SGR 2009/2 - Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'

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Superannuation Guarantee Ruling

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

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Preamble

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.

*[**Note:** This is a consolidated version of this document. Refer to the Legal database (ato.gov.au/law) to check its currency and to view the details of all changes.]*

What this Ruling is about

1. This Ruling explains the meaning of '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. Because of amendments of the SGAA which apply from 1 July 2008,[1] the amount against which an employer is required to calculate the contributions necessary to satisfy their superannuation obligations in respect of their eligible employees is standardised to OTE.[2] Previously employers used a 'notional earnings base' for this purpose in many cases.

3. This 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 in calculating the superannuation guarantee shortfall of individual employees where their employer has not provided the required minimum level of superannuation support.

4. [Omitted.]

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

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[1] Made by the *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

6. This Ruling replaces Superannuation Guarantee Rulings SGR 94/4 *Superannuation guarantee: ordinary time earnings* and SGR 94/5 *Superannuation guarantee: salary or wages*, which are withdrawn from the date of effect of this Ruling.

Ruling

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

7. An amount can only be part of an employee's OTE if it is 'salary or wages' of the employee. But an employee's salary or wages may include amounts that are not OTE.

8. Payments specifically excluded by the SGAA from being OTE are not necessarily excluded from being '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).

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

Diagram 1: Relationship between OTE and salary or wages



Part A – Ordinary time earnings

Definition of 'ordinary time earnings'

10. *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.

11. The SGAA does not define the expression 'earnings in respect of ordinary hours of work' or any of the terms in that expression.

Meaning of 'earnings'

12. An employee's 'earnings', for the purpose of the definition of OTE, is the remuneration paid to the employee as a reward for the employee's services. The practical effect for superannuation guarantee purposes is that the expression 'earnings' means 'salary or wages'.

Meaning of 'ordinary hours of work'

13. An employee's 'ordinary hours of work' are the hours specified as his or her ordinary hours of work under the relevant award or agreement, or under the combination of such documents, that governs the employee's conditions of employment.

14. The document need not use the exact expression 'ordinary hours of work', but it needs to draw a genuine distinction, for the purposes of the award or agreement, between ordinary hours and other hours. In particular, it would be expected that the other hours are remunerated at a higher rate (typically described as overtime) than the ordinary hours, or otherwise identifiable as a separate component of the total pay in respect of non-ordinary hours.

15. Any hours worked in excess of, or outside the span (if any) of, those specified ordinary hours of work are not part of the employee's 'ordinary hours of work'.

16. If the ordinary hours of work are not specified in a relevant award or agreement, the 'ordinary hours of work' are the normal, regular, usual or customary hours worked by the employee, as determined in all the circumstances of the case. This is not necessarily the minimum or maximum number of hours worked or required to be worked.

17. In such cases, it may often not be possible or practicable to determine the normal, regular, usual or customary hours of an

employee's work. If so, the actual hours worked should be taken to be the ordinary hours of work.

18. 'Ordinary hours of work' are not necessarily limited to hours to be worked between 9am and 5pm, Monday to Friday. They may (depending on the provision in the relevant award or agreement, if any) include hours to be worked at other times, including at night, on weekends or on public holidays.

Maximum contribution base

19. The total of OTE in respect of an employee for a quarter cannot exceed the maximum contribution base for the quarter: see paragraph (b) of the definition of 'ordinary time earnings' in subsection 6(1). For any quarter in the 2008–09 year, the maximum contribution base is $38,180. The amount is subject to yearly indexation, which takes into account movements in full-time adult average weekly ordinary time earnings (AWOTE).

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

20. Earnings consisting of over-award payments, shift-loading or commission are specifically included in the definition of OTE by subparagraph (a)(ii) of that definition in subsection 6(1).

Over-award payments

21. An over-award payment is the component of a payment in excess of an award entitlement. The Commissioner's view is that the specific inclusion of these payments does not apply to over-award payments that are specifically referable to hours worked that are not ordinary time hours. For example, an employer's policy may be to offer a higher rate of overtime pay for some overtime hours worked than the penalty rate required by an award. Even though technically over-award payments, such additional payments would not be OTE under subparagraph (a)(ii) of the definition of OTE in subsection 6(1).

Shift-loading

22. A shift-loading is an amount paid to a worker in addition to his or her basic hourly rate for having to work outside the usual span of time for day workers. Shift-loadings payable on ordinary hours of work must be distinguished from overtime payments under awards and agreements. Often these are mutually exclusive under awards and agreements, but if an employee is entitled to a shift-loading in respect of hours other than ordinary hours of work, the Commissioner's view is that the specific inclusion of shift-loadings does not apply in that circumstance.

Commission

23. A commission is a payment made to an employee such as a salesperson on the basis of the volume of sales he or she achieves or other similar criteria. These are always OTE except in the unusual case where they can be shown to be wholly referable to overtime hours worked.

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

24. Specifically excluded from the definition of OTE in subsection 6(1) is a lump sum paid to the employee on the termination of his or her employment, being:

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

Earnings 'in respect of ordinary hours of work' means all earnings other than overtime

25. All amounts of earnings in respect of employment are in respect of the employee's ordinary hours of work unless they are remuneration for working overtime hours, or are otherwise referable only to overtime or to other hours that are not ordinary hours of work. There is no such thing as earnings that are merely in respect of employment generally and are not OTE because they are not in respect of any particular hours of work.

26. An award or agreement may itself have a definition of 'ordinary time earnings' that purports to apply for superannuation purposes. However, the central question posed by the definition of OTE in the SGAA is what amounts are 'earnings in respect of ordinary hours of work'. This could in some cases be a different amount from any purported amount of 'OTE' in the award or agreement. As mentioned in paragraph 13 of this Ruling, the Commissioner accepts that 'ordinary hours of work' are as determined by the relevant award or agreement, but that does not imply that OTE *itself* is necessarily as determined by the award or agreement.

Certain specific kinds of payments that are 'ordinary time earnings'

Allowances and loadings

27. Many employees receive various additional payments that are described as allowances or loadings and that are paid to employees to recognise or compensate for certain conditions relating to their employment. Examples:

- a 'site allowance' paid fortnightly at a flat rate in acknowledgement of the displacement an employee undergoes when a job requires him or her to work in a remote location;
- a 'casual loading' of 20% of the basic ordinary time rate of pay paid to a casual worker in lieu of any fixed, regular minimum hours of work and of paid leave entitlements;
- a 'dirt allowance' paid as a flat rate in acknowledgement of the conditions in which the work is undertaken; and
- a 'freezer allowance' paid at the rate of an extra $2.50 per hour to employees, such as some supermarket employees, who perform most of their duties in cold storage facilities.

These kinds of payment are OTE except to the extent that they:

- are not 'salary or wages', for example if they are payments of a predetermined amount to offset or reimburse particular expenses (see paragraph 72 of this Ruling); or
- relate solely to hours of work other than ordinary hours of work (see paragraphs 41 to 43 of this Ruling).

Bonuses

28. Additional earnings received as a reward for good performance, and other like 'bonus' payments, are OTE in most cases. Exceptionally, a discrete and clearly identifiable bonus payment may relate solely to work performed entirely outside ordinary hours. For example, an employer may pay a bonus specifically to recognise a special project that an employee contributed to entirely in non-ordinary hours.

29. There would need to be clear evidence that this was the sole basis for the payment. The more common case of a lump sum performance bonus that is at least partly referable to results achieved in ordinary hours of work is wholly OTE.

Piece-rates

30. Unless an employee is subject to an award or agreement that specifies the employee's ordinary hours of work, 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'.

31. If the employee is subject to an award or agreement that specifies their ordinary hours, then the employee's earnings in respect of those hours must be determined having regard to the relevant provisions of the award or agreement.

Paid leave and holiday pay

32. Subject to the exclusions mentioned at paragraph 34 of this Ruling, salary or wages that an employee receives, at or below his or her normal rate of pay for ordinary hours of work, in respect of periods of paid leave is simply a continuation of his or her ordinary time pay. It is OTE. It does not matter whether the entitlement to take the paid leave accrued gradually over time, arose in a specified circumstance or following a specified event, or was simply granted to the employee in the exercise of the employer's discretion.

33. Similarly, salary or wages received at the ordinary time rate in respect of public holidays, rostered days off and the like is OTE.

34. However, payments made while a worker is on paid parental leave or other kinds of ancillary leave are not OTE as these types of leave payments are excluded from being 'salary or wages' in the SGAA by section 12 of the *Superannuation Guarantee (Administration) Regulations 2018* (SGAR): see paragraph 59B of this Ruling.

35. The principle in paragraph 32 of this Ruling does not extend to extra payments by way of 'leave loadings', and like payments, that are demonstrably referable to a notional loss of opportunity to work overtime, or similar.

36. Lump sum arrears payments of unused leave or salary or wages otherwise than on termination of employment are also OTE.

Top-up payments

37. An employee may receive 'top-up payments', such as those made while serving on jury duty or with defence reserve forces, that make up some or all of the difference between any amount the employee is receiving for performing such service and the ordinary time rate of pay he or she would earn if not performing such service. Top-up payments of this kind are not OTE as they are excluded from being 'salary or wages' in the SGAA by section 12 of the SGAR: see paragraph 59B of this Ruling.

Payments in lieu of notice

38. An employee may be entitled to a period of notice before the employer's termination of his or her employment takes effect. Awards and agreements often provide that, instead of giving this notice, the employer may simply pay an amount equivalent to the ordinary time rate of salary or wages that the employee would have earned during the notice period. Such payments are OTE.

Workers' compensation payments – employee required to work

39. Workers' compensation payments made by an employer or on behalf of an employer (for example, by an insurance company) are part of an employee's OTE only if they are 'salary or wages' paid in respect of ordinary hours of work. Any such payments are part of 'salary or wages' only if the employee actually performs work or is required to attend work: see paragraphs 68 and 76 of this Ruling.

Directors' fees

40. All fees paid to a company director are earnings in respect of the director's ordinary hours of work.

Certain specific kinds of payments that are not 'ordinary time earnings'

Overtime payments

41. Payments for work performed during hours outside an employee's ordinary hours of work are not OTE.

42. This is so whether the payments are calculated at an hourly rate or the employee gets a specific loading, or an annualised or lump sum component of a total salary package, that is expressly referable to overtime hours as remuneration for overtime hours worked.

43. However, some employees, particularly some managers and professionals, receive a single undissected annual salary within a remuneration package that recognises in a non-specific way that the employee may often be expected to work more than the ordinary hours of work prescribed. The whole amount of salary payable under such a package is OTE, unless overtime amounts are distinctly identifiable as mentioned in paragraph 42 of this Ruling.

On-call allowances

44. An on-call or availability allowance is a payment to an employee for making himself or herself available at certain times to be called in to work if needed. This entitlement is separate from the salary or wages he or she will receive if actually called in. If paid in respect of hours that the employee is not otherwise working, these payments are not OTE.

45. In some cases on-call allowances are paid as a loading on the salary of an employee received for ordinary hours of work. For example, some doctors employed by hospitals are paid an extra hourly allowance, while carrying out routine duties in ordinary hours of work, to make themselves available to perform urgent surgery if required. Payments of that kind are OTE (except of course to the extent that they are paid in respect of overtime hours).

Certain payments that are not salary or wages

46. The following payments are not salary or wages for SGAA purposes and thus are not OTE:

- certain private or domestic payments: see paragraph 57 of this Ruling;
- fringe benefits and other non-cash payments: see paragraph 58 of this Ruling;
- payments specifically excluded by the SGAA from being salary or wages for the purposes of calculating superannuation guarantee shortfalls: see paragraphs 59A and 59B of this Ruling;
- some workers' compensation payments: see paragraphs 68 and 76 of this Ruling;
- some sign-on bonuses: see paragraph 71 of this Ruling;
- expense allowance payments and reimbursement of expenses incurred for the employer: see paragraphs 72 and 73 of this Ruling;
- redundancy payments: see paragraph 74 of this Ruling; and
- payments for unfair dismissal: see paragraph 75 of this Ruling.

Part B – Salary or wages

Definition of 'salary or wages'

47. *Salary or wages*, is defined in subsection 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).

48. Under subsections 11(2) and 11(3) 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.

49. The SGAA defines 'salary or wages' inclusively in section 11. Unless specifically excluded, payments are included in the definition of 'salary or wages' if they satisfy the ordinary or common law meaning of that term or if they fall within the extended definition in subsection 11(1).

50. 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: see subsection 6(3) of the SGAA.

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

Commission

51. Commission payments are 'salary or wages' under paragraph 11(1)(a) A commission is a payment made to an employee such as a salesperson on the basis of the volume of sales they achieve or other similar criteria.

Body corporate executives

52. 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).

Labour component of contracts

53. Payments in respect of the labour component of a contract covered by subsection 12(3) (contracts wholly or principally for the labour of the person working under the contract), are 'salary or wages' under paragraph 11(1)(ba).

Parliamentarians

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

Performers

55. 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.[3]

Public office holders

56. The remuneration of a person who:

- holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory;
- is otherwise in the service of the Commonwealth, of a State or of a Territory; or
- is a member of an eligible local governing body within the meaning of paragraph 12-45(1)(e) of Schedule 1 to the *Taxation Administration Act 1953*,

constitutes 'salary or wages' under paragraph 11(1)(e).[4]

Payments excluded from the definition of 'salary or wages'

Private or domestic work 30 hours per week or less

57. 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). Work of a private or domestic nature means work relating personally to the individual making payment for the work or work relating to the person's home, household affairs or family organisation. See further paragraphs 93 to 98 of Superannuation

[3] See further Superannuation Guarantee Ruling SGR 2009/1 *Superannuation guarantee: payments made to sportspersons*.
[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.

Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?*.

Fringe benefits and other non-cash benefits

58. Fringe benefits as defined in the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) are excluded under subsection 11(3) of the SGAA.[5] Additionally, the Commissioner takes the view that other 'benefits', within the meaning of the FBTAA, given by employers to employees that are neither fringe benefits nor salary or wages within the meaning of that Act are not salary or wages for SGAA purposes. For example:

- contributions made by an employer to a complying superannuation fund for the benefit of an employee (including those required to be made by the superannuation guarantee legislation itself); and
- the acquisition of a share, or of a right to acquire a share, under an employee share scheme (within the meaning of Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936)),

are not salary or wages for SGAA purposes.

Local government

59. Remuneration of a person who holds office as a member of a local government council that is not an eligible local governing body is excluded by subsection 12(9A).

Exclusions under sections 27 to 29

59A. Sections 27 to 29 of the SGAA specify salary or wages that are not to be taken into account for the purposes of calculating an individual superannuation guarantee shortfall under section 19 of the SGAA. The excluded salary or wages are:

- salary or wages paid to a non-resident employee for work done outside Australia (paragraph 27(1)(b));
- salary or wages paid by a non-resident employer to a resident employee for work done outside Australia (paragraph 27(1)(c));
- salary or wages paid by an employer to an employee who is not a resident of Australia for work done in the Joint Petroleum Development Area (within the meaning of the *Petroleum (Timor Sea Treaty) Act 2003*) (paragraph 27(1)(ca));

[5] See *Fringe benefits tax (FBT) – a guide for employers* (NAT 1054) (available on www.ato.gov.au) for examples of fringe benefits.

- salary or wages paid to an employee who is a prescribed employee for the purposes of paragraph 27(1)(d);[5A]
- salary or wages prescribed for the purposes of paragraph 27(1)(e): see paragraphs 59B and 59C of this Ruling;
- salary or wages paid to a part-time employee who is under 18 years of age (section 28); and
- pay and allowances for members of the Australian Defence Reserve Forces for service other than continuous full-time service (section 29).

Prescribed salary or wages – parental leave and ancillary leave

59B. Salary or wages paid to an employee for a period of parental leave are prescribed for the purposes of paragraph 27(1)(e) by section 12 of the SGAR. Section 5 of the SGAR contains an inclusive definition of 'parental leave' for this purpose. Also prescribed are salary or wages paid to an employee who is engaged in an eligible community service activity and paid while absent from his or her usual employment; and salary or wages paid to an employee who is undertaking service with the Australian Defence Force and paid while absent from his or her usual employment.

Prescribed salary or wages – other payment types

59C. Payments of salary or wages funded by a payment to the employer under the Commonwealth program known as the Aged Care Workforce Retention Grant Opportunity are prescribed for the purposes of paragraph 27(1)(e): see paragraph 12(1)(f) of the SGAR. Payments of salary or wages are also prescribed if a scheduled international social security agreement provides that the employer to which the salary or wages relate is not subject to the Act in relation to the work for which the salary or wages were paid: see section 12 of the SGAR.

Determining whether a payment constitutes salary or wages

60. The ordinary meaning of the term 'salary or wages' is remuneration paid to employees for their services as employees. In most practical situations, it is straight-forward to determine whether any given payment made in an employment context is salary or wages.

[5A] The only employees currently prescribed for this purpose are those who hold certain kinds of visas or entry permits under the *Migration Act 1958* and the *Migration Regulations 1994* and who also meet certain other criteria relating to their employment: see section 11 of the SGAR.

61. The term is not limited to fixed payments made periodically for work performed, such as a worker's fortnightly pay cheque. It extends to certain lump sum payments, bonuses and allowances that are part of the worker's remuneration. These kinds of payment are dealt with in paragraphs 64 to 71 of this Ruling.

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

63. Payments to an employee are included in 'salary or wages' if the employee is entitled to receive the money for themselves. For example, a meal allowance that the employee is free to spend or not as he or she wishes. By contrast, an advance given to an employee to enable the employee to expend the money on behalf of the employer is not 'salary or wages'.

Certain payments that are 'salary or wages'

64. Discussed below are other types of remuneration provided to employees that are 'salary or wages'.

Allowances

65. 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 72 of this Ruling.

Bonuses

66. A bonus is 'salary or wages' if it is paid to an employee by reason of their services as an employee and not on a personal basis. Only in those very limited cases in which the Commissioner would accept that the payment is not assessable income of the employee for income tax purposes, in respect of their employment, would the Commissioner accept that the payment is made on a personal basis and so is not salary or wages for SGAA purposes.

Leave payments

67. Payments of salary or wages retain their character as such while the employee is on any period of paid leave. However, payments made to an employee while he or she is on parental leave or certain other kinds of ancillary leave are excluded from salary or wages; see paragraph 59B of this Ruling.

Workers' compensation payments

68. Any workers' compensation payments received by an injured employee for the hours the employee performs work or attends work as required form part of 'salary or wages'. In contrast, if the employment has been terminated, or if the employee is paid workers' compensation for hours not worked (or not attending work as required); the payment would not be 'salary or wages' as in these situations it cannot be said that the payment is a reward for the services of the employee to the employer.

Unused leave payments

69. Lump sum payments for unused annual leave, long service leave and sick leave, whether paid on termination of employment or otherwise, are 'salary or wages'.

Payments in settlement of a dispute

70. 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 is not salary or wages.

Sign-on bonuses

71. A 'sign-on' bonus is salary or wages if it is assessable income in the hands of the employee for income tax purposes. Only in limited situations would the Commissioner accept that such a payment is not assessable income, as where the payment is clearly referable to a separate restrictive covenant entered into by the employee: see Taxation Ruling IT 2307 *Income Tax: Assessability of lump sum payment made under contract to play football: covenant in contract that taxpayer not engage in competitive footrunning during term of contract*.

Certain payments that are not 'salary or wages'

Expense allowances and reimbursements

72. Expense allowances, that is, those allowances paid to an employee with a reasonable expectation that the employee will fully expend the money in the course of providing services, are not 'salary or wages'.

73. A reimbursement that compensates an employee for an expense they have incurred on behalf of the employer is also not 'salary or wages'.

Redundancy payments

74. Redundancy payments made on termination of employment are not a reward for services rendered by an employee, even if part of the payment is calculated by reference to the employee's period of service with the employer. They are payments to compensate the employee for the loss of their job; not a reward for their services.

Unfair dismissal

75. Similarly, payments by way of compensation for unfair dismissal are not 'salary or wages'.

Workers' compensation payments – employee not required to work

76. Workers' compensation payments made by or on behalf of an employer to an employee who is not required to attend work due to incapacity, or whose employment has been terminated, are not salary or wages.

Date of effect

77. This Ruling applies to payments made to employees in the quarter beginning on 1 July 2009 and all later quarters. 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 this Ruling.

Commissioner of Taxation
13 May 2009

Appendix 1 – Examples

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

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

Table 1: Examples index and paragraph references

Eg No	Payments to an employee in relation to…	Salary or wages?	OTE?	Paragraph references
Awards and agreements				
1	A simple overtime situation	Yes	No	13-15, 41-43, 189-202
2	Overtime hours – agreement prevailing over award	Yes	No	13-15, 41-43, 189-202
3	Agreement supplanting award removes distinction between ordinary hours and other hours	Yes	Yes	13-15, 41-43, 189-202
4	No ordinary hours of work stipulated	Yes	Yes	13-18, 203-210
5	Casual employee – *shift-loadings* *overtime payments*	 Yes Yes	 Yes No	13-18, 22, 189-210, 220-222
6	Casual employee whose hours are paid at overtime rates due to a 'bandwidth' clause	Yes	No	13-18, 189-210
7	Piece-rates – no ordinary hours of work stipulated	Yes	Yes	30-31, 230-234
8	Overtime component of earnings based on 'hourly driving rate' formula stipulated in award	Yes	No	30-31, 230-234
Allowances				
9	Allowance by way of unconditional extra payment	Yes	Yes	27, 65, 259-270
10	Expense allowance expected to be fully expended	No	No	27, 72, 266
11	Danger allowance	Yes	Yes	27, 65, 259-267
12	Retention allowance	Yes	Yes	27, 65
13	Hourly on-call allowance in relation to ordinary hours of work for doctors	Yes	Yes	44-45

Eg No	Payments to an employee in relation to…	Salary or wages?	OTE?	Paragraph references
Payment of expenses				
14	Reimbursement	No	No	46, 73 268-270
15	Petty cash	No	No	46, 73, 268-270
16	Reimbursement of travel costs	No	No	46, 73, 268-270
17	Payments for unfair dismissal	No	No	46, 75
18	Workers' compensation – *Returned to work* *Not working*	 Yes No	 Yes No	39, 46, 68, 271-273
Leave payments				
19	Annual leave	Yes	Yes	32, 67, 235-238
Termination payments				
20	Termination payments – *In lieu of notice* *Unused annual leave*	 Yes Yes	 Yes No	46, 74 38 69
Bonuses				
21	Performance bonus	Yes	Yes	28-29, 274-278
22	Bonus labelled as ex-gratia but in respect of ordinary hours of work	Yes	Yes	28-29, 274-278
23	Christmas bonus	Yes	Yes	28-29, 274-278
24	Bonus in respect of overtime only	Yes	No	28-29, 41-43, 274-278

Ordinary hours and overtime hours

Example 1 – A simple overtime situation

79. *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 is overtime and is to be paid at a rate of time-and-a-half for the first three hours and double time thereafter.*

80. *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.*

Salary or wages

81. *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'.*

OTE

82. *The 38 hours Grace works during the weekdays are her 'ordinary hours of work' because that is what the award provides.*

83. *The three additional hours worked on the Saturday are not 'ordinary hours of work'.*

84. *The wage payment to Grace for 38 hours of work is 'earnings in respect of ordinary hours of work' and is OTE.*

85. *The wage payment for the additional 3 hours overtime is not 'earnings in respect of ordinary hours of work' and is therefore not included in OTE.*

86. *It would make no difference how frequently or regularly Grace worked overtime hours. Payments of salary or wages for all such work cannot be OTE because they are not in respect of ordinary hours as defined by the relevant award.*

Example 2 – Ordinary hours of work and overtime hours determined by agreement prevailing over award

87. *Ennio is employed under a collective agreement which incorporates by reference terms from an award. To the extent of any inconsistency between the agreement and the award, the agreement prevails.*

88. *The award provides that the ordinary hours are an average of 38 hours per week and gives an employer the right to require an employee to work reasonable overtime.*

89. *However, the agreement provides for a shift roster which requires that employees work an average of 44 hours per week and identifies on the roster the ordinary hours of work as 40 hours (all paid at a particular hourly rate) and the overtime hours as 4 hours (to attract a penalty rate of pay in addition to the ordinary hourly rate).*

Salary or wages

90. *The payment for Ennio's 44 hours of work is a reward for services provided as an employee of the company and is therefore 'salary or wages'.*

OTE

91. *As the agreement requires Ennio to work an average of 40 'ordinary' hours per week, these are his 'ordinary hours of work'.*

Therefore, the payment to Ennio for 40 hours of work is 'earnings in respect of ordinary hours of work' and is OTE.

92. *The payment for the additional 4 hours of rostered overtime is not 'earnings in respect of ordinary hours of work' and is therefore not included in OTE.*

Example 3 – Agreement supplanting award removes distinction between ordinary hours and other hours

93. *Cliff was 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.*

94. *However, Cliff and his employer agree under a workplace agreement that he will work 50 hours each week which will be paid at the same hourly rate for all of the 50 hours worked. That rate is inclusive of all allowances and penalties. No lesser amount of hours is identified as 'ordinary', nor is separate provision made for any overtime rate of pay.*

95. *Cliff duly works his 50 hours per week and is paid at the appropriate single rate under the agreement.*

Salary or wages

96. *The payment to Cliff for the 50 hours worked is a reward for the services he is providing and is therefore 'salary or wages'.*

OTE

97. *Under the terms of the agreement (which overrides the terms of the award to the extent of any inconsistency), no distinction is made between any of the hours Cliff works, nor is any component of his pay separately identifiable as overtime. Therefore Cliff's ordinary hours of work for superannuation guarantee purposes are 50 hours per week.*

98. *Therefore each whole payment to Cliff for 50 hours of work is 'earnings in respect of ordinary hours of work' and is OTE.*

Example 4 – No ordinary hours of work stipulated

99. *Kim is employed under a contract requiring her to work a minimum number of hours per week in a call centre. By agreement between her and the employer, she may work additional shifts as is mutually convenient. She often does so, though there is no clear and consistent pattern to this.*

100. *There is no award or agreement governing Kim's employment that specifies her ordinary hours of work, nor do the extra shifts worked attract any overtime penalties or other higher payments.*

Salary or wages

101. *All wage payments made to Kim are a reward for services she provides as an employee and are therefore 'salary or wages'.*

OTE

102. *As there are no stipulated ordinary hours of work, and no readily discernible pattern of customary, regular, normal or usual hours, all of Kim's hours actually worked are ordinary hours of work. Therefore all of her wages are OTE.*

Example 5 – Casual employee who qualifies for shift allowances for some hours and overtime payments for other hours

103. *Otzi is employed on a casual basis under a collective agreement. The agreement provides that casuals have no guaranteed minimum working hours in any given week and no entitlement to paid leave. Instead Otzi receives a 'casual loading' equal to 19% of his ordinary time rate of pay for every hour he works.*

104. *The agreement provides that the ordinary hours of work for all employees, including casuals, are no more than 38 hours in any given week. Work beyond those ordinary hours attracts an overtime penalty rate, in addition to any casual loading otherwise payable.*

105. *Also, all workers who are required to work late at night or on weekends are entitled to a shift-loading payment of 25% of their ordinary time rate of pay, in addition to any casual loading. However shift-loadings are not payable for hours that attract the overtime rate.*

Salary or wages

106. *All wage payments, including all loadings and penalties, made to Otzi are a reward for services he provides as an employee and are therefore 'salary or wages'.*

OTE

107. *All wage payments, including the casual loading and any shift-loading, for ordinary hours of work as defined in the agreement are OTE. However, if Otzi works any overtime hours, none of the pay he receives for those hours is OTE because such pay is entirely in respect of hours that are not ordinary hours of work.*

Example 6 – Casual employee whose hours are paid at overtime rates due to a 'bandwidth' clause

108. *Take the facts of Example 5 with the following changes. The agreement makes no provision for shift-loadings. Instead, and in addition to the overtime entitlement mentioned in Example 5 at paragraph 104 of this Ruling, any worker, including a casual, who works hours outside a specified bandwidth of hours, being from 8.00am to 6.00pm Monday to Friday (public holidays excluded) is entitled to be paid at overtime rates. These hours are defined by the agreement not to be ordinary hours of work.*

109. *Otzi routinely works an evening shift, most of his working days starting at 4.00pm and ending at 11.00pm. Thus he is paid at the overtime rate for the hours worked after 6.00pm.*

Salary or wages

110. *All wage payments, including the casual loading and any overtime penalties, made to Otzi are a reward for services he provides as an employee and are therefore 'salary or wages'.*

OTE

111. *All wage payments, including the casual loading, for the ordinary hours of work as defined in the agreement are OTE. However, the hours that Otzi works that are overtime hours – including those that are overtime hours because they are worked outside the 8.00am to 6.00pm bandwidth mentioned above – are not ordinary hours. All pay for these hours is not OTE.*

Example 7 – Piece-rates where no ordinary hours of work are stipulated

112. *Evan works as a fruit picker for Green Apples Ltd. Evan is paid $0.10 for every kilogram of apples that he picks. There are no ordinary hours specified in any award or agreement. Evan produces 5,000 kilograms of apples in his working hours in the week and so is paid $500 by Green Apples Ltd.*

Salary or wages

113. *The payment made to Evan is a reward for services he provides as an employee and is therefore 'salary or wages'.*

OTE

114. *As Evan's ordinary hours of work are not specified in any award or agreement, his ordinary hours of work are the hours that he actually works. Therefore the $500 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.

Example 8 – Overtime component of earnings based on 'hourly driving rate' formula stipulated in award

115. *Samson is employed as a long-distance truck driver. He is employed under an award which stipulates a minimum guaranteed wage payment per week, regardless of how little he actually drives. If, however, a driver travels sufficiently far in a given week, an hourly rate of pay determines the driving component of his wages in place of the minimum weekly wage. One week, Samson travels from Adelaide to Darwin via the Stuart Highway. This is stipulated in his award as a distance of 3,019 kilometres, and he is assumed to have taken 40.25 hours to complete this journey. Samson's driving component of his earnings for this trip is worked out by multiplying the hourly driving rate by 40.25 hours. This produces a result well in excess of the minimum guaranteed payment for the week in question. Samson is therefore paid that higher amount.*

116. *The hourly driving rate is said by the award to incorporate two additional components: an 'Industry Disability Allowance' and an 'Overtime Allowance'. The formula in the award stipulates that the hourly rate is determined by dividing the minimum weekly wage rate stipulated in the award by 40 and multiplying it by 1.3 (Industry Disability Allowance) and 1.2 (Overtime Allowance).*

117. *The 'Industry Disability Allowance' is expressed as taking the place of shift-loading and various conditions-of-service allowances. The 'Overtime Allowance', by contrast, takes the place of any entitlement to be paid for overtime hours.*

Salary or wages

118. *The payment made to Samson is a reward for his services as an employee. It is 'salary or wages'.*

OTE

119. *The overtime allowance of the payment Samson receives (being the basic hourly rate multiplied by 0.2) is not OTE as having regard to the terms of the award as a whole it is genuinely referable, albeit on a notional averaged basis, to overtime hours worked rather than ordinary hours. The remainder of the hourly rate is OTE. In particular the Industry Disability Allowance is referable, albeit on a notional averaged basis, to earnings that would be in respect of ordinary hours.*

Allowances

Example 9 – Allowance by way of unconditional extra payment

120. *Yuihim is a marketing executive of Liaisons Pty Ltd. In addition to his usual salary, he is paid $500 per month as an allowance for the purposes of entertaining clients. The amount is paid to Yuihim regardless of whether or not he spends the $500. He has complete discretion as to whether or not he spends the allowance.*

Salary or wages

121. *The payments made to Yuihim are a reward for services he provides as an employee. He is entitled to keep them regardless of whether he incurs any expense in respect of the stated purpose of the payments. They are 'salary or wages'.*

OTE

122. *The allowance is not paid for services provided by Yuihim only outside his ordinary hours of work. Therefore the monthly payments are earnings 'in respect of ordinary hours of work' and are OTE.*

Example 10 – Expense allowance expected to be fully expended

123. *Matteo is an employee of JJ Investment Pty Ltd. In addition to his usual salary, Matteo is paid $300 per month to cover expenses he is expected to incur while visiting clients. The expenses Matteo 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.*

Salary or wages

124. *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'.*

OTE

125. *A payment cannot be OTE unless it is 'salary or wages'. As Matteo's allowance is not 'salary or wages', it is not OTE.*

Example 11 – Danger allowance

126. *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 industry agreement. The allowance is not expended in the course of Bernie's work.

Salary or wages

127. *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'.*

OTE

128. *Conditions of work allowances such as Bernie's danger allowance are not paid for any specific services provided by the employee, and are not expended in the course of the employees work. These allowances are additional remuneration paid to the employee for work undertaken and are not specifically referable to overtime hours only. Therefore the allowance is an earning 'in respect of ordinary hours of work' and is OTE.*

Example 12 – Retention allowance

129. *Therese is currently working as an engineer for an aircraft maintenance company. 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.*

Salary or wages

130. *The payment is made to Therese as remuneration or reward for her services as an employee and is therefore 'salary or wages'.*

OTE

131. *The retention allowance received by Therese is paid as a reward for, and as part of, her continuing services to her company. It is not referable to overtime hours in particular. Therefore the allowance is 'earnings in respect of ordinary hours of work' and is OTE.*

Example 13 – Hourly on-call allowance in relation to ordinary hours of work for doctors

132. *Leyna is a medical doctor employed at the State Hospital. Leyna's employment contract stipulates that she is paid at a specified hourly rate and, in addition, receives an hourly on-call allowance while carrying out her duties at the hospital during her ordinary hours of work. The allowance is for making herself available to perform*

urgent surgery cases which may arise during her shift. Where the duration of such surgery cases extend Leyna's total number of hours worked for that particular shift beyond her stipulated ordinary hours of work per shift, she is separately remunerated in relation to those extra hours on duty but there is no hourly on-call allowance payable on those extra hours.

Salary or wages

133. *The hourly on-call allowance is paid to Leyna as remuneration or reward for her services as an employee and is therefore considered to be 'salary or wages'.*

OTE

134. *Leyna's hourly on-call allowance is considered 'earnings in respect of ordinary hours of work' as it is paid with reference to her ordinary hours of work and is OTE.*

Payment of expenses

Example 14 – Reimbursement

135. *Fernando 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 Fernando exactly $14.50 in respect of the receipts.*

Salary or wages

136. *The payment that Fernando 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 in the course of his duties. The payment is not 'salary or wages'.*

OTE

137. *As the payment received is not salary or wages, it is not earnings for the purposes of the definition of OTE and is therefore not OTE.*

Example 15 – Petty cash

138. *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.*

Salary or wages

139. *The payment of petty cash made to Mary from her employer is not paid as compensation for performing services as an employee. Rather, Mary's employer is providing her with funds of the employer to be expended for the employer, and Mary does so as an agent for her employer. The payment is therefore not 'salary or wages'.*

OTE

140. *A payment cannot form part of OTE unless it is 'salary or wages'. As Mary's allowance is not salary or wages' it is not OTE.*

Example 16 – Reimbursement of travel costs

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

Salary or wages

142. *The payment made to Genevieve by FTR Inc is not paid as reward for performing services as an employee. Rather, the payment is a reimbursement for the expense calculated on a reasonable basis according to income tax laws. The payment is therefore not 'salary or wages'.*

OTE

143. *A payment cannot form part of OTE unless it is 'salary or wages'. As Genevieve's allowance is not salary or wages, it is not OTE.*

Example 17 – Payments for unfair dismissal resulting from an order via the Industrial Relations Commission

144. *Priya 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. Priya's employment has been terminated.*

Salary or wages

145. *The payment made to Priya for unfair dismissal is not remuneration or reward for services rendered to her former employer but rather a remedy for unlawful termination of employment. In this*

instance, it does not matter that the payment is based on ten weeks' pay, the payment is in the nature of damages or compensation granted due to the finding of an unfair dismissal and therefore not 'salary or wages'.

OTE

146. *As the payment is not considered 'salary or wages', it follows that the payment is not OTE.*

Example 18 – Workers' compensation

147. *Dean and Lamont were both injured in a snorkelling accident while on duty as reef guides for their employer, Ocean Tours.*

148. *Dean was able to resume work within a month, although he was placed on lighter duties. Lamont was not able to return to work as a result of the accident.*

149. *Both employees received workers' compensation payments from the Atlantis Insurance Co in an amount of a continuation of their salaries.*

Salary or wages

150. *The workers' compensation payment received by Dean on resumption of work is 'salary or wages'.*

151. *The workers' compensation payment received by Lamont is not 'salary or wages'.*

OTE

152. *The workers' compensation payment received by Dean is OTE, as it is paid to ensure that he continues to receive payment for his ordinary hours of work.*

153. *As the workers' compensation payment received by Lamont is not 'salary or wages', it is not OTE.*

Leave payments

Example 19 – Annual leave

154. *Marissa takes four weeks annual leave to which is she entitled as part of her employment package. During her leave Marissa's employer continues to pay Marissa her regular weekly pay.*

Salary or wages

155. *The annual leave payments made to Marissa are part of the remuneration or reward for her services as an employee and are therefore 'salary or wages'.*

OTE

156. *Although the payments are made to Marissa whilst she is on annual leave (and thus are not paid for actual attendance at work), they are regarded as a continuation of her ordinary pay with reference to her ordinary hours of work. The earnings are not calculated by reference to other hours of work.*

157. *Therefore the payments are 'earnings in respect of ordinary hours of work' and are OTE.*

Termination payments

Example 20 – Termination payments

158. *Darren was an employee of Tafs Ltd. As a result of his poor behavioural record, Darren was dismissed. Rather than requiring Darren to continue working throughout the obligatory notice period of two weeks, Tafs Ltd terminated Darren's employment immediately and paid him (in lieu of notice) the equivalent of two weeks' salary.*

159. *Tafs Ltd also made an unused annual leave payment to Darren in respect of one week's unused leave.*

Salary or wages

160. *Both payments are 'salary or wages'. The payment in lieu of notice is effectively a payment of salary or wages that Darren was entitled to receive during the notice period. The payment in lieu of leave is a salary or wage payment to which Darren was entitled but had not previously received.*

OTE

161. *Although Darren did not perform duties to receive payment in lieu of notice, the payment was nonetheless made 'in respect of ordinary hours of work' rather than overtime hours. To this extent, the amount is OTE.*

162. *The unused annual leave payment made to Darren is not OTE, being specifically excluded from the definition of 'ordinary time earnings'.*

Bonuses

Example 21 – Performance bonus

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

Salary or wages

164. *The payment made to Tamara is a reward for her services as an employee and is therefore 'salary or wages'.*

OTE

165. *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.*

166. *The earnings are 'in respect of ordinary hours of work'. Although the bonus is said to recognise both her ordinary service and the long hours she has had to work, it is sufficiently connected with ordinary hours to be OTE. The Commissioner does not accept that such bonus payments can be dissected into an OTE component and 'overtime' payments. This is in contrast to an overtime only bonus as considered in Example 24 at paragraph 175 of this Ruling.*

Example 22 – Bonus described as ex-gratia but paid in respect of ordinary hours of work

167. *Nammie is an employee of Tangerine Ltd. As an employee, Nammie 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, Nammie 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.*

Salary or wages

168. *The payment made to Nammie is a reward for her services as an employee.*

169. *Although the bonus payment is labelled an 'ex gratia payment', and is indeed gratuitous in as much as the employer does not necessarily have to pay it, this does not stop it from being salary or wages. There is a causal connection between the payment and the work*

completed by employees. The payment is not a personal gift unrelated to any work performed. The payment is therefore 'salary or wages'.

OTE

170. *The bonus is not solely referable to hours of work outside ordinary hours. Therefore the bonus payment is 'in respect of ordinary hours of work' and is therefore OTE.*

Example 23 – Christmas bonus

171. *Suzie is an employee of Jessri Pty Ltd. At the end of the year the company gives her what is described as a Christmas gift of $250 in cash. It is said to be a Christmas bonus paid to Suzie as an expression of the company's goodwill. It is said to be not related to Suzie's performance at work.*

Salary or wages

172. *On these facts, the Commissioner would treat the payment made to Suzie as salary or wages. In the absence of clear evidence to the contrary, the payment would be seen as in substance given as a reward for services provided in respect of her work despite the label which has been given to the payment. Only in rare cases, as where the payment is very small, or there is a family or other clear private connection between employer and employee, would the Commissioner entertain any suggestion that payments like this are not salary or wages.*

173. *For income tax purposes the payment would be regarded as salary assessable in Suzie's hands. In the same way it is regarded as salary or wages for SGAA purposes*

OTE

174. *The bonus is not solely referable to hours of work outside ordinary hours. Therefore the bonus payment is 'in respect of ordinary hours of work' and is OTE.*

Example 24 – Bonus in respect of overtime only

175. *Robert is an employee of SRP Ltd. In addition to his normal duties, Robert was asked to work overtime hours on five consecutive weekends for the specific purpose of writing a staff training manual about some newly enacted legislation.*

176. *Robert's manual was distributed by SRP Ltd to other companies within the industry, all of which paid fees to SRP Ltd for its use. SRP Ltd passed on a portion of these receipts to Robert in the form of a bonus.*

Salary or wages

177. *The payment made to Robert is a reward for services provided as an employee of SRP Ltd and is therefore 'salary or wages'.*

OTE

178. *On these unusual facts, the services which Robert provided were all identifiably performed outside of Robert's ordinary hours of work. The bonus payment is not OTE.*

Appendix 2 – Explanation

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

Legislative context

179. If an employer does not provide the minimum level of contributions in respect of their eligible[6] employees by the prescribed dates, the employer will be liable to pay the superannuation guarantee charge. Although the level of superannuation support required to be provided by an employer is calculated as a percentage of OTE, 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.

180. However, subsection 23(2) provides for a reduction of the charge percentage according to a formula where the employer has made contributions to a Retirement Savings Account 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 OTE.

181. In the case of defined benefit superannuation schemes, the charge percentage in respect of an employee (within a particular class of employees) is generally reduced in accordance with subsection 22(2) to the extent of the notional employer contribution rate (in relation to that class of employees) as specified in a benefit certificate. (An exception is that the charge percentage is reduced by less than that if, for a particular quarter, the period of employment is longer than the period of the employee's membership of the relevant scheme or the period for which the benefit certificate has effect in relation to the scheme.)

182. The meaning of the phrase OTE 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 OTE.

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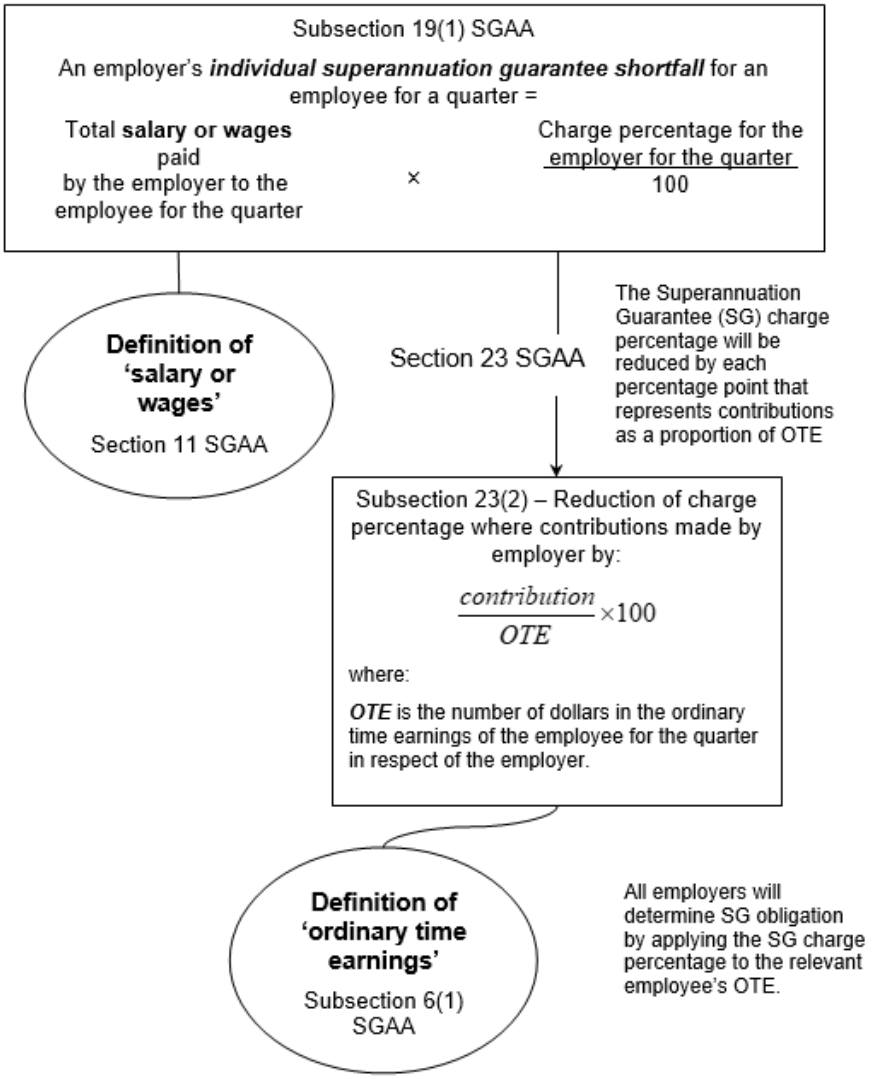
[6] Employees in receipt of salary or wages which are not excluded, for example, by sections 27, 28 or 29. For further information on who is an eligible employee for Superannuation Guarantee purposes see www.ato.gov.au.

183. The following diagram illustrates how the concepts of 'salary or wages' and OTE interrelate in relation to an individual superannuation guarantee shortfall calculation.

Diagram 2: Relationship between salary and wages and OTE for an individual super guarantee shortfall calculation



Part A – Ordinary time earnings

Definition

184. *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.

The SGAA does not define the expression 'earnings in respect of ordinary hours of work' or any of the terms in that expression. The following discussion examines these elements in turn.

Earnings

185. 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, or on behalf of, 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'. The component earnings that are either included or excluded in OTE have to be earnings of the employee.

186. The Commissioner considers that the term 'earnings', as used in the definition of OTE, embraces all those amounts, and only those amounts, that are 'salary or wages' paid by the employer to their employee.

187. It follows that OTE in relation to an employee for a quarter is always a sum no larger than the salary or wages paid to that employee for the quarter. If it were possible for the OTE for a quarter to be substantially greater than the corresponding salary or wages, employers might in some cases be better off *not* making superannuation contributions, but rather incurring the charge instead (even though the charge is not deductible for income tax purposes and has other costs associated with it). This outcome cannot have been intended.

188. In any case the ordinary meaning of earnings is sufficiently similar to the meaning of 'salary or wages' in the context of the SGAA that the two may be regarded as synonymous.

Ordinary hours of work specified in award or agreement

189. It is common for awards and agreements that govern the terms and conditions of a worker's employment to make provision for the ordinary hours of work of the worker. Normally, hours worked in excess of the ordinary hours of work attract penalty rates of pay and are described as 'overtime'. In general, a clear distinction is

understood to apply for various purposes between ordinary time earnings and overtime earnings.

190. The definition of 'OTE' in the SGAA uses the expression 'ordinary hours of work' without defining it. On one view, the expression should be interpreted according to the general English dictionary meanings of those terms. In particular 'ordinary' could be read as meaning regular, customary or usual; as opposed to meaning *normal* in the sense of stipulated by some fixed standard, or norm. On this view, a worker's ordinary hours would not necessarily be the hours specified in any award or formal agreement as their ordinary hours, if in fact he or she *ordinarily* worked a greater number of hours.

191. However, another view is that Parliament consciously chose the expression 'ordinary hours of work' in framing the SGAA in 1992 knowing that it had a specialised and well-established meaning in the particular context of the Australian industrial relations system, and intended that the interpretation of the expression be informed by that context.

192. The Commissioner accepts that this second view is the correct view. Although the general English meaning of the adjective 'ordinary' is sufficiently wide to admit of either interpretation, the context and history of the SGAA, as well as practical considerations, point sufficiently strongly to the latter reading in the Commissioner's view.

193. The precise text of the expression in the definition supports this view. The expression 'ordinary hours of work' tends to suggest a fixed or stipulated quantity. It does not aptly describe an individual's actual work-patterns from time to time. A phrase like 'earnings in respect of hours that the employee ordinarily works' would have been a more natural way to denote actual working patterns.

194. There is evidently a relationship between the SGAA and the legal concepts making up the Australian industrial relations system. As originally enacted, the SGAA made a number of express references to features of the then industrial relations system. Also, some other references only make sense if understood in light of relevant industrial instruments; for example, the reference to 'over-award payments' later in the OTE definition. These express references support the view that the framers of the SGAA had in mind that 'ordinary hours of work', being a term commonly used in awards at the time, might be understood as taking its meaning from awards and industrial agreements.

195. The Explanatory Memorandum for the Taxation Laws Amendment Bill (No. 4) 1993,[7] a Bill that proposed to amend the OTE definition, stated that the principal reason for adopting ordinary time earnings as a default earnings base was to achieve consistency with the award superannuation system.

196. No court decision directly settles this question. However, the High Court considered similar arguments, in a related but technically distinguishable context, in *Australian Communication Exchange Ltd v.*

[7] Enacted as the *Taxation Laws Amendment Act 1994.*

Deputy Commissioner of Taxation[8] (*ACE*). This case was about the proper interpretation of a particular award for the purposes of the now repealed SGAA provisions about notional earnings bases. The question was what, under the award concerned, were the ordinary hours of work of casual workers many of whose hours might have regularly occurred outside a specified bandwidth of ordinary hours.

197. Strictly speaking the High Court was solely concerned with the drafting of the particular award in question rather than the definition of OTE in the SGAA. The significance of the case for present purposes is as follows.

198. For the reasons given above, the Commissioner accepts that, at least in general, the expression 'ordinary hours of work' in the SGAA definition of OTE is intended to refer to the ordinary hours as defined by the relevant award or agreement. It could be questioned whether this was intended even where a worker would therefore get minimal mandatory superannuation support because *most* of their actual or regular hours worked are outside the specified bandwidth of ordinary hours and thus attract overtime penalty rates. Moreover if *all* actual or regular hours for a given quarter are worked outside the bandwidth, the SGAA seems to operate in an odd way. In that situation, the employer apparently could not reduce its individual superannuation guarantee shortfall at all, but must instead incur a liability to pay superannuation guarantee charge to the Commissioner in respect of the full amount of salary or wages paid, including all of the overtime payments.

199. A majority of the High Court rejected arguments of this kind in the context of the Award at issue in *ACE*, recognising that the SGAA deferred to the particular Award in this respect and that such instruments may merely represent the results of wider compromises. In the same way, the Commissioner recognises that the OTE definition defers generally to awards and agreements in this respect. It therefore seems likely that the courts would reject any arguments for an exception from the general principle of deference to awards and agreements based on a perceived general policy intention that all workers must receive a substantial level of superannuation support.

200. A number of cases have dealt with similar expressions as they were used in certain State workers' compensation legislation in various contexts. In *Kezich v. Leighton Contractors Pty Ltd* [9], the High Court found that the expression 'the ordinary hours [the worker] would have worked' referred to his or her regular, usual, customary or normal hours. On the other hand, in the more recent case of *Catlow v. Accident Compensation Commission*,[10] the High Court interpreted the expression 'the worker's normal number hours per week' as referring to the nominal number as set out in the relevant industrial agreement, as opposed to the actual number of hours (including overtime hours) that the worker had informally agreed with his

[8] [2003] HCA 55; 2003 ATC 4894; (2003) 53 ATR 834.
[9] (1974) 131 CLR 362.
[10] (1989) 167 CLR 543; [1989] HCA 43.

employer routinely to work. None of these cases is quite decisive of the issue for SGAA purposes. No unifying principle emerges. Much appears to depend on the precise statutory context in question.

201. The Commissioner recognises that to take the view that, even if only in limited cases, an employee's 'ordinary hours of work' would be his or her regular, usual, customary or normal hours, where these were greater than the nominal ordinary hours under an award or agreement, would impose a significant compliance burden for many employers who have large numbers of staff working at least some overtime hours. It is also difficult to state, in a way that creates adequate certainty for self-assessment purposes in many actual practical cases, what precisely is meant by a concept such as regular, usual, customary or normal hours of work.

202. An award or agreement may itself have a definition of 'ordinary time earnings' that purports to apply for superannuation purposes. However, the question posed by the definition of OTE in the SGAA is what amounts are 'earnings in respect of ordinary hours of work'. This could in some cases be a different amount from any purported amount of 'ordinary time earnings' in the award or agreement. As mentioned in paragraph 13 of this Ruling, the Commissioner accepts that the ordinary hours or work are as determined by the relevant award or agreement, but that does not imply that OTE itself is necessarily as determined by the award or agreement.

Ordinary hours of work not specified in award or agreement

203. Some employees work under arrangements where no provision is made for the ordinary hours of work. Experience suggests that is more likely to occur if there is no relevant award or collectively negotiated industrial agreement.

204. It is not essential for the award or agreement to use the exact expression 'ordinary hours of work', but the instrument must disclose an intention to draw a genuine distinction between ordinary hours and other hours, which in particular would normally entail the other hours being remunerated at substantially higher (that is, overtime) rates. The Commissioner considers that this basic and widely understood distinction, in the industrial climate that prevailed in 1992, between ordinary time earnings and overtime earnings is what Parliament had in mind in enacting the OTE definition.

205. Thus, a clause merely prescribing a minimum or maximum number hours of work over a given period is not the same as one prescribing ordinary hours of work, particularly if any further hours of work actually performed are to be paid at the same rate as the minimum or maximum hours.

206. There is Federal Court authority for this proposition. In *Quest Personnel Temping Pty Ltd v. Commissioner of Taxation*[11] (*Quest*),

[11] [2002] FCA 85; (2002) 116 FCR 338; 2002 ATC 4116; (2002) 49 ATR 84.

the Court considered the question of what were the ordinary hours of work of employees who worked regularly for numbers of hours greater than the minimum hours specified in their contracts of employment. The contracts did not specify the ordinary or standard hours of work. Employees were not paid at a higher hourly rate if they agreed to work hours greater than the minimum.

207. In the Administrative Appeals Tribunal decision at first instance, the Tribunal said:

> If it was normal, regular, customary or usual for the employee to work more than that minimum number of shifts, it is difficult to see that those actual hours worked were not "ordinary hours of work". In one sense, the meaning of ordinary can be considered as the opposite of extraordinary. If the additional shifts worked on a normal or regular basis could not be said to be extraordinary, being other than ordinary or usual, it is difficult to see that they are not ordinary hours of work.

208. In the Federal Court on appeal from this decision, Grey J held that, in these circumstances, the Tribunal was correct to conclude that the ordinary hours of work of an employee were the normal, regular, customary or usual hours worked by that employee. There was no higher rate of pay prescribed for additional hours worked, nor had any 'ordinary' hours been set by any award or collective bargaining process.

209. The Commissioner regards the *Quest* decision as an authoritative statement of the law in these limited kinds of cases.

210. However, if it is not possible or practicable to determine the normal, regular, customary or usual hours worked by a given employee in a quarter, the employer should pay superannuation contributions on all the actual hours worked by the employee, rather than defaulting to some other purported earnings base such as the minimum hours specified in the contract of employment.

Maximum contribution base

211. The OTE, 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.

212. 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. For the amount of the maximum contribution base, see paragraph 19 of this Ruling.

OTE is now the standard earnings base

213. Before 1 July 2008, OTE was the default earnings base to be used by an employer in calculating their superannuation obligations. Amendments of 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.[12] The effect of the amendments is that, as from 1 July 2008, an employer must use ordinary time earnings as the earnings base in all cases in calculating their required contribution.

214. Employers may still use the notional earnings bases specified in legislation or industrial agreements where these are above an employee's OTE, but this is not required by the SGAA.

215. 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 superannuation guarantee contributions calculated against the same amount.[13]

Payment specifically included in OTE

216. The Commissioner considers that the specific inclusion of over-award payments, shift-loadings and commissions in OTE was intended to avoid doubt and to prevent any possible argument that, by their very nature, these sorts of earnings could never be in respect of ordinary hours. The Commissioner does not however read the definition so literally as to compel the odd result that these amounts are always OTE even where they are clearly referable only to overtime hours worked.

Over-award payments

217. The term 'over-award payments' is not defined in the SGAA. The *Macquarie Dictionary*[14] 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.

218. 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).

219. However, the Commissioner's view is that the specific inclusion of these payments does not apply to over-award payments that are specifically referable to hours worked that are not ordinary time hours. For example, an employer's policy may be to offer a

[12] See Explanatory Memorandum to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004.
[13] See Explanatory Memorandum to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004.
[14] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW (*Macquarie Dictionary*).

higher rate of overtime pay for some overtime hours worked than the penalty rate required by an award. Even though these literally could be described as over-award payments, such additional payments would not be OTE under subparagraph (a)(ii).

Shift-loading

220. 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.

221. 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. Such payments are therefore included in the definition of OTE in subsection 6(1).

222. Shift-loadings payable on ordinary hours of work must be distinguished from overtime payments under awards and agreements. Often these are mutually exclusive under awards and agreements, but if an employee is entitled to a shift-loading in respect of hours other than ordinary hours of work, the Commissioner's view is that the specific inclusion of shift-loadings does not apply in that circumstance.

Commission

223. A commission is a payment made to an employee such as a salesperson on the basis of the volume of sales he or she achieves or other similar criteria. These are always OTE except in the unusual case where they can be shown to be wholly referable to overtime hours worked.

224. Tribunal Member Fice in *Prushka Fast Debt Recovery Pty Ltd v. Commissioner of Taxation*[15] (*Prushka*) said this:

> 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.

Earnings 'in respect of ordinary hours of work' means all earnings other than overtime

225. All amounts of earnings in respect of employment are in respect of the employee's ordinary hours of work unless they are

[15] [2008] AATA 762.

remuneration for working overtime hours, or are otherwise referable only to overtime or to other hours that are not ordinary hours of work.

226. The Commissioner does not consider that the services or attendance of an employee specifically during certain hours of work is necessary for the earnings to be 'in respect of ordinary hours' and therefore OTE. The Commissioner's view is that the expression 'in respect of ordinary hours of work' was intended to ensure that overtime payments, and cognate amounts, were excluded from the earnings base. It was not intended to exclude amounts paid at a worker's ordinary time rate solely on the ground that they were not earned as a direct result of actually working particular hours in ordinary time.

227. For example, during public holidays an employee does not provide services or attend work, and the entitlement to the payment for the holiday has not accrued during ordinary hours actually worked. However, the payment the employee receives is 'in respect of ordinary hours of work' because it is salary or wages received at their ordinary rate of pay paid for a period which would normally be their ordinary working hours.

228. Given this view, the Commissioner considers that there is no such thing as earnings that are merely in respect of employment generally and are not OTE because they are not in respect of any particular hours of work. However payments that are not considered 'salary or wages' for the purposes of the SGAA cannot be OTE.

229. [Omitted.]

Piece-rates

230. 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.

231. 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. These standard hours can be used to determine the 'ordinary hours of work' for the purposes of calculating OTE.

232. 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 whole amount of salary payable under such a package is OTE, unless overtime amounts are distinctly identifiable.

233. 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'.

234. Unless the employee is subject to an award or agreement which specifies the ordinary hours of work, all payments made on a piece-rate basis are included in an employee's OTE and in 'salary or wages'.

Paid leave

235. Although leave payments are not paid for actual attendance at work or for services, the salary or wages that an employee receives in respect of periods of paid leave is a continuation of their ordinary pay during their 'ordinary hours of work' and therefore take the place of earnings in respect of actual hours worked. Therefore any salary or wages an employee receives while on annual leave, long service leave or sick leave is in respect of their ordinary hours of work and is OTE.

236. However, as noted in paragraph 59B, payments made to an employee while on parental leave or other ancillary types of leave and 'top-up payments' made while an employee is on jury service, defence reserve service or the like are excluded from salary or wages for superannuation guarantee purposes. Therefore they are not OTE.

237. Casual employees, including part-time casuals, are usually not entitled to paid leave or paid public holidays.[16] Instead they receive a higher rate of pay (a 'casual loading') which is referable to their ordinary hours of work and therefore OTE, unless paid in respect of overtime hours worked.

238. By way of exception an annual leave loading that is payable under some awards and industrial agreements is not OTE if it is demonstrably referable to a notional loss of opportunity to work overtime. However, the loading is always included in 'salary or wages'.

Payments for unused long service leave entitlements while still employed

239. 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.

240. Although unused long service leave paid as a lump sum on termination is specifically excluded from OTE by its definition in subsection 6(1), if a payment for unused long service leave occurs

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

while the employee remains employed, this amount is paid in connection with the employee's ordinary hours in the same way as any other long service leave payment. Therefore, the payment of unused long service leave entitlements while still employed is included in OTE.

Part B – Salary or wages

Ordinary meaning of salary or wages

241. At common law, 'salary or wages' constitutes 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.

242. 'Salary' is a fixed amount paid regularly to an employee as remuneration for work done. It is sometimes used in contrast 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. However, the terms 'salary' and 'wage' are often 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.

243. 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.

244. In *Mutual Acceptance Co Ltd v. Federal Commissioner of Taxation* (*Mutual Acceptance*) the High Court construed the ordinary meaning of the terms 'salary' and 'wages'[17]. Dixon J explained the meaning of the terms:[18]

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

245. Further, in *Mutual Acceptance* Latham CJ stated:[19]

> 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

[17] In *Mutual Acceptance*, the Court considered whether certain payments made to employees were 'wages' within the meaning of the *Pay-roll Tax Assessment Act 1941-1942*. In that Act, 'wages' were defined as 'wages, salary, commission, bonuses paid or payable … to an employee as such'.
[18] *Mutual Acceptance* (1944) 69 CLR 389 at 403; (1944) 7 ATD 506.
[19] *Mutual Acceptance* (1944) 69 CLR 389 at 396; (1944) 7 ATD 506.

> 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.

Payments specifically included in the definition of 'salary or wages' in the SGAA

Commission

246. Commission payments are specifically included as 'salary or wages' in the SGAA. See paragraphs 223 and 224 of this Ruling for a description of commissions.

Body corporate executives

247. 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).

Labour component of contracts

248. 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'. 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.[20]

Parliamentarians

249. 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.[21] 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.

250. However, the members in question are specifically incorporated into the definition of employee in the SGAA by virtue of

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[20] The scope and operation of subsection 12(3) is discussed in more detail in paragraphs 64 to 78 of SGR 2005/1.

[21] 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*.

subsections 12(4) to 12(7). Payments to these persons would be 'salary or wages' under the extended definition in paragraph 11(1)(c).

Performers

251. The common law meaning of 'salary or wages' is expanded in paragraph 11(1)(d) to include payments made to artists, musicians and sportspersons. 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.

252. 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.

253. 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 only 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.[22]

Public office holders

254. 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));

[22] See SGR 2009/1.

- members of eligible local governing bodies.[23]

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

Private or domestic work

255. '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: subsection 11(2). The SGAA does not define the terms 'domestic' and 'private'. Work of a domestic or private nature means work relating personally to the individual making payment for the work or to the individual's home, household affairs or family organisation.

Fringe benefits and other non-cash benefits

256. Fringe benefits as defined in the FBTAA are excluded under subsection 11(3) of the SGAA.[24]

257. Additionally, the Commissioner takes the view that other 'benefits', within the meaning of the FBTAA, given by employers to employees that are neither fringe benefits nor salary or wages within the meaning of the FBTAA are not salary or wages for SGAA purposes. For example:

- contributions made by an employer to a complying superannuation fund for the benefit of an employee (including those required to be made by the superannuation guarantee legislation itself); and
- the acquisition of a share, or of a right to acquire a share, under an employee share scheme (within the meaning of Division 13A of Part III of the ITAA 1936),

are not salary or wages for SGAA purposes. In forming this view the Commissioner takes into account the intent evidenced by subsection 11(3) and the general distinction drawn for income tax, fringe benefits tax and Pay as You Go purposes between salary or wages and other kinds of employment benefits.

Local government

258. Remuneration of a person who holds office as a member of a local government council (other than an eligible local governing body) is excluded.

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[23] See TR 2002/21 for guidance in determining whether a person falls into one of these categories.

[24] See *Fringe benefits tax (FBT) – a guide for employers* (NAT 1054) (available on www.ato.gov.au) for examples of fringe benefits.

Allowances and reimbursements

259. Section 11 does not expressly include in its definition of 'salary or wages' the term 'allowance'. The Commissioner however interprets the expression as used in the SGAA context as extending to the same kinds of allowances that have been regarded as salary or wages under definitions of 'salary or wages' that expressly include allowances.

260. In *Mutual Acceptance*,[25] 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 Assessment Act 1941-42*.[26] The payment represented partial compensation for the motor vehicle expenses likely to be incurred by those employees.

261. In discussing what may be considered as the ordinary meaning of an 'allowance' Latham CJ in *Mutual Acceptance* stated that an allowance paid as compensation for unusual conditions of services:[27]

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

262. *Mutual Acceptance* was relied upon in *Road & Traffic Authority of NSW v. Federal Commissioner of Taxation*[28] 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 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.

263. Hill J 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'.

264. 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.

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[25] (1944) 69 CLR 389; (1944) 7 ATD 506.
[26] The definition of 'wages' in the *Commonwealth Pay-roll Tax Assessment Act 1941-42* expressly included the term 'allowance' unlike the SGAA.
[27] (1944) 69 CLR 389 at 397.
[28] (1993) 43 FCR 223; 93 ATC 4508; (1993) 26 ATR 76.

265. Allowances of this kind are to be distinguished from expense allowances dealt with under paragraphs 72 and 266 of this Ruling.

Expense allowances

266. 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. 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. It also does not form part of an employee's OTE.

Military allowances

267. 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

268. 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. As a reimbursement is not provided as a reward for services of the employee it is not 'salary or wages' or 'OTE'.

269. **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.

270. 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'.

Workers' compensation and other payments made on behalf of an employer

271. 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.

272. 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.[29]

273. However, workers' compensation payments, including top-up payments received by an injured employee who does not work or is not required to attend work due to incapacity to work, are not considered 'salary or wages'. In these cases the payments are to be categorised as compensation for loss of work rather than 'salary or wages'.

Bonuses

274. A bonus is 'salary or wages' if it is paid to an employee by reason of their services as an employee and not on a personal basis. Only in those very limited cases in which the Commissioner would accept that the payment is not assessable income of the employee for income tax purposes would the Commissioner accept that the payment is made on a personal basis and so is not salary or wages, and therefore not OTE, for SGAA purposes.

275. In *Prushka*, 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 Prushka were clearly paid in an employment context and by reference to the specific performance of its employees as a group.

276. Accordingly, it was held that the payments were OTE as well as 'salary or wages' for superannuation guarantee purposes. A bonus that is a 'retention 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.

277. These are no different from other kinds of bonus. They are a form of remuneration for services rendered and would be assessable as income in the hands of the employee. Therefore, a retention payment is 'salary or wages'.

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[29] The Commissioner's views on the SGAA treatment of tripartite relationships are set out in Superannuation Guarantee Ruling SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries* – see paragraphs 66 to 68.

278. A ‘sign-on’ bonus is salary or wages if it is assessable income in the hands of the employee for income tax purposes. Only in limited situations would the Commissioner accept that such a payment is not assessable income, as where the payment is clearly referable to a separate restrictive covenant entered into by the employee: see Taxation Ruling IT 2307.

Appendix 3 – Detailed contents list

279. Below is a detailed contents list for this Superannuation Guarantee Ruling:

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