Technical Products Pty Ltd* in construing the meaning of the expression 'in respect of' used in the OTE definition.

187. It is considered that earnings are 'in respect of' ordinary hours of work where they are paid for, or by reason of, or in connection with, the provision of services or attendance during ordinary hours of work of the employee. There is a sufficient link between the earnings and ordinary hours of work if the provision of services or attendance constitutes one of the reasons for the payments, provided it is not an incidental reason. It is necessary to have regard to the substance of the payment by reference to the facts of each case, and not the label that has been ascribed to it.

The meaning of 'ordinary hours of work'

188. In *Quest Personnel Temping Pty Ltd v. Commissioner Taxation*[20] (*Quest*), the Federal Court considered the meaning of the expression 'ordinary hours of work' in connection with the definition of OTE in the SGAA, which was the question raised on appeal from a decision of the AAT. The Court was of the view that the expression 'ordinary hours of work' has to be construed in the context of the SGAA and in a manner that promotes the underlying object or purpose of the Act, which is that of providing a framework under which employers are encouraged to provide superannuation support for the benefit of their employees. It noted that the SGAA is not a piece of ordinary taxation legislation designed for the purpose of the collection of revenue. Accordingly, whilst a strict construction might be considered appropriate for ordinary taxation legislation, the view was taken that a construction that favours the underlying object of the SGAA is preferred to any that does not.

189. As the Court noted in *Quest,* the definition of OTE in section 6 is designed to cover all situations of employment.

[19] *Smith* (1987) 164 CLR 513 at 526-527, 87 ATC 4883 at 4890.
[20] (2002) 116 FCR 338; 2002 ATC 4116; (2002) 49 ATR 84.

190. In concluding that the expression 'ordinary hours of work' in relation to an employee are the normal, regular, customary or usual hours worked by that employee, the Court relied for support on the decision of the High Court in *Kezich v. Leighton Contractors Pty Ltd*[21] (*Kezich*) which construed the expression 'the ordinary hours he would have worked' in legislation dealing with workers compensation.

> What has to be determined is the meaning that those words have in the Act and since the words 'ordinary hours' are common English words they should, in accordance with established principles of statutory construction, be understood in their natural meaning unless the context otherwise requires.
>
> The word 'ordinary' means 'regular, normal, customary, usual'. A man's 'ordinary hours' of work are the hours during which it is usual for him to work. There is nothing in the expression 'ordinary hours' that connotes payment at any particular rate, and to understand the words as meaning 'hours during which work is done for which overtime is not paid' would be to place upon them a meaning which they simply do not bear. The expression 'the ordinary hours he would have worked' in my opinion means the same as 'the hours he would ordinarily have worked' and it is of course no reason to depart from the proper meaning of the words because the same meaning could have been achieved by a different form of words; in the collocations to which I have just referred the use of the adjective instead of an adverb does not change the sense of the expression.
>
> …. As the clause stands, what has to be determined is what were the hours the workman would ordinarily have worked had he not been incapacitated. The workman is then to be paid the wage he would ordinarily have received for working those hours. The clause is not concerned with the question whether the 'ordinary wage' included something extra for overtime, but solely with the question what was ordinary for the particular worker concerned.[22]

191. In *Kezich,* the appellant's employment was subject to an industrial award which, inter alia, provided that 'the ordinary working hours shall be 40 in a week to be worked in five days'. The award fixed the rates of pay which were to be paid for these 'ordinary working hours', and provided for overtime payment at an increased rate for work in excess of the 40 hours in a week. In fact, he was employed on the basis that he would normally work 60 hours per week, comprising 10 hours six days a week. Under the *Workers' Compensation Act 1912-1973* (WA), compensation was payable upon total incapacity equal to 'weekly earnings' of the worker, which was defined in the Act as the amount the worker would have received for ordinary hours he would have worked, if he were not incapacitated for work as a result of the injury.

[21] (1974) 131 CLR 362.
[22] *Kezich* (1974) 131 CLR 362 at 364-365.

192. The Court was unanimous in its view that the words 'ordinary hours' contained in the relevant Act was to be given its meaning by that Act and not the meaning given in the industrial award. Gibbs J stated:

> The Act deals with the compensation payable to workers generally; it is not confined in its operation to any particular trade…It would not be legitimate to construe the schedule by placing upon the words 'ordinary hours' the meaning which they may happen to bear in an industrial award governing employment of a particular kind. The meaning of the Act cannot be determined by reference to the provisions of the Building Construction Employees and Builders' Labourers' Award, 1973….What has to be determined is the meaning that those words have in the Act and since the words 'ordinary hours' are common English words they should, in accordance with established principles of statutory construction, be understood in their natural meaning unless the context otherwise requires.[23]
>
> It was found as a fact that the appellant normally worked 60 hours per week in accordance with the terms of his engagement so that the ordinary hours he would have worked, had he not been incapacitated, was 60 hours of work.

193. The Court in *Quest* also referred to the judgment of the High Court in *Catlow v. Accident Compensation Commission*[24] (*Catlow*) which considered the construction of the phrase 'worker's normal number of hours per week' in legislation dealing with worker's compensation. The appellant worked 36 ordinary hours per week under the terms of an industrial agreement but agreed to work such additional hours as was required by the employer for which he was remunerated at overtime rates. The appellant worked a considerable amount of overtime by working longer days, working Saturdays and on some of his rostered days off as was required by the employer. By majority, the Court held that the normal number of hours was the time fixed by the relevant award, industrial agreement or contract as the standard hours.

> 'Industrial awards and agreements usually state the number of ordinary working hours in each day and week and provide for the payment of overtime and penalty rates of pay for hours worked outside those ordinary hours... Thus, in the present case the industrial agreement under which the appellant was employed provided that the ordinary hours of work should be an average of thirty-six per week which were to be worked in the manner specified 'without payment of overtime': cl. 3.
>
> Against the industrial background of awards and agreements fixing a number of ordinary hours per week, it seems natural to read the expression 'calculated at the worker's ordinary time rate of pay for the worker's normal number of hours per week' as a reference to the ordinary time rate of pay for the worker's standard or ordinary hours per week as fixed by award, agreement or contract.[25]

[23] (1974) 131 CLR 362 at 363.
[24] (1989) 167 CLR 543; [1989] HCA 43.
[25] *Catlow* (1989) 167 CLR 543 at 560-561.

194. Grey J in *Quest*, sought to explain the apparent distinction between the decision in *Catlow* and that in *Kezich* in the following terms:

> The distinction between these two cases appears to rest upon the proposition that the fixing by collective means of standard hours of work, coupled with a provision for remuneration at a higher rate of hours worked beyond those standard hours, will usually lead to the conclusion that the standard hours fixed are to be considered as 'normal hours' or, perhaps, 'ordinary hours'.[26]

195. The decision in *Kezich* demonstrated a case where the working of hours beyond the fixed standard hours that are prescribed in the award or industrial agreement:

> …becomes so regular, normal, customary or usual that the additional hours are to be regarded as ordinary hours for a particular employee. This is so notwithstanding that the additional hours are remunerated at overtime rates or penalty rates.[27]

196. *Kezich* is therefore a case where the employee, notwithstanding the terms of the award, was engaged upon the basis that he would normally work a span of hours different from the standard hours contemplated by the award and those were the hours actually worked regularly.

197. Both the decisions by the High Court in *Kezich* and *Catlow* were followed by the decision in *Australian Communication Exchange Ltd v. Deputy Commissioner of Taxation*[28] (*ACE*). The taxpayer company employed casuals under a state clerical award which obliged it to contribute 3% of the employee's ordinary time earnings to superannuation. The Court had to construe the meaning of 'ordinary time earnings' in the award itself, which was the earnings base that could be used under former section 14 by the employer for calculating the superannuation contributions to be made on behalf of the employees for superannuation guarantee purposes. *ACE* is therefore distinguishable as the Court was not required to construe the definition of OTE in the SGAA.[29]

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[26] *Quest* (2002) 116 FCR 338; 2002 ATC 4116; (2002) 49 ATR 84 at 26.
[27] *Quest* (2002) 116 FCR 338; 2002 ATC 4116; (2002) 49 ATR 84 at 27.
[28] [2003] HCA 55; 2003 ATC 4894; (2003) 53 ATR 834.
[29] Until the amendments to the SGAA effective from 1July 2008 introduced by *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004,* OTE was the default earnings base. As from 1 July 2008, an earnings base specified in any award or industrial agreement can no longer be used by employers to determine their superannuation guarantee obligations.

198. In consideration of the judicial views held in *Quest* as to the meaning of the expression 'ordinary hours of work' for purposes of the SGAA and the reasoning in *Catlow* and *Kezich* which involved employment under awards and agreements with the employer, what are an employee's 'ordinary hours of work' for superannuation guarantee purposes has to have regard to whether the employee is employed in accordance with the terms and conditions of the award, the terms of his employment contract (for example a workplace agreement), if any, and the hours he regularly works. The 2004 amendments removed any deference in the SGAA to provisions prescribed in awards, superannuation schemes, occupational superannuation arrangements or a Commonwealth, State or Territory law in relation to the provision of superannuation support.[30]

199. The amendments proceeded on the basis 'that persons on similar overall levels of remuneration should receive similar levels of compulsory employer superannuation contributions'.[31] Equality for employees was considered to be of paramount importance.[32]

200. In the context of an employment situation that is regulated by an award or an industrial agreement, where it is usual for the award or agreement to fix the standard hours of work and the ordinary rate of pay, together with a provision for higher rates of pay for hours worked beyond the standard hours, the standard working hours prescribed are the normal, regular, customary, usual hours of work of an employee who works in accordance with the provisions of that award or industrial agreement. Those standard hours prescribed are the 'ordinary hours of work' in relation to that employee for superannuation guarantee purposes.

201. In a case where, notwithstanding the provisions of an award or industrial agreement, the employee has agreed under a workplace agreement to work hours in excess of 38 hours per week as his standard working hours, and those hours are the hours actually worked, those hours would be the usual, regular, customary hours of work in relation to that employee. An example is where the agreement requires the employee to work an average of 42 hours per week under a 12 hour continuous shift roster, with standard 4 shifts on, 4 shifts off. The workplace agreement may still define the ordinary hours to be 38 hours per week, specify the hours on the roster that are ordinary hours and those that are overtime hours, and/or provide for penalty rates for overtime work. However, these features do not affect the conclusion that the hours customarily worked by the employee are an average of 42 hours per week. For superannuation guarantee purposes, the 'ordinary hours of work' are 42 hours per week.

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[30] Compare *Australian Communication Exchange Ltd v. Deputy Commissioner of* Taxation [2003] HCA 55; 2003 ATC 4894; (2003) 53 ATR 834, in particular at paragraph 10 per McHugh, Gummow, Callinan and Heydon JJ.

[31] See paragraph 4.21 of the Explanatory Memorandum to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004.

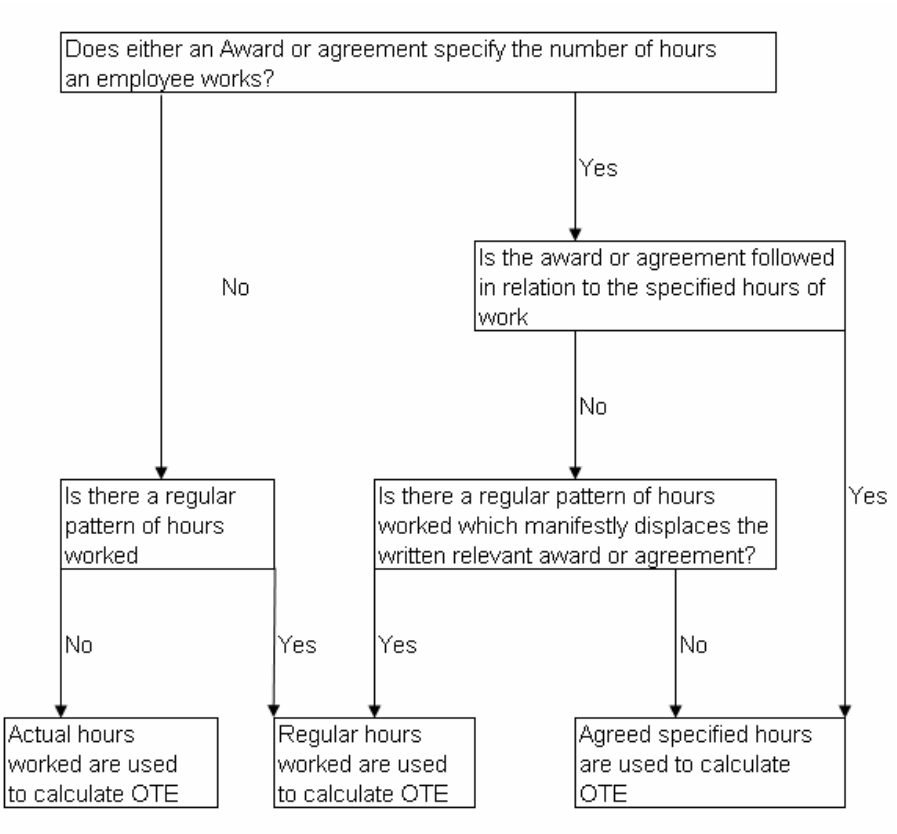
[32] See paragraph 4.47 of the Explanatory Memorandum to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004.

202. As the decision in *Kezich* demonstrates, in a case where, on an objective basis, it is manifestly evident from the regular work pattern of an employee that the span of hours actually worked are consistently different from the standard working hours contemplated in the award, industrial agreement or workplace agreement, the employee's ordinary hours of work for purposes of the SGAA are those hours actually worked as established by that regular work pattern. It is considered that in this case the factual circumstances indicate an implied variation of the employee's standard working hours from those originally agreed upon.[33]

203. An employee may not be offered fixed standard hours of work. For example, he or she may be offered only a minimum number of hours of work or a minimum number of shifts in a period, or works only when called upon to do so. The hours actually worked may therefore vary from time to time. The hours actually worked may in fact be more than the minimum number of hours of work initially offered. This was the case with the temporary employees engaged by the employer in *Quest* who habitually worked hours that were more than the minimum hours offered. The employer in that decision tended for contracts to provide skilled data entry operators and employed temporary employees to fulfil each contract, offering different employees minimum working hours that varied from 3 standard shifts each week, to 5 standard shifts each fortnight, a standard 7 hour 36 minutes per rostered day, to an 8 am to 4 pm day. The Court concluded the actual hours worked were the 'ordinary hours of work' for superannuation guarantee purposes if the normal, regular, customary or usual hours of an employee were more that the minimum specified in their offer of employment.

[33] *Abbott v. Women's & Children's Hospital Inc* (2003) 86 SASR 1; [2003] SASC 145 at paragraph 34.

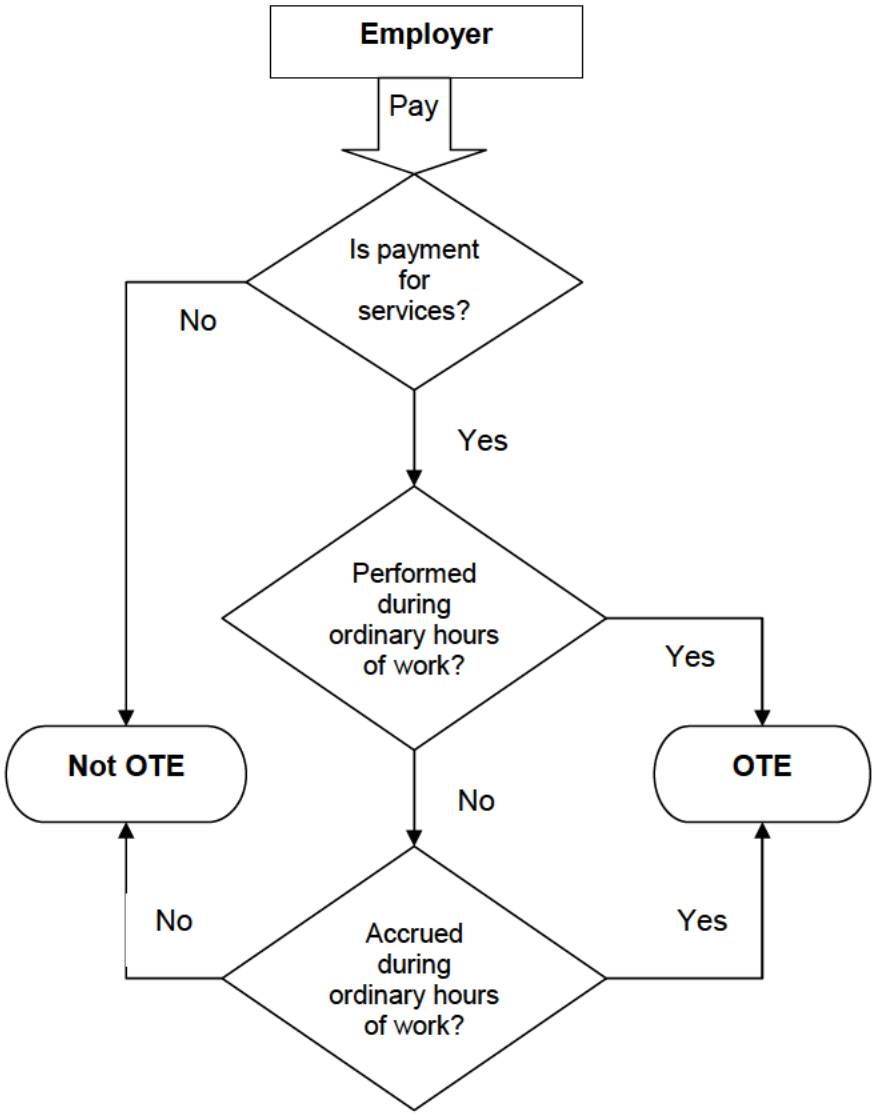
204. The following flowchart illustrates, in broad terms, the steps required to ascertain the ordinary hours of work for a particular employee[34] for the purposes of the SGAA, as explained in this draft Ruling.



[34] This diagram does not apply to an employee paid by piece rates method.

Identifying 'earnings in respect of ordinary hours of work'

205. To assist in determining whether a payment falls within the expression 'earnings in respect of ordinary hours of work', this flow chart illustrates the principles provided in paragraph 26 of this draft Ruling (ignoring lump sum payments):



Over-award payments

206. The term 'over-award payments' is not defined in the SGAA and therefore takes its ordinary meaning. The *Macquarie Dictionary* defines 'over-award' as:

> Of or relating to a rate of pay which is higher than that awarded by an industrial tribunal for a particular work classification.

207. An over-award payment is a payment made above the minimum rate specified in the relevant award as part of a worker's remuneration. This type of payment is specifically included in the definition of OTE in subsection 6(1).

Shift-loading

208. The *Macquarie Dictionary* defines 'shift loading' as:

> An allowance paid to employees on shiftwork as compensation for their having to work outside the usual span of hours fixed for day workers.

209. A payment in addition to the ordinary rate of pay made to a shift worker by reason of compensation for working outside the span of hours which is designated for day workers, for example, early morning, late at night, weekends or public holidays, is a shift-loading for the purposes of the SGAA. Such payments are therefore included in the definition of OTE in subsection 6(1).

Commission

210. Tribunal Member Fice in *Prushka Fast Debt Recovery Pty Ltd v. Commissioner of Taxation* [2008] AATA 762 considered the meaning of commission as follows:

> The word *commission* is not defined in the SGA Act. Its ordinary meaning, in the context in which it is used in the SGA Act is: *pro-rata remuneration for work done as agent* (the Shorter Oxford English Dictionary). I accept therefore that payments made to an employee on the basis of percentage of sales could properly be described as a commission.

211. A commission is any payment made to an employee on the basis of agreed performance criteria (for example, a payment based on a percentage of sales). These payments are specifically included in the definition of OTE in subsection 6(1).

Maximum contribution base

212. The *ordinary time earnings*, in relation to an employee, for a quarter is the maximum contribution base, if the total ascertained in accordance with paragraph (a) of the definition of *ordinary time earnings* in subsection 6(1) is greater than the maximum contribution base for the quarter.

213. As such, the maximum amount that an employer is required to contribute on behalf of an employee for a quarter, is the maximum contribution base, provided this contribution is made prior to the cut-off date for the relevant quarter.

Part B – Salary or wages

Ordinary meaning of salary or wages

214. At common law, 'salary or wages' is generally accepted as constituting remuneration paid to employees for their services as employees. That is, it presupposes an employment relationship. The common law meaning of 'salary or wages' turns also on common law concepts of employment. Whether a payment satisfies the common law meaning of 'salary or wages' must be determined by reference to the individual circumstances of each case.

215. 'Salary' is a fixed amount paid regularly to an employee as remuneration for work done. It is sometimes used in contradistinction to 'wage', which may vary in amount from pay period to pay period according to the type or amount of work done, depending on the type of employment. Usually, however, 'salary' and 'wage' are used interchangeably. The *Macquarie Dictionary* defines 'salary' as:

> a fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical, or menial kind.

216. The *Macquarie Dictionary* defines 'wages' as:

> Wage (*often plural*) that which is paid for work or services, as by the day or week; hire; pay.

217. In *Mutual Acceptance Co Ltd v. Federal Commissioner of Taxation*[35] (*Mutual Acceptance*) the High Court construed the ordinary meaning of the terms 'salary' and 'wages'. Dixon J explained the meaning of the terms:[36]

> 'wages' and 'salary,' refer to ordinary forms of remuneration for work done.

218. Further, in *Mutual Acceptance* Latham CJ stated:[37]

> wages are…payments made to an employee in connection with and by reason of his service as an employee or in respect of some incident of his service. Thus a merely personal gift by an employer to a person who happened to be an employee would not be included within 'wages,' though a bonus paid to employees because they were employees would be so included.
>
> Further, the payment must be made 'to any employee.' if money is given to an employee in order to enable him to make a payment to a third person on behalf of his employer, such money cannot be regarded as paid to the employee…Money is paid to an employee only when he, after receiving it, becomes the owner of the money, having the complete disposition and control of it. Money which is held by an employee on behalf of his employer cannot be regarded as paid to the employee within the meaning of the definition.

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[35] (1944) 69 CLR 389; (1944) 7 ATD 506.
[36] *Mutual Acceptance* (1944) 69 CLR 389 at 403; (1944) 7 ATD 506.
[37] *Mutual Acceptance* (1944) 69 CLR 389 at 396; (1944) 7 ATD 506.

219. 'Salary or wages' as defined in section 11 specifically excludes remuneration under a contract for the employment of a person, for not more than 30 hours per week, in work that is wholly or principally of a private or domestic nature under subsection 11(2). The SGAA does not define the terms 'domestic' and 'private' and so these terms take their ordinary meanings. Work of a domestic or private nature means work relating personally to the individual making payment for the work or to the person's home, household affairs or family organisation.

220. Fringe benefits as defined in the FBTAA are excluded under subsection 11(3) of the SGAA.

221. Remuneration of a person who holds office as a member of a local government council is excluded.

Commission

222. Commission payments are specifically included as 'salary or wages' in the SGAA. A commission includes any payment made to an employee on the basis of performance criteria, for example, a payment based on percentage of sales.

Payment for performance of duties as a member of the executive body of a body corporate

223. Payments such as director's fees to a member of the executive body of a body corporate are included as 'salary or wages' under paragraph 11(1)(b).

Payments under a contract referred to in subsection 12(3) made in respect of the labour of the person working under the contract

224. Under subsection 12(3) a person who works under a contract that is 'wholly or principally for the person's labour' is an employee of the other party to the contract. Payments made in respect of this labour are therefore 'salary or wages' for the purposes of the SGAA. Subsection 12(3) has to be considered where there is no common law employment relationship or where there is doubt as to the common law status of an individual.

225. Where an individual who has been engaged under a contract, and the subsequent conduct of the parties indicates that:

- the individual is renumerated wholly or principally for their personal labour and skills;
- the individual performs the contractual work personally (there is no right of delegation); and

- the individual is not paid to achieve a result,[38]

then the contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under subsection 12(3).[39]

Remuneration of a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory

226. Members of the Commonwealth House of Representatives and of the Senate, members of State Legislative Assemblies and Legislative Councils and members of the Northern Territory and Australian Capital Territory Legislative Assemblies are not common law employees because they have no identifiable employer.[40] None of the usual indicators of an employer/employee relationship, such as an express or implied contract of employment or an ability to direct activities or exercise control over the employee, apply to members.

227. However, the members in question are specifically incorporated into the definition of employee in the SGAA by virtue of subsections 12(4) to 12(7). Payments to these persons would be 'salary or wages' under the extended definition in paragraph 11(1)(c).

Payments to a person for work referred to in subsection 12(8)

228. The common law meaning of 'salary or wages' is expanded in paragraph 11(1)(d) for the purposes of the SGAA to include payments made to artists, musicians and sports persons. Payments are 'salary or wages' if the payment is made to a person for:

- performing or presenting or participating in the performance or presentation of any music, play dance, entertainment, sport, display or promotional activity;
- providing services in connection with these activities;
- performing services in or in connection with, the making of any film, tape, disc or of any television or radio broadcast.

[38] See paragraph 78 of the SGR 2005/1.
[39] The scope and operation of subsection 12(3) is discussed in more detail in paragraphs 64 to 78 of the SGR 2005/1.
[40] See, for example, *State Chamber of Commerce and Industry v. Commonwealth of Australia (Fringe Benefits Tax Case (No. 2))* (1987) 163 CLR 329; 87 ATC 4745; (1987) 19 ATR 103. See also paragraph 36 of Taxation Ruling TR 1999/10 Income tax and fringe benefits tax: Members of Parliament – allowances, reimbursements, donations and gifts, benefits, deductions and recoupments.

229. In order to fall within the scope of paragraph 12(8)(a), the payment made must be referable to the person's participation or performance in the activity, regardless of the result achieved from that participation. This causal link is apparent in the requirement that the person is 'paid to perform'. Further, under the terms of paragraph 12(8)(a), the person is required to actively participate in the activity and that participation must involve the exercise of the person's intellectual, artistic, musical, physical or other personal skills.

230. Therefore, for example, a sportsperson paid 'appearance fees' and similar payments to participate in sporting activity is an employee of the payer under the SGAA. However, a sportsperson paid 'prize money' would not be an employee of the payer because prize money is not paid to make the sportsperson participate in a sporting activity. Prize money is paid for achieving a result, and only becomes due once a result has been produced. Therefore in the SGAA appearance fees and similar payments would be 'salary or wages', but prize money or other payments made for achieving a particular result are not.[41]

Remuneration of a person referred to in subsections 12(9) or 12(10)

231. The SGAA includes as 'salary or wages' the remuneration of:

- members of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory (paragraph 11(1)(c));
- persons in the service of, or holding an appointment, office or position with the Commonwealth, a State or a Territory (including members of the defence force and the police forces) (paragraph 11(1)(e));
- members of eligible local governing bodies.[42]

232. The term 'remuneration' is not defined in the SGAA. The *Butterworths Australian Legal Dictionary* defines remuneration as 'payment, recompense or reward for work'. The courts have held that remuneration is a term which denotes a broader concept than 'salary or wages'.[43]

[41] See Superannuation Guarantee Ruling SGR 2008/D1.
[42] See Taxation Ruling TR 2002/21 Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses or allowances paid to office holders for guidance in determining whether a person falls into one of these categories.
[43] See the decision of Australian Industrial Relations Commission in *Rofin Australia Pty Limited v. Newton* (1997) 78 IR 78 which was made in the context of Federal unfair dismissal legislation.

233. The notion of office holder's remuneration being a 'salary' is affirmed in Halsbury's Law of England:[44]

> **Office-holders.** The categorisation of an individual as an office-holder tends to be of more significance in the law relating to income taxation than in employment law. While it is true that in the case of certain major offices the individual's status as an office-holder may mean that he is not an employee, in most cases this will not be so and there will be nothing to prevent the ordinary definition of 'employee' from being satisfied. Even if the office-holder does not qualify as an employee, there may still be aspects of employment law applicable to him, particularly in relation to the payment of wages, since the remuneration of a modern office-holder is likely to be construed as an ordinary salary for performing the duties of the office, not as the archaic form of an honorarium for filling an office...

234. As originally enacted, a person who held an office as a member of a local government council was regarded as an employee of the council and the payments they received (allowances and sitting or member fees) were regarded as 'salary or wages' for SGAA purposes. However, amendments were made to the SGAA by the *Taxation Laws Amendment Act (No. 2) 1995* to exclude local government councillors and the payments they receive in the course of their duties from the definition of 'employee' and 'salary or wages' contained in the SGAA. Accordingly, remuneration received by a local government councillor will not be 'salary or wages' under section 11 of the SGAA.

235. This exemption does not apply to members of 'eligible local governing bodies'. Pursuant to subsection 12(10), a person who is a member of an 'eligible local governing body' is an employee for the purposes of the SGAA.[45] The remuneration they receive is included in the definition of 'salary or wages'.[46]

Workers Compensation and other payments made on behalf of an employer

236. Workers compensation payments, including top-up payments received by an injured employee where the employee performs work or is required to attend work is considered 'salary or wages'. This is despite the fact the workers compensation may be paid by another party such as an insurance company rather than the employer.

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[44] Halsbury's Laws of England Volume 16(1A)(1)(i) paragraph 8.

[45] An eligible local governing body is a local governing body that has made a unanimous resolution that the remuneration of its members be subject to withholding under paragraph 12-45(1)(e) of Schedule 1 to the *Taxation Administration Act 1953* (about Pay As You Go Withholding).

[46] Paragraph 11(1)(e).

237. Under subsection 6(3), payments of salary or wages to an employee can be made by another party on behalf of the employer. The payment is also considered 'salary or wages' if an employee is directed by the employer to perform services for another party, or is only required to attend a workplace. If the employer retains control of an employee by way of an employment contract, then the employer retains their SG obligations in respect of that employee.[47]

238. However, workers compensation payments, including top-up payments received by an injured employee who does not work or is not required to attend work is not considered 'salary or wages'. In these cases the employee has usually terminated employment and so the payments would be categorised as compensation for loss of work rather than 'salary or wages'.

239. Workers Compensation and other payments made by an employer or on behalf of an employer will form part of an employee's OTE if it is paid in respect of ordinary hours of work.

Part C – Payment types which are relevant to both 'ordinary time earnings' and 'salary or wages'

Allowances and reimbursements

240. An employer may make payments to an employee that are in addition to their pay. A payment of a definite predetermined amount may be made to the employee to cover an estimated expense in the course of providing their services. The allowance is given with the expectation that it will be fully expended by the employee in the course of providing services; however the employee has the discretion whether or not to expend the allowance.

241. An allowance can also be paid to compensate for particular working conditions, for example height, dust or danger. These types of allowances are not expended in the course of the employee's work, but rather are paid as compensation for the conditions applying to the job.

242. An allowance which is paid to a worker for having to work outside the usual span of time for day workers is specifically included as shift-loading for the purposes of the definition of OTE.

243. Section 11 does not expressly include in its definition of 'salary or wages' the term 'allowance'. Therefore, where an employer pays an allowance to an employee, it will only come within section 11 if it falls within the ordinary meaning of salary or wages.

[47] The Tax Office's views on the SGAA treatment of tripartite relationships are set out in SGR 2005/2 – see paragraphs 66 to 68.

244. A relevant authority that addresses the question of whether allowances fall within the ordinary meaning of 'salary or wages' is the High Court decision in *Mutual Acceptance.* In that case, the High Court considered whether a fixed weekly payment to employees who used their own motor vehicles in the course of their duties was an 'allowance' and therefore 'wages' as defined in the then Commonwealth pay-roll tax legislation.[48] The payment represented partial compensation for the motor vehicle expenses likely to be incurred by those employees.

245. In discussing what may be considered as the ordinary meaning of an 'allowance' is, Latham CJ in *Mutual Acceptance* stated as follows:[49]

> When the word is used in connection with the relation of employer and employee it means in my opinion a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of that service.

246. Importantly, and of most relevance for the purposes of section 11, Latham CJ went on to state that allowances that are paid as compensation for unusual conditions of services:[50]

> … represents higher wages paid on account of special conditions, *and may fairly be described as part of wages in the ordinary sense* (emphasis added).

247. The High Court, by majority, held that the car allowance was given to the employee as part of their remuneration for their services and their entitlement to the allowance accrued by reason of employment.

248. *Mutual Acceptance* was relied upon in *Road & Traffic Authority of NSW v. Federal Commissioner of Taxation*[51] where the employees received fare allowances under the relevant award for travel to and from work. They were paid regardless of whether or not the employee incurred the expenditure. The question for decision by the court was whether the allowances were expense payment benefits subject to fringe benefits tax or were within the definition of 'salary or wages' in former subsection 221A(1) of the ITAA 1936.

249. Justice Hill considered the allowance as additional compensation to the employees for their services. There was no need that the remuneration relate to specific services rendered, as long as the payments in question were given as remuneration for services generally. The fare allowances had no relationship to the actual cost of travel incurred by the employees. Accordingly, they were not reimbursements. The fare allowances were held to be 'salary or wages.'

250. Allowances paid to an employee in respect of 'ordinary hours of work' are included in OTE and are 'salary or wages' for the purposes of section 11 of the SGAA, unless they are fringe benefits under the FBTAA, for example, a living away from home allowance.

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[48] The definition of 'wages' in that Act expressly included the term 'allowance' unlike the SGAA.
[49] (1944) 69 CLR 389 at 396-397.
[50] (1944) 69 CLR 389 at 397.
[51] (1993) 43 FCR 223; 93 ATC 4508; (1993) 26 ATR 76.

251. Allowances are distinguished from expense allowances dealt with under paragraph 252 of this draft Ruling.

Expense allowances

252. An expense allowance is an allowance which is paid with the reasonable expectation that the money will be fully expended by the employee in the course of providing their services. The expense allowance is not given for the services of the employee, but rather in recognition of the expenditure that the employee will incur in the course of providing their services. An example is a car allowance paid to real estate agents. As this type of allowance does not fall within the ordinary meaning of 'salary or wages', it does not form part of 'salary or wages' for the purposes of section 11.

Military allowances

253. Military allowances are granted because of the particular conditions that apply to the job, including long working hours, loss of leisure time and restriction of leisure activities, poor living conditions and extra expenses incurred as a result of being deployed on duty. Such allowances are also included in OTE and in salary or wages for superannuation guarantee purposes.

Reimbursements

254. A payment is a reimbursement if the employee is compensated exactly for all or an agreed part of an expense already incurred, although not necessarily disbursed. With reimbursements in general, the employer considers the expense to be its own and the employee incurs the expenditure on behalf of the employer. A requirement that the employee vouch for expenses lends weight to a presumption that a payment is a reimbursement rather than an allowance.

Note: where the reimbursement relates to the use of the employee's car, the Commissioner will treat a payment calculated at a set rate per kilometre as a reimbursement if the expense amount is calculated on a reasonable basis. For example, calculations made with reference to the statutory formula in the income tax laws would be considered reasonable.

255. An employer may make a payment in advance to an employee to enable the employee to expend an amount of money. Where the employee is required to account for any unspent monies to the employer, the payment is neither an allowance nor a reimbursement. In this situation the employee expends the money as an agent for the employer. The payment is not included in OTE or 'salary or wages'.

Bonuses

256. A bonus will form part of an employee's OTE where the bonus is paid in respect of ordinary hours of work.

257. In *Mutual Acceptance*, Dixon J explained the meaning of 'bonuses' at CLR 403:

> occasional or periodical additions whether contracted for or voluntary.

258. A bonus is paid to an employee as an additional reward for superior performance or exceptional results achieved. In *Murdoch v. Commissioner of Payroll Tax (Vic)*[52] the High Court referred to the judgment of McInerney J with approval. His Honour is quoted as follows:

> A bonus imports, in the case of an employee or agent, something given or paid over and above what is due and payable for his services. Often it is paid out of profits realised in reward to those whose services have contributed to the making of the profit....in the case of an employee the payment of a bonus is ordinarily made as a voluntary gift, ex-gratia, in recognition of the extent to which the services of that employee have contributed to the making of the profit.[53]

259. A bonus may be payable on the basis of certain performance criteria having been met or it may be an ex-gratia or discretionary payment. If the bonus is paid for the services provided by the employee, the bonus forms part of that employee's OTE as those services would have been performed either wholly or in part during ordinary hours of work. .

260. In *Prushka Fast Debt Recovery Pty Ltd v. Commissioner of Taxation* [2008] AATA 762, which involved payments to employees from a profit sharing bonus scheme based on specified revenue targets achieved, Tribunal Member Fice made the following fact findings:

> … the bonuses paid by Pruska were clearly paid in an employment context and by reference to the specific performance of its employees as a group.'

261. Accordingly, it was held that the payments were OTE as well as 'salary or wages' for superannuation guarantee purposes.

262. A discretionary payment made as a free gift and which is unconnected with the provision of services (such as a Christmas bonus) is not OTE and not 'salary or wages.' However, if the payment made has a connection with the work performed during ordinary hours, it would be included in OTE, regardless of how it is described.

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[52] (1980) 143 CLR 629; 80 ATC 4424; (1980) 11 ATR 135.
[53] 80 ATC 4424 at 4430.

Retention payment

263. A bonus that is a 'retention payment' is a payment in respect of employment. This payment is not based on the performance of the individual, but rather there is a contractual right to the bonus if the relevant individual has been employed for the full year and remains employed at the payment date. The payment is primarily designed to ensure retention of staff. As this payment requires the employee to have worked ordinary hours for the full year, it is in respect of ordinary hours of work and is OTE.

264. Even if the payment is based on overall company results, it is still the work performed during ordinary hours which produces such results and therefore results in the bonus being paid. Therefore, as the payment is in respect of ordinary hours of work, it is OTE for superannuation guarantee purposes. A retention payment is 'salary or wages' as it is directly related to the services of the employee.

265. Conversely, a bonus which is provided to encourage a future employee to contract with the employer, for example sign-on bonuses for sportspersons, would not be included in OTE and in 'salary or wages' as they are not earnings for attendance or services.

Piece rates

266. Employees may receive their wages calculated on a piece-rate basis, that is, on the basis of completion of the number of units or items rather than on the number of hours worked. For example, payments could be on the number of kilometres driven, the number of buckets filled with fruit, or the number of items of clothing completed.

267. In certain circumstances a minimum weekly wage may be set by an award or agreement which also provides for standard hours per week. This allows for the payment of leave entitlements to be based on that minimum weekly wage.

268. The rate of pay may recognise the conditions of the work required and incorporate various components into the one rate, for example the weekly wage, allowances and overtime. The incorporation of an overtime component in the rate of pay would imply that a certain amount of overtime is regularly worked. In these circumstances, the overtime hours are regarded as 'ordinary hours of work' for the purposes of the SGAA.

269. The rate of pay recognises the flexibility required in the services required. As the hours actually worked results in the number of units or items completed, which provides the basis of calculation of the wage payments, those hours worked are the employee's 'ordinary hours of work'.

270. All payments made on a piece-rate basis are included in an employee's OTE and in 'salary or wages'.

Paid leave

271. The right to leave, including annual leave and public holidays is secured by State and Federal legislation and these entitlements are reproduced in industrial awards.

272. Federally, the *Workplace Relationship Act 1996* guarantees rights to annual leave, public holidays, personal leave (including sick leave, carers leave and compassionate/bereavement leave), parental leave (including maternity leave, paternity leave and adoptive leave). Long service leave is covered by the *Long Service Leave (Commonwealth Employees) Act 1976*.

273. Being a statute based right (reproduced in numerous awards) leave payments should not be differentiated on the basis of type. The entitlement to leave for all full time employees is the same for all types of leave, although different types of leave may be subject to particular tests of entitlement, for example, length of service tests, for maternity and parental leave and accrual of annual leave over a 12 month period.

274. Casual employees, including part-time casuals, are usually not eligible to any sort of leave or paid public holidays.[54] Instead they receive a higher rate of pay (a 'casual loading').

275. Although leave payments are not paid for actual attendance at work or for services, they are paid to satisfy entitlements that accrued by reason of the employee's overall service and are therefore OTE as well as 'salary or wages'.

276. In this respect 'ordinary time earnings' are not payments for work done during ordinary hours but are payments to put the employee in a financial position as if service was performed during ordinary hours and the rate of pay applicable to leave payments reflects this ordinary hours of service.

277. All forms of paid leave count as service by the employee. The statutory rights to leave can only be exercised in terms of service by the employee.

278. Unless a payment can be clearly associated with an employee's service outside ordinary hours all leave payments are considered OTE.

279. An annual leave loading that is payable under some awards and industrial agreements are not OTE as it is not paid in respect of 'ordinary hours of work.' However, the loading is included in 'salary or wages'.

[54] However, casual workers who have worked for the same employer for a long time are frequently given some entitlements by their employer and section 264 of the *Workplace Relationship Act 1996* does recognise 'eligible casual employees' (in relation to maternity leave) being a casual employees who have worked on a regular and systematic basis for an employer with an expectation of continuance of employment.

Payments for unused flex leave

280. An employer may have an agreement with their employee allowing for flex credits to accrue for work completed outside an agreed standard day. A flex credit only accumulates once an employee has worked their standard working hours for the settlement period. Employees are able to take time off on the unused flex credit subject to the organisation's requirements. Under the agreement, unused flex credit can be paid out within a settlement period as salary.

281. A payment for unused flex credit would represent an amount paid for work performed in excess of an employee's normal working hours for a settlement period. Therefore such a payment would not be in respect of ordinary hours of work and would not be considered to be OTE for the purposes of superannuation guarantee.

282. However, such a payment still retains the character of a reward for services of the employee and therefore it is salary or wages under the SGAA.

Payments for unused long service leave entitlements whilst still employed

283. An employer may pay long service leave entitlements as a lump sum in lieu of leave to an employee whilst they remain in that same employment.

284. Although unused long service leave paid as a lump sum on termination is specifically excluded from OTE by its definition in section 6(1), where a payment for unused long service leave occurs whilst the employee remains employed by the same employer, this amount is paid in connection with the employee attending or working ordinary hours. Therefore, the payment of unused long service leave entitlements is included in OTE.

Appendix 3 – Your comments

285. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

286. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**19 December 2008**
Contact officer:	**Jonathan Purcell**
Email address:	**jonathan.purcell@ato.gov.au**
Telephone:	**(02) 9374 8231**
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Appendix 4 – Detailed contents list

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

SGR 2005/1; SGR 2005/2;
SGR 2008/D1; TR 97/12;
TR 1999/10; TR 2002/21;
MT 2030

Previous Rulings/Determinations:

SGR 94/4; SGR 94/5

Subject references:

- Awards and industrial agreements
- Employee bonuses
- Employees
- Overtime
- Salary
- Superannuation
- Superannuation guarantee charge

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