SUBMISSION

TO

THE AUSTRALIAN TAX OFFICE

DRAFT SUPERANNUATION GUARANTEE RULING

SGR 2008/D2

The Australian Mines and Metals Association (AMMA) on behalf of our member companies welcome the opportunity to comment on the *ATO's Draft Superannuation Guarantee Ruling* SGR 2008/D2 (the Draft Ruling).

AMMA Membership

AMMA membership is drawn from the resources sector across Australia and is the national employer association for the mining, hydrocarbons and associated processing and service industries.

AMMA is also the sole national employer association representing the employee relations and human resource management interests of Australia's onshore and offshore resources sector and associated industries.

AMMA represents all major minerals and hydrocarbons producers as well as significant numbers of coal, construction and maintenance employers in the resources sector.

Background

The Australian Taxation Office (ATO) Draft Ruling concerns the meaning of the words "ordinary time earnings" as defined in sub s.6(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

Pursuant to the SGAA an employer is required to make a compulsory superannuation contribution based on an employee's "ordinary time earnings" (superannuation guarantee charge).

The "ordinary time earnings" of an employee is defined in the SGAA 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 (a) would be greater than the maximum contribution base for the quarter, the maximum contribution base.*

Intrinsic to the definition of "ordinary time earnings" above, is the meaning attached to the words **"ordinary hours of work"**, which have been in the SGAA since its inception. AMMA does not accept the Draft Ruling conclusion as to what is meant by the words "ordinary hours of work".

The Draft Ruling prefers to adopt a literal interpretative approach and while stating at paragraph 12 that the words take their ordinary meaning within the context of the SGAA, the context is not applied as will be seen in this submission.

The Draft Ruling fails to recognise a number of significant factors in coming to its conclusion:

- the genesis of the SGAA including its unique industrial relations background,
- the true purpose of the *Superannuation Laws Amendment (2004 Measures No 2) Act 2004*; and
- recent High Court and other judicial authorities which are contrary to those relied on in the Draft Ruling.

To include regular overtime as the Draft Ruling requires for the purposes of "ordinary hours of work" under the SGAA will increase costs for employers. All workplaces where overtime is a regular feature will be faced with increased superannuation costs as a result of the Draft Ruling. Despite this, the Draft Ruling makes no reference to where this obvious additional cost on employers was accepted by the Parliament as a consequence of the *Superannuation Laws Amendment (2004 Measures No 2) Act 2004*.

An examination of the second reading speeches and parliamentary debates concerning the SGAA shows no Parliamentary intention for overtime to be included in the superannuation calculation.

In AMMA's view the use of the words "ordinary hours of work" by the Parliament in the SGAA was to reflect the existing practice under the Superannuation Principle of the Australian Industrial Relations Commission (AIRC) in limiting the superannuation calculation to "ordinary hours of work" exclusive of overtime and at no additional cost to employers already paying a 3% superannuation contribution on an employee's "ordinary hours of work" exclusive of overtime.

Superannuation Laws Amendment (2004 Measures No 2) Act 2004

Prior to July 1, 2008 employers whose employees were covered by an industrial award or registered agreement were entitled to calculate their superannuation guarantee charge on a "notional earnings base" specified in an award or agreement.

In 2004 the Federal Parliament passed legislation to remove the ability of employers to use anything other than "ordinary time earnings" (as defined above) as employee earnings for the purpose of the SGAA. These changes were brought about by Schedule 1 in the *Superannuation Laws Amendment* (*2004 Measures No 2) Act 2004 (2004 Amendment Act)* which amended the SGAA effective from 1 July 2008.

The *2004 Amendment Act* was introduced to remove perceived inequities where employers could calculate their compulsory superannuation contribution on less than an employee's "ordinary time earnings" due to the wording of their industrial instrument. The *2004 Amendment Act* now requires payment for weekend penalties and loadings to be included in the superannuation calculation where this work forms part of an employee's "ordinary hours of work".

An examination of the second reading speeches and Parliamentary debates concerning the *2004 Amendment Act* shows that Parliament did not intend to legislate to require regular overtime to form part of an employee's "ordinary time earnings" in the superannuation calculation, but to standardise "ordinary time earnings" for all employees. (See Chapter 4 - Explanatory Memorandum).

The Explanatory Memorandum accompanying the *2004 Amendment Act* discusses the benefits of adopting ordinary time earnings as a standardised earnings base by removing inequities in calculating the earnings base. There are no examples in the Explanatory Memorandum where overtime, regular or otherwise, is to be included in an employee's earnings base as a result of simplifying the superannuation calculation.

For example; the Hon Senator Sherry[1] referred to employees whose shift payments and weekend penalties had not been included in their earnings base and where employers had been able to pay less than the 9% due to the wording of their industrial award or agreement. These sentiments were also supported by Hon S. Sidebottom[2] where he referred to weekend penalties being excluded from "ordinary time earnings".

At no stage was any reference made to the inclusion of regular overtime in an employee's "ordinary time earnings" as a result of *2004 Amendment Act*.

[1] Senate Second Reading Debates 23 June 2004

[2] H of R Second Reading Debates 2 June 2004

For such a significant change and resultant additional cost on employers it could not be said that this was overlooked. It was not addressed because it was not the mischief that the *2004 Amendment Act* intended to remedy.

Draft Ruling SGR 2008/D2

Draft Ruling 2008/D2 will replace Superannuation Guarantee Rulings 94/4 and 94/5 at the date of issue of the final ruling. The existing Ruling 94/4 is insightful as it was issued shortly after the SGAA was enacted and made reference to the meaning of the words "ordinary time earnings".

Paragraph 19 of SGR 94/4 contains a Table headed: **What is excluded from ordinary time earnings.** Overtime payments are said to be excluded on the basis:

> … overtime is paid for work outside ordinary hours. It makes no difference how often the employee works overtime.

There is no qualification that regular or compulsory overtime is different from *ad hoc* or discretionary overtime as does the Draft Ruling. Nor is there any reference to the High Court decision of *Kezich v Leighton Contractors Propriety Limited*[3] which had been in existence for 20 years at the time of the 94/4 Ruling, presumably on the basis it was not considered relevant. However strangely, now in 2008, it is comprehensively relied on in the proposed replacement Draft Ruling.

The replacement Draft Ruling concludes that "ordinary hours of work" as referred to in s.6 of the SGAA means an employee's working hours which are established by a regular work pattern because they are the regular, normal and the customary hours of work, even if some of those hours are regarded and paid as overtime (see paragraph 19).

As stated above, AMMA does not accept this conclusion which is reached in a vacuum by ignoring the history of the SGAA and the fact that the language used had a well understood meaning and purpose at the time of enactment.

Correct Meaning of "Ordinary Hours of Work"

The concept of including regularly worked overtime as part of an employee's "ordinary hours of work" is not accepted by AMMA to be the correct approach. An examination of the background of the SGAA, subsequent amendments to

[3] HCA 131 CLR 362 (1974)

the SGAA, and a complete examination of relevant judicial authorities clearly shows this to be the case.

As stated previously the correct approach to the calculation of the compulsory employer superannuation contribution was provided by the ATO in SGR 94/4 issued shortly after the enactment of the SGAA which categorically ruled out overtime as part of the superannuation earnings base.

On the question of what constitutes an employee's "ordinary hours of work" for the purpose of the definition of "ordinary time earnings" in s.6 of the SGAA, the Draft Ruling at paragraph (19) states that an employee's "ordinary hours of work" are established by a regular work pattern because they are the regular and customary hours of work.

It is pertinent to observe that the SGAA definition of "ordinary time earnings" specifically includes *over-award payments, shift-loading or commission*. Whereas overtime is not specifically mentioned in the definition, the Draft Ruling concludes that regular overtime constitutes "ordinary hours of work".

Shift loading, commission, over award payments and overtime are all industrial relations terms and interpreted as such. In industrial awards and agreements, shift loadings and commission are normally not paid on overtime but relate to ordinary hours, exclusive of overtime. This is an indicator that paragraph (a)(ii) of the SGAA definition of "ordinary time earnings" is concerned with payments in respect of ordinary hours of work, excluding overtime.

There appears no reason why Parliament would have wished to extend the meaning of the phrase "ordinary time earnings" to include only the over-award component of an employee's overtime earnings, or if accepting the Draft Ruling view that regular overtime already falls within paragraph (a) (i) of the definition, including the over-award component of an employee's earnings for any irregular overtime.

The proposition that all over-award payments are to be included in the ambit of "ordinary time earnings" would result in there being a negligible difference between the statutory definitions of "ordinary time earnings" and "salary or wages", save in relation to lump sum payments for unused leave on termination which is expressly excluded from the definition of 'ordinary time earnings".

Accordingly, while read literally, paragraph (a)(ii) of the definition could be construed to include the over award component of any overtime payment (whether the overtime was regular or not), the paragraph should be read down so as to apply only to earnings in respect of ordinary hours of work exclusive of overtime.

History of Superannuation Legislation

To interpret the SGAA its genesis must be considered and in particular its industrial relations background where the phrase "ordinary hours of work" has its origins.

In the National Wage Case decision of June 1986, the AIRC dealt with a claim by the Australian Council of Trade Unions (ACTU) that a 3% wage equivalent superannuation contribution be paid by employers.

The AIRC did not accede to the claim but said that it would be prepared to certify agreements or make consent awards dealing with superannuation subject to certain conditions. These included superannuation contributions involving the equivalent of a wage increase not in excess of 3% of "ordinary time earnings"[4]. The AIRC fixed January 1, 1987 as the starting date and following representations from the Commonwealth, agreed to arbitrate where agreement could not be reached.

In the National Wage Case decision of April 1991, the ACTU again sought an amount of 3% in superannuation contributions required to be paid by employers, to be phased in by amounts of 1% from 1 July 1991, 1 May 1992 and 1 May 1993. The AIRC's Superannuation Principle included the following:

> *(ii) do not involve the equivalent of a wage increase in excess of three per cent **of ordinary time earnings** of employees.(our emphasis)*[5]

As a result of the ACTU claim the National Wage Bench requested the Commonwealth Government convene a national conference on superannuation. The claim was adjourned to be resumed on the application of any party to the proceedings. The business community requested the Government convene a national conference on superannuation, but instead, the Government announced that it would pursue compulsory superannuation coverage by passing legislation.

In July 1992 the *Superannuation Guarantee Charge Act 1992* (SGC) and the *Superannuation Guarantee (Administration) Act 1992* were proclaimed and introduced a compulsory superannuation contribution requirement for employers to pay on behalf of their employees.

[4] NWC June 1986 Print G3600

[5] NWC April 1991 Print J7400

There was no suggestion that "ordinary time earnings" would mean anything other than what was understood and applied as per the ACTU claims in the AIRC and reflected in the AIRC's Superannuation Principle.

To minimise the impact on business at the time, the SGAA recognised earnings base provisions other than "ordinary time earnings". The SGAA referred to the use of a *notional earnings* base for the calculation of an employer's superannuation guarantee obligation in certain cases including the use of notional earnings bases specified in industrial awards and agreements.

By allowing for the earnings base in awards/agreements to be used for superannuation guarantee purposes employers could make a superannuation contribution less than may otherwise be required if using *ordinary time earnings* as the base for calculation. This could exclude weekend penalties or loadings or amounts less than the required percentage employer contribution which the *2004 Amendment Act* has now addressed.

Consistent with the ACTU claim which became the basis of the SGAA, the AIRC has consistently held that the term "ordinary hours of work" does not include overtime.

In 2002 the AIRC considered the phrase "ordinary time earnings" in its Working Hours Case[6] . The AIRC despite being asked to do so by the ACTU who relied on the *Kezich* decision; did not adopt the reasoning in *Kezich* as to the meaning of "ordinary hours of work".

In refusing to accept that the term should be construed as meaning *regular, normal, customary or usual hours* the Full Bench held that the distinction between ordinary hours and overtime is one deeply embedded in the Commission's awards and agreements which could not be ignored.

Judicial Decisions

As stated above the Draft Ruling relies not on the history of the SGAA but primarily on two authorities, a High Court and Federal Court authority; *Kezich v Leighton Contractors Propriety Limited*[7] *and Quest Personnel Temping Pty Ltd v The Commission of Taxation*[8]

[6] AIRC Print PRO72002 July 2002

[7] HCA 131 CLR 362 (1974)

[8] 116 FCR 338 (2002)

The 1974 *Kezich* decision was decided 18 years before the SGAA was enacted and was never referred to in the Parliamentary debates surrounding the introduction of the legislation. The *Quest* decision contains a number of conflicting observations but can be easily confined to its circumstances. There are a number of more significant authorities including recent High Court authority that the Draft Ruling does not address.

1989 - Catlow v Accident Compensation Commission[9] ("Catlow")

While the Draft Ruling refers to *Catlow* it does not provide any satisfactory basis for distinguishing this decision from *Kezich*.

The High Court was asked to examine words in the Victorian Workers Compensation legislation. The legislation required compensation to be calculated at a worker's ordinary time rate of pay. In an apparent contrast to the judgment of the High Court in *Kezich*; the High Court held that the "ordinary time rate of pay" excluded overtime and was not a reference to the number of hours usually worked.

Dawson J stated that:

> *… if there is to be an ordinary time rate of pay it must be ordinary in relation to something. Clearly the thing selected is the normal, or standard number of hours worked per week. It cannot include overtime hours worked because they are extraordinary and incompatible with an ordinary time rate of pay*.

McHugh J, stated that it was helpful to bear in mind that the terms of employment of most workers are governed by industrial awards or agreements which provide for an ordinary time rate of pay and that awards and agreements usually state the number of ordinary hours in a week and that hours worked outside ordinary hours are paid at overtime rates. McHugh J also found that the history of the legislation showed that hours usually worked as overtime were intended to be excluded from the ordinary time rate of pay.

The concepts stated by McHugh J are not addressed by the Draft Ruling. This High Court decision is only three years prior to enactment of the SGAA.

1993 - Scott v Sun Alliance Australia Limited and Another[10] ("Scott")

[9] HCA 167 CLR 54 (1989)

[10] HCA 178 CLR 1 (1993)

In 1993, the High Court examined the Tasmanian Workers Compensation legislation and held that the words ordinary rate of pay referred to a rate fixed by an industrial award or agreement and not the hours agreed to be worked each week. It was found this would be different if there was no industrial award or agreement regulating the employment contract to distinguish between ordinary and overtime hours, such as private employment agreements, but the words "ordinary rate of pay" had an established and special meaning.

2003 Australian Communication Exchange Ltd v Deputy Commissioner of Taxation[11]

Similarly Kirby J, stated in *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation in 2003*, when the High Court was asked to interpret the words "ordinary working hours" as expressed in the Clerical Employees Award (Qld).

> *… the concept of overtime as hours worked in* ***addition to ordinary hours worked*** *is long established in this field of discourse*.
>
> *(our emphasis*)

2004 - Thompson v Roach Bros Pty Ltd (Thompson)[12]

A Full Bench of the Western Australian Supreme Court in Thompson was required to examine the words 'ordinary hours" in the *Workers Compensation and Rehabilitation Act 1981* (WA). The employee attempted to rely on *Kezich* in arguing that ordinary hours included regular overtime. The Full Bench reviewed all the authorities and recognised as the High Court had done in *Scott* and *Catlow* that such terms now have an established meaning and that unless the context otherwise requires, it is that meaning that should be attributed to the term in the statute.

An application for special leave to appeal to the High Court was refused.

2007 - Moloney v Beverage Engineering (Moloney)[13]

[11] 201 ALR 271 (2003)

[12] [2004 WASCA 110]

[13] [2007] FMCA 1072

In 2007 a decision of Federal Magistrate O'Sullivan held that the meaning of the words "ordinary hours of work" are not to be understood as including overtime hours.

The case involved the interpretation of s.661 of the *Workplace Relation Act 1996* where it referred to an employee's "ordinary hours of work".

In his decision the Federal Magistrate canvassed all the relevant decisions and was dismissive of *Kezich* preferring to rely on the later High Court decision of *Catlow* which accepted the need to consider the historical background of the relevant legislation.

The Draft Ruling does not explain the result in *Catlow*, nor does it take account of or refer to subsequent decisions in *Scott, Thompson or Moloney*.

Other Approaches

It is difficult to find any other area where the concept of "ordinary hours" when related to calculating remuneration means anything other than the hours an employee works exclusive of overtime hours worked.

The Australian Bureau of Statistics collects statistics on employee earnings and delineates earnings into a number of categories. Weekly Ordinary Time Earnings is one such category. The distinction between agreed hours of work and overtime is raised in the ABS's definition of Weekly Ordinary Time Earnings[14].

> *Weekly ordinary time earnings refers to one week's earnings of employees for the reference period attributable to award, standard or agreed hours of work. … Included in ordinary time earnings are award, workplace and enterprise bargaining payments, and other agreed base rates of pay, over-award and over-agreed payments, penalty payments, shift and other allowances; commissions and retainers; bonuses and similar payments related to the reference period; … Excluded are overtime payments, retrospective pay, pay in advance, leave loadings, severance, termination and redundancy payments, and other payments not related to the reference period*.
>
> (*Our emphasis*)

A construction which does not result in a component of regular or irregular overtime payments being included in the statutory definition of "ordinary time

[14] ABS Series 6302.0 Glossary

earnings" is consistent with the position which prevailed in industrial awards at the time the SGAA was enacted (and which is part of the broader context to which regard may be had in interpreting the SGAA).

At that time, the award system provided for contributions of up to 3% of "ordinary time earnings" which in the award context, did not include overtime payments.

While the Draft Ruling at [169] and [199] emphasises that the purpose of the *2004 Amendment Act* was to achieve equality for employees there are limits to the extent to which amending legislation and parliamentary materials evidencing the objects of an amendment can be relied upon to interpret an earlier statutory provision.

Although the object of enacting the SGAA was to increase the coverage of occupational superannuation and to increase the amount of contributions to a level adequate to fund a reasonable retirement that is too general an objective to assist in interpreting the expression "ordinary time earnings". It should not be assumed, simply because the statute has a beneficial purpose, that any ambiguity must be construed in such a way as to maximise the benefit[15].

The extent that the *2004 Amendment Act* was specifically directed to achieving equality among employees, this was to be achieved and was achieved by removing the capacity for employers to reduce earnings bases through the use of workplace agreements and requiring all employers to apply the statutory definition of "ordinary time earnings" see Explanatory Memorandum to the *Superannuation Laws Amendment (2004 Measures No 2) 2004 Bill* at 4.15 and 4.21.

The Draft Ruling in fact creates an inequity where employees who have access to regular overtime are to receive additional superannuation compared to those employees on the same wage who only have access to irregular or *ad hoc* overtime.

Allowances

Paragraph 27 of the Draft Ruling states that all allowances paid in relation to an employee's "ordinary hours of work" are part of "ordinary time earnings" excluding those allowances that are paid as a fringe benefit under the *Fringe Benefits Tax Assessment Act 1986*.

[15] *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd (2005)* 222 CLR 194 at [21]

An overtime meal allowance is provided as an example of an allowance that does not form part of "ordinary time earnings" as the meal is taken outside ordinary hours. This is to be contrasted with paragraph 253 which states that an allowance paid for poor living conditions e.g. living conditions which apply outside working hours is part of "ordinary time earnings" as the poor living conditions result from being deployed on duty. This rational is hard to follow as all allowances relate in some way to being deployed on duty, including a meal allowance paid while working overtime.

Conclusion

AMMA accepts that the *2004 Amendment Act* has the effect of removing the ability of employers to pay less than the 9% or to exclude weekend shift penalties or other loadings for ordinary hours worked where industrial instruments previously allowed such exclusion.

However, AMMA does not accept that regular overtime was envisaged to become part of an employee's "ordinary hours worked " for the purposes of the SGAA due to the *2004 Amendment Act*; or at any time.

AMMA believes the Draft Ruling is misconceived for a variety of reasons including:

- it contradicts Parliament's intention when enacting the SGAA and the 2004 amendments,
- is contrary to the initial view of the ATO when the SGAA came into effect; and
- completely ignores and is at odds with; the historical background and purposes of the SGAA.

On the basis of the above, AMMA submits that the words "ordinary working hours" must be read in their context and the historical background accompanying the SGAA. The words have an established and special meaning in the context of superannuation and industrial relations which requires the ATO to apply the interpretation that "ordinary working hours" means those hours of work which an employee ordinarily works, exclusive of overtime.

We would be pleased to expand or elaborate on any of the above.

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30 December 2008