

23 January 2009

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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’**

I refer to the above ATO Draft ruling issued by the Commissioner of Taxation on 5 November 2008 and regret the delay in providing a formal response on behalf of Australian Chamber of Commerce and Industry (ACCI) and its members.

Through our membership, ACCI represents over 350,000 businesses nationwide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies. The draft ruling is a very significant issue to ACCI members and employers in Australia.

I advise that ACCI has a number of principal objections to the draft ruling, which appears to overturn settled understandings of how employers have satisfied their legal obligations under the *Superannuation Guarantee (Administration Act) 1992* (the Act) and associated laws and industrial instruments.

Whilst we have attached a more detailed response to the draft ruling, the following is a summary of our primary concerns that would be imposed upon industry if the draft ruling proceeds or is finalised without significant amendments.

Firstly, our understanding (and analysis) suggests that the proposed ruling expands upon the settled concept of the ordinary time earnings (OTE) to now include payments for overtime work.<sup>1</sup> This is directly contrary to industry’s understanding of the law, extensive practice and process, with respect to paying superannuation in accordance with the Act and industrial awards. ACCI acknowledges that the ATO may not agree with submissions that indicate the office has in fact changed their position on the issue (in other words, the ATO may believe it is merely restating what has always been their view on the law). Notwithstanding such a view, ACCI’s position and substantial concerns remain. The impact of the proposed course clearly differs from a status quo position.

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<sup>1</sup> To be clear, and to rebut any presumption that the draft ruling reflects current law, ACCI does not agree with the views of the ATO as outlined in the ATO Interpretative Decision 2007/73.

If this is the case, employers will not only be exposed to potential penalties for breach of the Act, employers costs will significantly increase in a time of unprecedented economic uncertainty and where the economy and employment is poised very precariously.

Costs are also clearly set to increase as a result of current and ongoing industrial relations reforms, including the introduction of 'modern awards' by 1 January 2010, and the recently introduced *Fair Work* legislation imposing new National Employment Standards on business with higher costs. The context for the proposed approach should preclude it being proceeded with.

Secondly, ACCI does not agree that payments with respect to leave, including maternity leave, jury service and workers compensation, should be included within the definition of OTE at this stage. Such payments are contrary to SGR 94/4 and existing practice. With respect to maternity leave, the Government has recently requested the Productivity Commission to inquire into the introduction of a national paid parental leave scheme.<sup>2</sup>

The Productivity Commission's draft report (29 September 2008) canvasses a compulsory model which would see some employers pay employees parental leave (subject to subsequent reimbursement from the Government) but also require superannuation to be payable on those payments (which would not be refundable). The Productivity Commission will release a final report to the Government this year and pending the outcome of that review and ACCI's further consideration of that report, the ATO should not prematurely disturb continuing and existing lawful practices. It would be adverse and prejudicial to address superannuation on parental leave outside of consideration of the Productivity Commission report.

If the draft ruling on paid parental leave stands, there is a real risk that business may not voluntarily introduce paid parental leave schemes within their enterprises (or indeed, withdraw such existing policies) on the basis of increased costs, particularly during time of economic instability in Australia. Issues identified by ACCI with respect to leave and workers compensation are outlined in further detail in the attachment.

The combined effect of these proposed changes to existing approaches, will add to the overall cost structure of all businesses, but will impact some sectors disproportionately, including the mining and construction sectors. A cost impact analysis should be undertaken by the Government outlining the exact increase to industry's costs on an aggregate basis impact and impact – however, we estimate the likely increase costs will exceed several million for many businesses per annum.

ACCI understands that a number of ACCI member organisations may have provided the ATO with further submissions on the draft ruling, and as such, ACCI recommends specific industry consideration of the proposals in conjunction with this submission.

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<sup>2</sup> ACCI has provided a submission to the Productivity Commission inquiry, which can be found here (Submission No. 135): <http://www.pc.gov.au/projects/inquiry/parentalsupport/submissions>

### **Proposed Course of Action**

ACCI proposes as an interim (and urgent) measure that the ATO suspend its internal processes. This would see the draft ruling not formally adopted.

If this is not accepted, ACCI urges the ATO reconsider changes to overtime work and other measures which will result in increased costs to business, when the ATO Committee meets to formally adopt the draft ruling. At very least, the changes should be delayed so the impact and views of those affected can be properly taken into account.

Given the considerable increase in costs for industry, and the impact the proposed changes would have on business variability and jobs, ACCI intends to raise this submission with the Minister for Superannuation and Deputy Prime Minister to highlight possible legislative amendments to the Act to reflect the status quo and ongoing arrangements.

We also request an urgent meeting with the ATO Assistant Commissioner(s) responsible for this area to further outline our concerns with this matter, and employer's views of the correct application of the Act.

If 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**

## 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 18 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.