Australian Government
Australian Taxation Office

Interim decision impact statement

Department of Education v Commissioner of Taxation [2026] FCA 898

Relying on this Decision impact statement

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Venue:	Federal Court of Australia
Venue reference No:	VID 204 of 2025
Judgment date:	10 July 2026

Summary of decision

1. This Interim decision impact statement outlines the ATO's response to this case, which considered whether the Victorian Department of Education (Department) was liable to superannuation guarantee charge (SGC) under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) because the Department did not pay superannuation contributions in relation to a 'salary loading allowance' paid annually to teachers.

2. The Federal Court found that the Department was not liable to SGC for failing to pay superannuation contributions in relation to the salary loading allowance, as the allowance did not fall within the relevant notional earnings base or within the relevant employees' ordinary time earnings (OTE).

3. This decision is currently subject to appeal to the Full Federal Court.

4. All legislative references in this Interim decision impact statement are to the SGAA as in force prior to 1 July 2026[1], unless otherwise indicated.

5. All judgment references in this Interim decision impact statement are to the judgment of the Federal Court in *Department of Education v Commissioner of Taxation* [2026] FCA 898 unless otherwise indicated.

Overview of the facts

6. The Department pays a salary loading allowance to eligible teachers employed by the Department. The allowance is paid annually on a specific date. The teachers are entitled to the allowance if they complete the year of service doing their ordinary hours of work and remain employed by the Department on the specific date.[2] The allowance is calculated as 17.5% of the total of 4 weeks of the teacher's normal salary.[3]

7. During the periods in dispute, the Department did not pay superannuation contributions for its employee teachers in relation to the salary loading allowance paid to them.

8. For the relevant quarters prior to 1 July 2008, it was accepted by the parties that former section 13 applied[4], and that the Department would be liable for SGC if the salary loading allowance fell within the applicable notional earnings base.

9. The relevant notional earnings base in this case was that provided for under the *State Employees Retirement Benefits Act 1979* (Vic) and the *State Superannuation Act 1988* (Vic).[5] These Acts required superannuation to be paid on 'salary' as defined in the Acts. Relevantly, the definition of 'salary' excluded 'recreation leave allowance' and 'payments of a temporary character'.

10. For the relevant quarters from 1 July 2008, it was accepted by the parties that the Department would be liable for SGC if the salary loading allowance fell within the definition of OTE in section 6.[6]

11. In 2024, the Commissioner issued amended notices of assessment of SGC to the Department for the relevant quarters in the period 2004 to 2022, to include SGC related to the failure to make superannuation contributions in relation to the salary loading allowance for a total of 18 teachers that had made enquiries at that time.[7] The amended assessments were issued on the basis that the Department had not successfully reduced their charge percentage for the relevant employees to nil for the periods in dispute because, in the Commissioner's view, the salary loading allowance fell within the relevant notional earnings base and was OTE, respectively.[8]

12. Objections against the amended assessments were disallowed in full.

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[1] The SGAA has recently been amended by the *Treasury Laws Amendment (Payday Superannuation) Act 2025*, with effect from 1 July 2026. The legislative references in this Interim decision impact statement are to the SGAA as in force prior to 1 July 2026, unless otherwise indicated, as this case relates to periods prior to those amendments having effect.
[2] At [19]. Teachers not employed by the Department at that date can still receive salary loading allowance if they ceased employment due to old age or ill health. Part-time teachers and those who commenced employment part-way during the year receive a pro-rata entitlement to the salary loading allowance.
[3] Up to a specified cap that changes year to year.
[4] At [10].
[5] At [10].
[6] At [13–14].
[7] At [4].
[8] Section 23.

13. The Department appealed the objection decision to the Federal Court. The Department argued that the salary loading allowance:

- did not form part of the notional earnings base for periods prior to 1 July 2008, because[9]
  - it was effectively an annual leave loading and therefore excluded from 'salary' as a 'recreation leave allowance', or
  - it was a payment of a temporary character, and therefore was excluded from 'salary'
- did not form part of OTE because it
  - was effectively an annual leave loading and was paid to compensate for the lost opportunity to work overtime[10] and to cushion employees against additional expenses incurred while on leave[11]
  - was paid at a higher rate because it was 17.5% of the base salary.[12]

Issues decided by the Court

Issue 1 – for periods prior to 1 July 2008, whether the salary loading allowance formed part of the notional earnings base

14. The Court held that the salary loading allowance did not form part of the relevant notional earnings base for periods prior to 1 July 2008.

15. The Court considered evidence regarding the purpose of the allowance when it was first introduced in the 1970s, and accepted that the salary loading allowance was introduced to give teachers an equivalent loading to the recreation leave loading enjoyed by their public service counterparts.[13] The Court further accepted that the salary loading allowance was named as it was, and structured as it was, due to the particular arrangements of teachers which resulted in the formal entitlement to 4 weeks' annual leave not being taken over an identified period within the school holidays.[14]

16. The Court held that that the expression 'recreation leave allowance' in the relevant Acts is properly to be construed as capturing allowances that were, in substance, recreation leave allowances even if they were not paid when an employee literally took annual (recreation) leave.[15] The Court found that the salary loading allowance was therefore a recreation leave allowance, albeit one paid in a bespoke manner due to the peculiarities of the teaching profession, and that it had not lost that character since it was first introduced in the 1970s.[16] Accordingly, the salary loading allowance was not 'salary' as defined under the relevant Acts and therefore did not form part of the notional earnings base.

17. The Court rejected the arguments from the Department that the allowance was paid to compensate for the lost opportunity to work overtime during holiday periods[17], or to cushion the employee against additional expenses incurred during leave.[18] The Court also rejected the argument that the salary loading allowance was of a temporary character, on

[9] At [11].
[10] At [68].
[11] At [32].
[12] At [70].
[13] At [38].
[14] At [39].
[15] At [56].
[16] At [58].
[17] At [41].
[18] At [60].

the basis that although it was only paid once a year it was paid on an ongoing, recurring basis.[19]

Issue 2 – for periods from 1 July 2008, whether the salary loading allowance is OTE

18. The Court held that the salary loading allowance was not OTE for periods from 1 July 2008.

19. The Court held that, where an industrial award or agreement nominates a salary for an employee's ordinary hours, that is the payment they receive at ordinary rates of pay for their ordinary hours.[20] Amounts that are paid in addition to these amounts will not be OTE.[21]

20. The Court found that the salary loading allowance was an amount additional to the base salary in the relevant industrial agreements and therefore was not OTE, even though teachers did not need to perform any work beyond their ordinary hours to receive the payment and it was not compensation for a lost opportunity to work overtime.[22]

21. The Court considered that it was not relevant to the analysis that:

- it was not established by the Department that the allowance was compensation for a lost opportunity to work overtime[23]
- the allowance was introduced to give teachers the equivalent of annual leave loading[24], or
- the allowance was, or paid at, a different rate.[25]

ATO view of the decision

22. The Commissioner has appealed the Federal Court's decision in respect of both issues.

23. Draft Law Companion Ruling LCR 2026/D1 *Payday Super: qualifying earnings* continues to reflect the Commissioner's views on the interpretation of OTE, which is included within the term 'qualifying earnings' in section 10A of the SGAA from 1 July 2026. However, the Commissioner will not seek to finalise that Ruling until the appeal process has concluded.

Administrative treatment

24. Pending the outcome of the appeal process, where a decision turns on whether a particular amount is OTE, we do not propose to finalise:

- requests for advice concerning whether particular amounts fall within the meaning of OTE
- decisions in compliance activity, including issuing SGC assessments or amended SGC assessments

[19] At [60].
[20] At [63].
[21] At [66].
[22] At [65].
[23] At [69].
[24] At [69].
[25] At [71].

- objection decisions in relation to objections against SGC assessments or amended SGC assessments.

25. However, if a decision is required to be made (for example, because the employer's period of review will elapse or the employer gives notice requiring the Commissioner to make an objection decision), our decisions will be consistent with the existing ATO view of the law. In these circumstances, recovery of the liability will generally be deferred pending the outcome of the appeal and would only be pursued if the Commissioner is ultimately successful.

Commissioner of Taxation
5 August 2026

References

Related rulings and determinations:

LCR 2026/D1

Legislative references:

- SGAA 6(1)
- SGAA 10A
- SGAA former 13
- SGAA former 23
- State Employees Retirement Benefits Act 1979 (Vic)
- State Superannuation Act 1988 (Vic)
- Treasury Laws Amendment (Payday Superannuation) Act 2025

Cases relied on:

Department of Education v Commissioner of Taxation [2026] FCA 898; 2026 ATC 21-028

ATO references

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