

2 February 2009

██████████  
Australian Taxation Office  
GPO Box 9977  
SYDNEY NSW 2001

Dear ██████████,

**Re: SGR 2008/D2 – ATO Draft Ruling on the meaning of ‘ordinary time earning’  
and ‘salary or wages’**

Further to the Australian Chamber of Commerce and Industry’s (ACCI) earlier correspondence (dated 23 January 2009), which included a written submission (attached) on the above draft ruling, ACCI wishes to provide the ATO with a further supplementary submission. This further submission builds upon and clarifies certain aspects of the earlier submission.

The following paragraph appears in ACCI’s earlier written submission.

***Section 6(1) of the Act***

Section 6(1)(a)(ii) of the Act, currently and explicitly exempts “*earnings consisting of over-award payments, shift-loading or commission ...*” ACCI submits that Parliament’s intention was to exclude a specie of category that are generally known as on-costs payable in addition to the basic award payments (ie. OTE). The lexicon used clearly reflects industrial relations parlance, used in federal awards and instruments, and that is for OTE to exclude overtime.

Upon further analysis and reconsideration of s.6(1) of the *Superannuation Guarantee (Administration Act) 1992* (the Act), ACCI wishes to clarify its position as follows.

Section 6(1)(a)(ii) of the Act, currently and explicitly includes as ordinary time earnings (subject to superannuation payments) a number of specifically listed forms of employment on-costs being “*earnings consisting of over-award payments, shift-loading or commission ...*”

ACCI submits that Parliament’s intention was to include a specie of category that are generally known as on-costs payable in addition to the basic award payments (ie. OTE). By implication, the express identification of this particular set of employment on-costs, implies that other elements of pay derived from the award system which were not

explicitly identified as subject to superannuation were therefore intended to be excluded. We are further reinforced in this view by two matters of industrial background.

Firstly, the Act uses the term “ordinary time earnings” to define which payments do and do not attract superannuation. This has for many decades been a well understood and defined term in the industrial relations system, which has clearly excluded overtime. That Parliament chose to use this well known legal concept evinces an intention to not include overtime payments in superannuation liabilities. It is clear that Parliament wanted to clarify and make certain that ordinary time earnings under the Act would include other components from the industrial award system, in the form of *over-award payments, shift-loading or commissions*. It did not do so in relation to overtime, evincing a different statutory intention.

It is noteworthy that all terms used in s.6(1) are widely known industrial terms. ACCI also notes that the draft ruling refers to the Macquarie Dictionary to explain the ordinary meaning of such terms.

However, given that Act refers to industrial terms, at the time of its passage, the authoritative 1992 *CCH Macquarie Dictionary of Employment and Industrial Relations* buttresses ACCI’s view, and more appropriately reflects contemporary industrial relations practice. The CCH Dictionary is relied upon by Industrial Tribunals across federal and State jurisdictions, as well as the Courts.<sup>1</sup>

Furthermore, more insightful and relevant is the manner by which industrial concepts are treated differently and clearly delineated (ie. ordinary time pay vs overtime) within the CCH Dictionary.

### ***CCH Macquarie Dictionary of Employment and Industrial Relations (1992)***

**commission**  
(page 61)                    4. payments often made to sales staff in addition, generally, to their base wage, and usually related to a specified measure of performance, such as volume or value of sales. Supervisory staff related to the sales function sometimes also have arrangements in their contracts of employment for earning commission. Also commission earnings.

**ordinary pay**  
(page 250)                    the **remuneration** received by an employee for the normal weekly number of hours of work in an ordinary working week, calculated at the ordinary time rate of pay. **Overtime pay and special allowances paid only from time to time are not included, but overaward payments and allowances paid under all circumstances are normally included.** Ordinary pay is used for the purposes of calculating payment for periods of paid leave. Where no ordinary rate of pay is

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<sup>1</sup> See for example, *W E Bassett & Partners Pty Ltd v John Francis Doherty* [1997] FCA 715 (31 July 1997), which concerned interpretation of a term contained in a superannuation trust deed.

fixed (e.g. for an employee remunerated only by commission), it can be calculated by averaging the employee's weekly earnings during the previous twelve months.

- ordinary time** (page 250)      1. the time worked during **ordinary hours of work** (as contrasted with overtime).  
2. the rate of pay for ordinary hours of work.
- ordinary hours of work** (page 250)      the hours worked by an employee in an ordinary working day or week, normally between prescribed starting and finishing times. Work outside ordinary hours is overtime for employees working under awards or agreements providing for penalty rates. See also ordinary pay; ordinary time; standard hours.
- overtime** (page 253)      1. the time worked outside or in excess of the ordinary hours of work prescribed in an award. In addition to the normal payment of higher rates for overtime work, employers may be required under some awards to provide a meal or **meal allowance** wherever a certain number of overtime hours has been worked. Tribunals will enforce reasonable amounts of overtime.  
2. → **overtime pay.**  
3. of or relating to overtime.
- overtime pay** (page 253)      the payment for work done on **overtime**. The minimum rate for the first three hours is time and a half, and thereafter double time. Double time is increasingly being paid already after two hours on time and a half. Contrast ordinary pay. See also **penalty rate.**
- overaward payment** (page 253)      the difference between the actual rate paid and the award rate when the actual rate exceeds the award rate. It includes a so-called "third tier" of wages sometimes granted outside the formal award system in order to attract labour in times of under supply in the labour market. Awards in which overaward payments have been incorporated are called **paid rates awards**. Contrast **minimum rates award**. See also **collective agreement; enterprise bargaining; overaward; supplementary payment.**
- shift allowance** (page 320)      an additional payment for workers who work **shifts** other than **day shifts**, as compensation for the inconvenient working hours. The payment is usually a percentage of the ordinary time rate. Also **shift bonus; shift differential; shift premium.**

Clearly, the lexicon used reflects longstanding industrial relations parlance, used in federal awards and instruments, and that is for OTE to exclude overtime.

Secondly, the Act has its genesis from the industrial award system. It therefore is not built upon unknown ground or concepts. In the AIRC Award Simplification Decision

(Print 750023; December 1997), the Award provision on superannuation continued to exclude overtime from the definition of ordinary time earnings:

**25.2.2 Ordinary time earnings** for the purposes of this clause, means:

**25.2.2(a)** award classification rate;

**25.2.2(b)** over-award payment;

**25.2.2(c)** shift loading - including weekend and public holiday penalty rates earned by shift employees on normal rostered shifts forming the ordinary hours of duty not when worked as overtime;

**25.2.2(d)** casual loading in respect of casual employees.

**25.2.3** Ordinary time earnings does not include bonuses, commission, payment for overtime or other extraordinary payment, remuneration or allowance.

Many decisions of the AIRC construing federal award provision have considered the issue of overtime. ACCI notes that the ATO draft ruling dismisses the High Court decision of *Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation* [2003] HCA 55 in favour of other cases such as the 1974 decision of *Kezich* and and the Federal Court case of *Quest*. The ATO's justification (and which is contained in ATO Interpretative Decision 2007/73) appears at paragraph 197 of SGR 2008/D2 as follows: "*ACE is therefore distinguishable as the Court was not required to construe the definition of OTE in the SGAA*".

With respect, this conclusion ignores that fact that practitioners, employers and industrial tribunals have relied upon the *ACE* decision as confirming the law that overtime is not part of OTE. For example, in a recent decision of the AIRC, Commissioner Lewin relied upon the *ACE* decision in granting an application to vary the federal Transport Workers' (Superannuation) Consolidated Award 2004.<sup>2</sup> Commissioner Lewin summarised the decision of the *ACE* case within the context of the application before him, and SGAA legislative system as follows:

#### **Ordinary time earnings in the context of the application**

[16] However straightforward one might think the meaning of the phrase "ordinary time earnings" for present purposes may be, either in everyday English, as part of the SGA Act, or an award of the Commission or of an industrial tribunal of a State, the question requires some elaboration. This is due to the complexity with which the SGA Act deploys the interpretive provisions in clause 6 of that Act in aid of the construction of a concept of an employee's "notional earnings base", in sections 6, 19 and 23 thereof, which forms the amount in respect of which a superannuation contribution is required.

[17] Indeed a series of decisions; first of a single member of the Federal Court, second of the Full Federal Court and finally a majority (4/3) of the High court of Australia, demonstrates the potential interpretive possibilities which the relationship between the

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<sup>2</sup> PR947388 (16 June 2005).

SGA Act and the award systems allow. A wide divergence of views were expressed by the many judges in those decisions.

[18] In the case known as Australian Communications Exchange Limited v. Deputy Commissioner of Taxation<sup>4</sup> the Federal Court and the High Court were required to consider the meaning of the phrase "ordinary time earnings" in the SGA Act with reference to the provisions of the Clerical Employees Award (State) (QLD) an award of the Queensland Industrial Relations Commission.

[19] The facts of that case were that Australian Communication Exchange Ltd employed a number of Relay Officers as casual employees who performed their work outside the spread of ordinary working hours prescribed by the award in a call centre run by the company. The call centre operates 24 hours a day and seven days a week. All of the employees of the company were casuals. The company did not make superannuation contributions in respect of the earnings for work performed by those employees who were engaged outside of the spread of hours contained in the relevant award. The Deputy Commissioner of Taxation assessed the company as being liable to make payments under the Superannuation Guarantee Charge. The company objected to that assessment, which objection was disallowed, and subsequently appealed the disallowance of their objection to the Federal Court. Dowsett J allowed the objection. The Deputy Commissioner of Taxation appealed to the Full Court of the Federal Court. The Full Court allowed the Deputy Commissioner of Taxation's appeal but did not agree with the way in which the Deputy Commissioner of Taxation had construed the award in making its initial assessment and so ordered an assessment be made in accordance with its own decision. Neither the company or the Deputy Commissioner of Taxation were satisfied with that result and so both respectively, with special leave, appealed and cross appealed to the High Court.

[20] Without traversing the detailed history of those proceedings it is convenient to note that the judgment of the majority of the High Court concluded that where a casual employee performs work outside the spread of hours prescribed by that award the earnings in respect of such work do not form part of the "notional earnings base" <sup>5</sup> of such employees because that work is paid for at an overtime rate of pay<sup>6</sup>.

[21] Therefore, in brief summary, it can be said that, according to the ratio decendi of the majority of the High Court, in the ACE decision, the meaning of the phrase "ordinary time earnings" in the SGA Act cannot encompass earnings in respect of work which is performed under an award at overtime rates. In particular it would seem, in accordance with the reasoning of the majority in that matter, where an award prescribes a spread of hours and for the payment at overtime rates for work performed outside that spread of hours<sup>7</sup>, earnings for such work will not form part of an employee's "notional earnings base" for award or SGA Act purposes. So much is common to the submissions of the parties appearing in the proceedings before me. (emphasis added).

[22] Consequently, having regard to clauses 8.4, 8.5 and 7.4 of the TWU Superannuation award, where an employer respondent to that award employs persons to work outside the prescribed ordinary time hours of work as casual employees, the proper construction of the award is that no contributions to the fund are required to be made on behalf of such employees in respect of earnings for work so performed. Moreover, having regard to the interaction between the SGA Act and the award system, already noted, neither will any charge arise under that Act.

[23] Likewise, where a participating employer engages a casual employee to perform work a part of which is performed outside the spread of hours prescribed by an award and the work is paid for at overtime rates that part of the earnings of the employee will not form part of the notional earnings base for the purposes of an award or the SGA Act.

Therefore, to the extent that a participating employer would be liable to make contributions to the TWU Superannuation fund in respect of such an employee under the award, the contributions would be limited to the amount prescribed by the SGA Act in respect of the earnings for work performed within the spread of ordinary hours prescribed by the relevant award. So that, for example, if a casual employee covered by the terms of the Transport Workers Award 1998 was engaged for the minimum engagement of four hours at any time of the day within the spread of ordinary hours, the Transport Workers Superannuation Award would give rise to a liability upon an employer to make a superannuation contribution in respect of earnings for such work. Therefore, if a casual employee was to work 38 hours in a week and, for example, 18 of those hours were performed within the spread of ordinary hours and 20 outside that spread and paid for at overtime rates superannuation contributions would be required only in relation to the 18 hours of work performed at particular times of the day.

[24] Thus casual employees who perform all of their hours of work outside the spread of ordinary hours of that award at overtime rates will not benefit from any employer contributions to superannuation in respect of any such earnings.

[25] However, it is important to make an observation concerning a difference in the factual matrix in *ACE* and the circumstances the subject of the application under consideration here. In *ACE* the award considered by the High Court was a state award with common rule application in Queensland. That award prescribed employer liabilities in respect of superannuation contributions, the award also prescribed the spread of ordinary hours and the conditions under which work would be performed at the relevant overtime rate. The QLD award contained no equivalent provision to that part of clause 8 of the TWU superannuation Award which requires contributions in respect of a ruling by the ATO.

[26] In the matter before me, the TWU superannuation award is confined to the subject of superannuation. Moreover, the award applies in relation to superannuation to employers who, whilst in the transport industry, may be respondent to other transport industry awards of the Commission which may deal differently with the subject of the spread of hours, ordinary time rates of pay and overtime. The effect of such provisions will vary from award to award and employer to employer. Indeed it is also possible that some employers are respondent to the award and to more than one such industry award in relation to different operations and classes of employee, although, whether or not this is true as a matter of fact has not been established.

It is clear from the above paragraphs that Commissioner Lewin considered the factual differences before him with those in *ACE*. Nevertheless, he adopts what he considers is the “ratio” of *ACE* – a position that is contrary to the draft ruling (at para [117]):

In this respect, in my view, certain things about the scheme of the SGA Act are clear and undisputed in this matter. They are that, an employer should not be required to make superannuation contributions in respect of earnings in excess of those payable for the ordinary number of hours per week prescribed by an award for which wages are payable and that an employer should not be required to make contributions calculated on earnings for work performed in excess of the prescribed number of ordinary hours in a day where overtime becomes payable. These features of the "notional earnings base" will be preserved if the application is granted.

Therefore, the *ACE* decision should be accorded more weight than the ATO has given it within the context of its draft ruling and what appears to be current practice. It should not be absolutely dismissed upon purported factual differences. Indeed, and even more

concerning, is that the draft ruling puts the very employers who pay in accordance with that federal award, and which the Commission explicitly acknowledges does not attract superannuation on overtime, in legal jeopardy.

### **Conclusion**

In addition to the concerns raised by ACCI in its earlier submission, if the draft ruling is not amended or withdrawn, employers will be faced with an unpalatable dilemma. An employer can:

- Continue to pay superannuation based on SGR 94/4 and current practice, by not paying superannuation on overtime. It would therefore have to mount a legal challenge on any ATO litigation in order not to pay SGAA back-payments, charges and penalties;
- Pay superannuation on “regular” overtime (the definition of which is a further problem in itself). This will substantially increase an employer’s employment cost base and will ultimately lead to employee’s hours being reduced or other cost reductions in other areas. Any payments in addition to the legal SGAA payments, may not be easily recoverable if a subsequent Court decision rules overtime was not payable in the first instance.

We thank the ATO for considering this further supplementary submission and look forward to discussing these issues with you shortly in a meeting I understand is being organised between our organisations.

Should you require further information please contact Mr Daniel Mammone [REDACTED] Manager - Workplace Relation & Legal Affairs, in ACCI’s Melbourne office on (03) 9668 9950.

Yours sincerely,

**SCOTT BARKLAMB**  
**Director – Workplace Policy**

(Attachment - Extract from ACCI submission – 23 January 2009)

## ACCI RESPONSE TO DRAFT RULING SGR 2008/D2

### Issue 1: Definition of ordinary time earnings and ordinary hours of work

The draft ruling correctly indicates, at paragraph 12, that 'ordinary hours of work' are not defined in the *Superannuation Guarantee (Administration Act) 1992* (the Act). However, Paragraphs 19 and 36 appear to be inconsistent with existing law that has considered the issue of when employers are required to pay superannuation for ordinary hours of work.

The combined effect of these paragraphs is that employers will now be required to pay superannuation on overtime work, regardless of whether an industrial instrument provides the detail of ordinary time hours for that employee. This fundamentally reverses employers current understanding and practices, as (we understand) reflected in existing Superannuation Guarantee Ruling SGR 94/4. This ruling has been practitioners and employers primary source of understanding legal obligations for more than a decade, and has generally not seen superannuation payable on overtime.

There is no policy rationale for the proposed change, nor any public interest test that appears to be adopted in significantly departing from SGR 94/4 in many areas.

Whilst the ATO may argue that they are merely reflecting current law (including ATO Interpretative Decision 2007/73), this certainly does not reflect status quo on existing costs or application by employers for over a decade. Moreover, ACCI and its members are further reassured of their views that this represents a major and significant change to existing approaches, as a number of major law firms have publicly expressed a similar view:

**Freehills, *Are you paying enough superannuation?* (16 December 2008).**

*... However, while some clarification has been achieved, this Ruling, if ultimately adopted and applied by the ATO, will substantially increase some employers' superannuation liability, particularly in industries:*

*- transitioning from an earnings base other than OTE (for example, in an award) to the OTE test (following amendments to the SGAA which came into force on 1 July 2008), and;*

- where overtime is worked regularly and consistently.

...

**Meaning of 'ordinary hours of work'**

The SGAA has not changed in any relevant respect, however the ATO's views do appear to have changed.

The Commissioner's draft ruling proposes the following interpretation and application of the meaning of 'ordinary hours of work':

- an employee's 'ordinary hours of work' are calculated as the hours of work during which it is usual, regular, normal or customary for the employee to work

- where an employee's terms and conditions are governed by an award or industrial agreement, the standard hours prescribed in that document constitute that employee's 'ordinary hours of work', and

- where an employee has a workplace agreement (whether or not that employee is also covered by an award or industrial agreement), the standard working hours in the workplace agreement are taken to be the 'ordinary hours of work'.

However, the most significant change proposed by the ATO in the draft ruling provides that where 'it is manifestly evident from an objective evaluation of the regular work pattern of an employee that the span of hours actually worked are consistently different to the standard working hours provided in an award or an agreement', the regular work pattern determines the employee's 'ordinary hours of work'—regardless of whether or not these hours are remunerated at overtime or penalty rates.

Further, where the ordinary hours of work are not specified or agreed, or the offer of employment specifies the employee's minimum hours only, the employee's 'ordinary hours of work' will be the hours actually worked in addition to hours of paid leave.

**Implications of the draft ruling on employers**

While there may be some ramifications in relation to allowances, piece rates and bonus payments, it is likely that the major issues and costs to employers will stem from the Commissioner's interpretation of 'ordinary hours of work' in relation to overtime payments.

If there is no change to the Commissioner's view in the draft ruling of when overtime becomes part of an employee's ordinary hours of work, not only will there be increased costs for an employer, but it will be a considerable challenge for a business to determine when overtime becomes usual, regular, normal or customary for an employee, and therefore when the earnings on that overtime become part of the employee's OTE.<sup>3</sup> (emphasis added)

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<sup>3</sup> Freehills, 'Are you paying enough superannuation?', 16 December 2008.

<<http://www.freehills.com.au/4539.aspx>>

**Maddocks, Funds Management & Superannuation Update (December 2008)**

*Whilst employers will welcome much of the updated commentary and additional worked examples in the draft ruling (see for example the commentary related to bonuses and allowances), of more concern are the areas which reflect a marked departure from the established view expressed by the Commissioner in SGR 94/4 and 94/5. (emphasis added).*

*Key changes include:*

*- with the exception of accrued payments made on termination of employment, all forms of leave payments are considered to be OTE. This is a clear departure from SGR 94/4 where payments in respect of parental leave and jury duty were specifically excluded from OTE*

*- a more expansive view of the term 'ordinary hours of work' is taken so that onus is placed on the actual hours worked by an employee, rather than hours agreed between the employee and employer in an agreement or award. This impacts upon whether a payment can be considered to have been made in respect of overtime or ordinary hours of work*

The main problem with respect to overtime work is detailed in paragraphs 18 and 19 of the draft ruling:

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

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

However, according to Appendix 1 of the draft ruling, example 1, “occasional overtime under an award” is not considered OTE (see further below on the impracticality of such a test for employers).

The approach taken in the draft ruling appears to depart from the industrially understood concept of ordinary hours – this has been a concept known to the

industrial relations system and which is the approach (we say) Parliament took when it introduced the concept in the Act. Industrial instruments such as awards and agreements have dealt considerably with the issue of what are employers' obligations to pay for work outside the "ordinary" span of hours.

### ***Section 6(1) of the Act***

Section 6(1)(a)(ii) of the Act, currently and explicitly exempts "*earnings consisting of over-award payments, shift-loading or commission ...*" ACCI submits that Parliament's intention was to exclude a specie of category that are generally known as on-costs payable in addition to the basic award payments (ie. OTE). The lexicon used clearly reflects industrial relations parlance, used in federal awards and instruments, and that is for OTE to exclude overtime.

### Federal Awards

The current WR Act reiterates the historic treatment of award conditions, such as hours and other payments. Section 513(1)(a) clearly states that allowable award matters are "ordinary time hours of work ...", with 513(1)(i) of the WR Act further stating providing that awards can deal with "loadings for working overtime or for shift work".(emphasis added).

Once again, the industrial law treatment of the concept of ordinary hours of work is in contradiction to the approach the draft ruling takes. OTE and overtime are clearly separate things in IR legislation.

It is difficult to see why Parliament would chose such an expression that has a long and established history among the industrial relations system in Australia, rather than using another phrase which incorporates a different meaning. Secondly, the same expression used in s.6 of the Act is used in s.513(1)(i) of the WR Act for awards. Thirdly, the phrase, "over award payment" in s.6 can only refer to an *industrial* award. Parliament clearly had this in mind when it passed the Act. Therefore, it is ACCI's submission that the nexus between the industrial system and the Act cannot be overcome by a derivative analysis of case law on various questions (see below).

### Maximum Weekly Ordinary Hours

The *Workplace Relations Act 1996 (WR Act)*, which covers the majority of businesses in Australia includes a minimum standard relating to weekly hours of work for all employees – this includes both federally award covered employees and award-free employees (ie. the non-historically award covered employees, professionals, CEO's etc).

Section 226 of the WR Act Subdivision B, titled "*Guarantee of maximum ordinary hours of Work*", provides a guarantee for employees that they cannot be

requested to work more than 38 hours per week, unless those additional hours are reasonable. There is also the ability to average hours for up to 12 months. It is important to appreciate that all statutory workplace agreements made under the WR Act must comply with this Standard.

The Government's recently introduced *Fair Work Bill* which intends to repeal most of the WR Act, retains a similar concept of ordinary hours, under the National Employment Standards (NES).<sup>4</sup> In both cases, all statutory industrial agreements and common law contracts must comply with the standards.

### Modern awards

It is important that the ATO is familiar with the *Fair Work Bill* and how it relies on the historically used terms of ordinary hours of work. Clause 147 of the *Fair Work Bill* also specifies:

#### ***Ordinary hours of work***

*A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.*

*Note: An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards.*

This reflects the current process of the Australian Industrial Relations Commission (AIRC) 'modernising' industrial awards from the federal and State system into new awards to apply from 1 January 2010. Significantly, the new modern awards must specify "ordinary hours of work" in accordance with the Government's request to the AIRC (under s. 576C(1) of the *Workplace Relations Act 1996*):<sup>5</sup>

#### ***Ordinary hours of work***

46. *Many entitlements in the NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the NES. The Commission is also to ensure that ordinary hours (or the process for determining ordinary hours) are specified for each type of employment permitted by the modern award (for example, part time, casual). In the case of employees to whom training arrangements apply, the Commission should ensure that ordinary hours (or the process for determining ordinary hours) are specified for the purpose of calculating entitlements in the NES.* (emphasis added)

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<sup>4</sup> Clause 62 of the FW Bill largely replicates existing s.226.

<sup>5</sup> A consolidated version of the request can be found at:  
[http://www.airc.gov.au/awardmod/download/amrequest\\_consolidated081218.doc](http://www.airc.gov.au/awardmod/download/amrequest_consolidated081218.doc)

## **Case Law**

ACCI does not agree that *Quest Personnel Temping Pty Ltd v Commissioner of Taxation* (2002) 116 FCR 338 is a precedent for all scenarios of employment arrangements (as indicated at paragraph 189 of the draft ruling). It seems to be relied upon by the ATO in the draft ruling as providing the legal precedent for paragraph 19 of the draft ruling.

Firstly, the employees in *Quest* were not award dependent, nor covered by a statutory agreement. They were covered by a contract that provided for minimum shifts, whereby the employees did work regular hours. Whilst the law propounded by the Federal Court may be correct, it is properly confined to the facts of that case. Secondly, it is noted by the ATO that *Quest* relied upon the High Court decision of *Kezich v Leighton Contractors Pty Ltd* (1874) 171 CLR 362 and *Catlow v Accident Compensation Commission* (1989) 167 CLR 543. These were cases dealing with workers compensation and not superannuation.

Most importantly, it appears that Grey J in *Quest* distinguished the case of *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 to *Kezich* in paragraph 26, when his Honour states:

*The distinction between these two cases appears to rest upon the proposition that the fixing by collective means of standard hours of work, coupled with a provision for remuneration at a higher rate of hours worked beyond those standard hours, will usually lead to the conclusion that the standard hours fixed are to be considered as “normal hours” or, perhaps, “ordinary hours”. As I have said, that is not the present case. The offers of employment accepted by the employees in the present case did not purport to fix standard hours, with remuneration at a higher rate for hours in excess of them. They fixed only minimum hours, with hours worked beyond the minimum paid at the same rate as those worked within it.*

The underlined words do not appear in the ATO's draft ruling. It appears that insofar as collective agreements and awards are concerned, the *Quest* ruling appears to treat the definition of OTE in s.6 of the Act differently depending on the terms of the industrial instrument, and not “cover all situations of employment”, as indicated in paragraph 189 of the draft ruling.

## **Uncertainty of Draft's Approach**

The objective assessment test is a new test that the ATO is proposing and is contrary to existing industrial arrangements and federal legislation. According to Appendix 1 of the draft ruling, example 1, “occasional overtime under an award” is not considered OTE. A practical question arises: How is an employer going to assess with any certainty whether they are liable to pay superannuation on some

overtime and not other work? What is considered “occasional” overtime? These are not easy decisions for employers who may find that not only is it difficult to make an objective judgement call, but their administrative systems are not able to process “occasional overtime”. We consider the proposed approach to carry serious compliance concerns.

### ***Cost and Labour Impacts***

Such a change is a considerable and significant departure from existing practices and represents a major cost impost for industry. Before considering such a major change in policy, a detailed cost analysis should be prepared by the Government to provide industry with the cost impacts, especially during challenging economic times. The implications of the proposed changes alone should lead to them being reconsidered.

Such a change will severely impact particular sectors, such as mining and construction that regularly employ people to work overtime hours and factor such payments in project costs. To require such employers to now pay the full amount of superannuation on overtime work will have a negative impact in the sectors, on employment and projects.

Furthermore, employers will now potentially be subject to shortfalls in their superannuation guarantee and liable to SGC (including interests and) associated penalties. The draft approach is set to generate widespread non-compliance.

### ***Importance of SGR 94/4.***

Whilst ACCI understands the legal nature of an ATO ruling to not be conclusive view of the law, business and advisors have relied on the ruling for over a decade, and have provided advice and structured payrolls in good faith. This is why ATO rulings are significant to employers and to effectively managing overall costs of the SG scheme.

ACCI believes that the current ruling (94/4) provides an appropriate balance between competing policy objectives, including:

- Maintaining industrial arrangements and not increasing the possibility of industrial disputation,
- Appropriately delineating between payments to employees that should or should not be classified as OTE,
- Providing employees with appropriate levels of superannuation funding for retirement without excessive imposts to business.

We can see no basis for change and every basis not to make the changes canvassed in the draft ruling.

## **Issue 2: Other Payments**

### ***Parental Leave***

For the reasons outlined earlier in this submission, ACCI prefers the current treatment of paid parental leave under SGR 94/4.

### **Jury Service and Reservist Pay**

ACCI prefers the current treatment of paid parental leave under SGR 94/4. Under the proposed *Fair Work Bill*, employers will be required to pay up to 10 days in jury service payments. This is a significant cost to employers and the fact that superannuation is to be paid on a mandatory requirement, not as a work related entitlement to employees to enjoy as a result of services rendered is at odds with the superannuation treatment of other forms of payments. It also appears that the employer must pay superannuation on all amounts paid, not just any “top-up” amounts. ACCI also has concerns about the treatment of reservists pay for similar reasons. It would be absurd if an employer were compelled to pay superannuation on Government payments.

### ***Workers Compensation***

ACCI considers that paragraph 57 of the draft ruling needs to be revisited, particularly as a result of the Federal Magistrates' Court decision of *Lee v Hills Before & After School Care Pty Ltd* [2007] FMCA 4 (15 January 2007). An employer cannot terminate the employment of a person in receipt of workers compensation payments because it would be an unlawful termination under the WR Act. Therefore, employers currently do not terminate the contracts of employment in such circumstances. It would appear that under the draft ruling, an employer would be forced to pay superannuation for services not rendered, because they are “required to attend work” and their employment is ongoing. In any event, ACCI prefers the current treatment of workers compensation under SGR 94/4 as it is clear when superannuation is or is not payable.

### **Other Components**

ACCI has not had the opportunity to make a detailed analysis of other components that are now deemed to be OTE in the draft ruling. We therefore reserve the rights of ACCI and its members to make further submissions to the ATO on these issues, particularly where there has been a direct change from SGR 94/4 that results in increased costs or penalties to business.