Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union -

Decision impact statement

Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union

Court citation:	[2019] FCAFC 84
Venue:	Federal Court of Australia – Full Court
Venue reference no:	NSD 542 of 2018
Judges:	ALLSOP CJ, COLLIER AND RANGIAH JJ
Judgment date:	24 May 2019
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner (Intervener)

Impacted advice

This decision has no impact on any related advice or guidance.

Précis

Outlines the ATO's response to this case with respect to the meaning of 'ordinary time earnings' and 'ordinary hours of work' as used in the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

Brief summary of facts

The Commissioner applied for leave to intervene in an appeal by BlueScope Steel (AIS) Pty Ltd (BlueScope Steel) against a judgment of the Federal Court in *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd* [2018] FCA 80.

At first instance, the Court found that BlueScope Steel had contravened terms of various industrial awards and agreements by not making superannuation contributions relating to the 'additional hours component' and the 'public holidays component' of their employees' annualised salaries.

In arriving at this conclusion, the Court considered the construction and application of the terms 'ordinary time earnings' and 'ordinary hours of work' as defined in the SGAA, finding that the 'ordinary hours of work' of BlueScope Steel's employees included the 'additional hours' and 'public holidays' provided for in the relevant industrial awards and agreements.

The Commissioner's application to intervene was made on the basis that the Commissioner is responsible for the general administration of the SGAA and is responsible for the collection of the superannuation guarantee charge that may arise in relation to the Court's ruling. Further, the approach of the Court at first instance was inconsistent with the Commissioner's long settled and published position on the meaning of 'ordinary time earnings' and 'ordinary hours of work'. To that extent, the decision at first instance would have had widespread and large scale consequences for Australian employees, employers and the Commissioner. The Commissioner has

singular responsibility for the public interests sought to be served by the superannuation guarantee regime and those broader interests could not be privately enforced by employees, either directly or through seeking to compel the Commissioner to do so.

Issues decided by the Full Court

The Commissioner was granted leave to intervene to be heard on issues relating to:

(i) the meaning of the terms 'ordinary time earnings' and 'ordinary hours of work', and

(ii) the general operation of the SGAA and the Commissioner's powers and responsibilities under that Act.

In allowing the appeal of BlueScope Steel, the Full Court agreed with the Commissioner's submissions on the interpretation of the terms 'ordinary time earnings' and 'ordinary hours of work', within the meaning of section 6 of the SGAA.

In particular Allsop CJ stated at [56]:

> … The meaning that best reflects these considerations and the text, context, purpose and history of the provision is earnings in respects of ordinary or standard hours of work at ordinary rates of pay as provided for in a relevant industrial instrument, or contract of employment, but if such does not exist (and there is no distinction between ordinary or standard hours and other hours by reference to rates of pay) earnings in respect of the hours that the employee has agreed to work or, if different, the hours usually or ordinarily worked.

Collier J also stated at [314]:

> In light of these findings, I conclude that the expression "ordinary time earnings" in ss 6(1) and 23(2) of the SGA Act, in the circumstances of the present case where "ordinary hours of work" are defined by the Enterprise Agreements, means earnings in respect of those ordinary hours of work as defined.

Rangiah J agreed with Allsop CJ and Collier J on these issues.

In considering the interaction between the SGAA and industrial instruments that refer to the making of superannuation contributions, Allsop CJ observed at [19]:

> … If contributions are not made the employer suffers a tax. This is not an idle distinction, especially in the light of the fact that the superannuation legislation does not confer on an employee any right to require the Commissioner of Taxation to do anything for him or her in respect of superannuation: *Kronen v Federal Commissioner of Taxation* [2012] FCA 1463; 213 FCR 495 at 505 [50]. There is every reason for those representing employees to include in an enterprise agreement an obligation to pay superannuation at the minimum level that will avoid a charge or tax. That reason is the direct enforceability of the obligation. True it is that if an employer fails to pay the minimum contribution it is then faced with both the imposition of a tax and the possible enforcement of obligations in the enterprise agreement. That problem is easily avoided: comply with the obligations freely entered into in the enterprise agreement. This possible duality of consequences is no reason not to view the enterprise agreement as containing binding obligations which can be enforced on behalf of employees for their protection and proper payment, for instance by seeking relief under civil remedy provisions such as ss 539(2), 540, 545(1), 2(a) and (b) of the *Fair Work Act*.

This observation confirms that employees may have a right of action against their employer under the terms of their employment contract or industrial agreement where the employer does not meet their obligations to pay superannuation pursuant to the terms of that contract or industrial agreement. The contribution amounts

prescribed in a contract or agreement may actually be over and above the prescribed minimum superannuation contributions required to avoid the imposition of the superannuation guarantee charge.

ATO view of decision

The conclusion reached by the Court on the meaning of the terms 'ordinary time earnings' and 'ordinary hours of work' is consistent with the Commissioner's long settled and published position in Superannuation Guarantee Ruling SGR 2009/2 *Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'*.

Implications for impacted advice or guidance

None

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	12 November 2019
Due date:	13 December 2019
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

Fair Work Act 2009 539(2)
Fair Work Act 2009 540
Fair Work Act 2009 545(1)
Fair Work Act 2009 545(2)(a)
Fair Work Act 2009 545(2)(b)
SGAA 3
SGAA 5
SGAA 6
SGAA 11
SGAA 12
SGAA 16
SGAA 17
SGAA 19
SGAA 23
SGAA 47

Case references

Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd [2018] FCA 80; 107 ATR 333; [2019] ALMD 784; 278 IR 170

Kronen v Commissioner of Taxation [2012] FCA 1463; 213 FCR 495; [2014] ALMD 612

Other references

SGR 2009/2

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