

# **DRAFT SUPERANNUATION GUARANTEE RULING**

**SGR 2008/D2**

**Meaning of “Ordinary Time  
Earnings” and “Salary and Wages”**



**6 January 2009**

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# 1. Summary of Ai Group's position

1. Ai Group strongly opposes Draft Ruling SGR 2008/D2. The Draft Ruling incorrectly interprets the law and relevant Court decisions.
2. The aspects of Draft Ruling SGR 2008/D2 of most concern to Ai Group are:
  - The inclusion of regularly worked overtime within "Ordinary Time Earnings" (OTE) for the purposes of the *Superannuation Guarantee (Administration) Act 1992* ("SGAA");
  - The inclusion of the "overtime" component of piece rates within OTE; and
  - The inclusion of maternity / paternity leave payments and top-up payments when serving on jury duty or with reserve forces within OTE.

In each of these areas, the Draft Ruling conflicts with existing Superannuation Guarantee Ruling SGR 94/4.

3. The Draft Ruling disturbs interpretations which have been applied widely throughout industry since the Superannuation Guarantee Legislation came into operation. Many individual companies have advised Ai Group that the Ruling would increase their labour costs by several million dollars per year. These companies have common shift and overtime arrangements and therefore it is evident that the Ruling would result in a massive increase in industry costs.
4. The inclusion of regular overtime as OTE results in additional superannuation costs for every overtime hour worked multiplied by the penalty paid (eg. double-time).
5. At the current time when business is struggling to cope with very difficult economic circumstances and the global financial crisis, imposing additional costs is highly inappropriate and damaging.

6. The additional costs which would result from the Ruling would lead to:
  - Reduced industry competitiveness;
  - Reduced employment;
  - Higher prices; and
  - Increased infrastructure costs for Governments and other project owners.
  
7. The Draft Ruling states that the final Ruling will apply from 1 July 2009 but where it conflicts with a previous Ruling (eg. SGR 94/4) the new Ruling prevails. If the interpretations in the Draft Ruling stand:
  - Thousands of employers will be faced with increased costs for future superannuation contributions; and
  - Employers will be exposed to enormous costs for past liabilities (both direct costs and administrative costs).
  
8. The impact of the additional costs will be heavy on both small and large businesses.
  
9. The interpretations in the Draft Ruling will have a particularly harsh impact upon companies in the manufacturing, construction, transport and mining industries where regular overtime is commonly worked.
  
10. The impact upon the labour hire and contracting sectors will be very severe because labour hire companies and contractors have provided labour and services to their clients based upon the superannuation costs which they understood would be incurred. The increased superannuation contributions which will arise due to the Ruling are not recoverable.

11. The Draft Ruling has extremely wide implications given legislative amendments which came into operation on 1 July 2008 requiring that all employers make superannuation contributions on an earnings base no less favourable than OTE, as defined in the SGAA. From 1 July 2008, employers were no longer entitled to apply less generous earnings bases in awards or trust deeds.
12. The interpretations set out in the Draft Ruling has not commonly been adopted or pursued by trade unions. The Ruling, if issued in the terms drafted, will lead to a raft of industrial claims and increased industrial disputation.
13. The Draft Ruling incorrectly interprets Court decisions – placing great weight on early decisions and little or no weight on later decisions which conflict with the earlier decisions.
14. If the ATO perceives that there is insufficient clarity in the Court decisions then the appropriate course of action is for the Federal Government to introduce legislation into Parliament to amend the law to ensure that the interpretations which are currently being widely applied within industry prevail. Ai Group intends pursuing this issue with relevant Ministers.
15. In some areas the ATO's interpretation has changed without any new case law to support the change of view. In Ai Group's view, a change in approach in such circumstances risks the perception that the change is being used as a tool of public policy in itself. This role is more appropriately left to Parliament.
16. SGR 94/4 has been in place for over ten years and is widely relied upon as a means of determining legal obligations and should not be departed from unless it is essential. Ai Group submits that it is not essential, warranted or in the public interest.
17. The latest Court decisions support the interpretations in SGR 94/4.

## 2. Ai Group

18. The Australian Industry Group (Ai Group) is the largest industrial organisation of employers in Australia representing employers in manufacturing, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines and other industries. Ai Group represents industries with around 440,000 businesses employing about 2.4 million people.
19. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees. Ai Group itself provides services to approximately 10,000 companies employing around 750,000 employees.
20. In addition to representing industry, Ai Group provides a wide range of services to its member companies in the areas of: workplace relations, legal, taxation, superannuation, occupational health and safety, workers compensation, the environment, international trade and export, economics, research, statistics, skills development and immigration.

## 3. Relevant legislative provisions

21. “Ordinary time earnings” is defined in s.6(1) of the SGAA in the following terms:

“**ordinary time earnings**, in relation to an employee, means:

(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 paragraph (a) would be greater than the maximum contribution base for the quarter—the maximum contribution base.”

22. “Salary and wages” is defined in s.11 of the SGAA as follows:

**“11 Interpretation—salary or wages**

- (1) In this Act, **salary or wages** includes:
- (a) commission; and
  - (b) payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate; and
  - (ba) payments under a contract referred to in subsection 12(3) that are made in respect of the labour of the person working under the contract; and
  - (c) remuneration of a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory; and
  - (d) payments to a person for work referred to in subsection 12(8); and
  - (e) remuneration of a person referred to in subsection 12(9) or (10).
- (2) Remuneration under a contract for the employment of a person, for not more than 30 hours per week, in work that is wholly or principally of a domestic or private nature is not to be taken into account as salary or wages for the purposes of this Act.
- (3) Fringe benefits within the meaning of the *Fringe Benefits Tax Assessment Act 1986* are not salary or wages for the purposes of this Act.”

## 4. Overtime whether regular or irregular is not OTE

***[References in the Draft Ruling: Paragraphs 15-21, 23, 24, 26, 31, 36, 67-106, 188-204 and 268-270]***

### Summary

23. Overtime, whether regularly worked or not, is not OTE for the purposes of the SGAA, for the following reasons:

- The latest Court decisions support the interpretation in current Superannuation Guarantee Ruling SGR 94/4 that all overtime payments are excluded from OTE because *“These are paid for work performed outside ordinary hours of work. It makes no difference how often the employee works overtime”*.

- The Draft Ruling incorrectly interprets Court decisions, placing great weight on early decisions and little or no weight on later conflicting decisions.
  - The term “ordinary time earnings” has a well-established meaning in the workplace relations field and other fields and the same meaning applies under the SGAA;
  - If Parliament had intended that superannuation contributions be calculated upon overtime earnings it would have logically specified this in s.6(1) of the SGAA or in the Explanatory Memorandum. It did not. The definition refers to “over award payments, shift loading and commission”. If Parliament had intended regular overtime to be included, surely it would have included it with these other components in the definition.
24. The reasons why overtime, whether regular or irregular, is not OTE are explained in more detail in the sections which follow.

## **Superannuation Guarantee Ruling SGR 94/4**

25. Current Superannuation Guarantee Ruling SGR 94/4 explains the definition of OTE under the SGAA.
26. Clause 7 of SGR 94/4 states:

“The ordinary hours of work may be specified in a statute or under an industrial award. If so, the ordinary hours specified are also the ordinary hours of work under the SGAA”.

27. Clause 19 of SGR 94/4 states:

**“What is excluded from ordinary time earnings?”**

<b>Types of Earnings</b>	<b>Reasons</b>
Overtime payments	These are paid for work performed outside ordinary hours of work. It makes no difference how often the employee works overtime.”

28. Attachment A to SGR 94/4 contains a Checklist to assist in identifying the types of payments which are to be regarded as OTE and those to be regarded as salary or wages. The following wording appears in the Checklist:

<b>“Payment Type</b>	<b>OTE?</b>	<b>Salary or Wages?</b>
Overtime	No	Yes”

29. It can be seen from the above that SGR 94/4 unambiguously specifies that “*Overtime*” payments are not to be included when calculating OTE.

30. Ai Group submits that the content of SGR 94/4 remains accurate and relevant based upon the latest Court decisions.

## **Relevant Court decisions**

31. In the Draft Ruling, the High Court’s 1974 *Kezich*<sup>1</sup> decision is cited at length, as is the subsequent decision of Justice Gray of the Federal Court in the *Quest*<sup>2</sup> case. Neither of these decisions are appropriate authorities, for the reasons set out below.

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<sup>1</sup> *Kezich v Leighton Contractors Pty Ltd* (1974) 131 CLR 362

<sup>2</sup> *Quest Personnel Temping Pty Ltd v Commissioner of Taxation* [2002] FCA 85

## ***Kezich – vs – Catlow***

32. *Kezich* is not an appropriate authority for the ATO to apply. This decision has, in effect, been overturned by the High Court's later *Catlow*<sup>3</sup> decision.

33. The facts surrounding the *Catlow* case, which was determined 15 years after *Kezich*, are as follows:

- Mr Catlow was injured at work and an issue arose as to the quantum of his weekly compensation entitlements.
- Mr Catlow worked 36 ordinary hours per week for Safeway Stores under the terms of an industrial agreement but was required to work such additional hours as his employer required over and above the 36 ordinary hours. These additional hours were paid at overtime rates. Mr Catlow worked a substantial amount of regular overtime, starting earlier and finishing later than other warehouse staff and working many Saturdays.
- The Victorian *Accident Compensation Act* provided an entitlement to weekly payments “*calculated at the worker’s ordinary time rate of pay for the worker’s normal number of hours per week*”. Mr Catlow argued that he was entitled to weekly payments based upon the total hours that he had worked, including overtime hours. The Accident Compensation Commission argued that he was entitled to weekly payments on the basis of the 36 ordinary hours which he had worked each week.

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<sup>3</sup> *Catlow v Accident Compensation Commission* (1989) 167 CLR 543

34. In *Catlow*, the High Court upheld the Accident Compensation Commission's position. McHugh J, with whom Deane and Dawson JJ agreed, said:

"In construing the terms of s.95(1), it is 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 for a standard or ordinary number of hours per week. Industrial awards and agreements usually state the number of ordinary working hours in each day and week and provide for the payment of overtime and penalty rates of pay for hours worked outside those ordinary hours.... Thus, in the present case the industrial agreement under which the applicant was employed provided that the ordinary hours of work should be an average of 36 per week which were to be worked in the manner specified 'without payment of overtime'.

Against this industrial background of awards and agreements fixing a number of ordinary hours per week, it seems natural to read the expression 'calculated at the worker's ordinary time rate of pay for the worker's normal number of hours per week' as a reference to the ordinary time rate of pay for the worker's standard or ordinary hours per week as fixed by award, agreement or contract". (Emphasis added).

35. McHugh J went on to say that:

"Judicial decisions on similar expressions in comparable statutes support the view that the 'normal number of hours per week' in s.95(1) means the ordinary hours fixed by award, agreement or the terms of the employment". (Emphasis added).

36. The High Court's approach in *Catlow* is the appropriate test for determining OTE for the purposes of the SGAA when regular overtime is worked rather than *Kezich*. That is, the term "ordinary time earnings" refers to the earnings which relate to the employee's "*standard or ordinary hours per week as fixed by award, agreement or contract*".

## ***Quest and ACE***

37. The Draft Ruling relies heavily on the decision of a single Federal Court judge (Justice Gray) in *Quest*. This decision is not an appropriate authority to rely upon for the purposes of the Ruling because:

- The *Quest* decision was made on 12 February 2002 – that is, after the Full Federal Court’s decision in the *ACE*<sup>4</sup> case (28 November 2001) but before the High Court overturned the Full Federal Court’s decision in 2003<sup>5</sup>. The Full Federal Court in *ACE* had held that the employer was required to make superannuation contributions on behalf of the relevant employees for time worked outside of ordinary hours;
- The *Quest* case involved an unusual set of facts (ie. the employees were award free casual employees who did not have a specific number of ordinary hours prescribed in their contracts of employment) and the Judge who made the decision – Justice Gray – highlighted that a different interpretation would most likely apply in other cases such as where employees were covered under an award which specified a particular number of ordinary hours;
- At the time when the *Quest* case was determined, legislation did not exist prescribing an entitlement to a maximum number of ordinary working hours. Such an entitlement now exists in the *Workplace Relations Act* (as part of the Australian Fair Pay and Conditions Standard) and is included in the *Fair Work Bill* which is currently before Parliament (as part of the National Employment Standards)

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<sup>4</sup> Deputy Commissioner of Taxation v Australian Communication Exchange Ltd [2001] FCA 1664.

<sup>5</sup> *Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation* [2003] HCA 55.

38. Ai Group was involved in the *ACE* case. We provided information about industry practices which we understand was submitted to the High Court by Australian Communication Exchange Ltd's legal representatives. Also, we met with the ATO at a senior level and were instrumental in convincing the ATO to recommend to its Test Case Panel that the High Court proceedings be funded under the Test Case Funding Program.

39. In its decision in *ACE*, the majority said (at paragraph 36) in respect of an employer's obligation to make superannuation contributions:

"Each of "casual employee", "ordinary hours", "ordinary working hours", "ordinary time earnings", "casual rates", "overtime" and "ordinary working hours for all employees" must be given meaning and effect under the Award."

40. Similarly, the term "ordinary time earnings" in the SGAA must be given meaning and effect in terms of the employee's award, workplace agreement or employment contract.

41. It is erroneous for the ATO to place substantial weight on *Quest* and to stretch the principles within the decision to situations where an employee is covered under an award, workplace agreement or contract of employment which specifies a particular number of ordinary hours. Justice Gray specifically differentiated the situation before him (ie. award-free casual employees with letters of engagement which only specified a minimum number of shifts which the employees could expect to be offered) from that which usually applies.

42. Justice Gray said:

"The offers of employment specified the minimum hours for which an employee could be called upon to work. The clear import of the word 'minimum' was that an employee could be expected to be asked to work more than five standard shifts in a fortnight. An industrial award or agreement usually expresses the maximum hours that an employee may be required to work. It is true that provision is often made for work beyond such standard hours, but it is usual for the award or agreement to provide that such additional work is to attract a higher

level of remuneration. That is what marks it out as work performed outside ordinary hours.  
(Emphasis added).

43. Justice Gray's *Quest* decision was made in the context of his concern about the potential for an employer to minimise the superannuation contributions payable in an award-free environment by specifying a very low minimum number of ordinary hours in a contract of employment and then deeming all time worked beyond such minimum to be overtime.

44. Justice Gray said:

"This conclusion also operates to promote the underlying purpose or object of the Act. It would tend to defeat that underlying purpose or object if an employer, by engaging employees on the basis that they would work for a low specified minimum, could avoid the obligation to pay superannuation contributions (or the charges in lieu of those contributions) in respect of much greater hours habitually worked by the employees. Counsel for the applicant argued that it was unrealistic to believe that an employer would be able to attract employees by offering them very low minimum hours. This is not necessarily so. People might be prepared to enter into contracts specifying very low minimum hours if they understood that they were habitually to be offered hours well above the minimum. In a labour market dominated by high unemployment, many people may feel that they had no choice but to accept a contract specifying a low minimum."

45. The *Quest* decision has no relevance to employees covered under an award, workplace agreement or contract of employment which specifies a particular number of "ordinary hours". The calculation of superannuation contributions for these employees is appropriately determined through the application of the High Court's approach in *Catlow* – not the decision of Justice Gray in *Quest*.

46. Further, even for award-free, casual employees whose contracts of employment do not define "ordinary hours, it is inappropriate for *Quest* to be relied upon for the purposes of a Ruling – given all of the factors referred to in paragraph 37 above.

## ***Other relevant Court decisions – Scott, Thompson and Moloney***

47. In *Scott v Sun Alliance Australia Ltd*<sup>6</sup>, the High Court was called upon to construe the term “the ordinary time rate of pay of the worker” in the Tasmanian *Workers Compensation Act*. The Court decided that in situations where an employee’s conditions are fixed by an industrial instrument, the term “ordinary time rate of pay for the worker” is a reference to the rate of pay for the fixed standard hours, not overtime or usual or customary time.
48. The High Court said (at para 5):
- “The expression ‘ordinary time rate of pay’ is well known in the industrial relations field in Australia and New Zealand. It and similar terms have long been used in legislation. Unless the context otherwise requires, ‘ordinary time rate of pay’ means the rate of pay for the standard or ordinary hours of work in contrast to the overtime or penalty rate of pay for hours of work other than the standard hours. When expressed by reference to a week, it refers to the product of multiplying that hourly rate by the standard 35, 38 or 40 hour week, as the case may be, fixed by legislation, industrial award or agreement”.
49. The approach taken by the High Court in *Catlow* and *Scott* was followed by the Full Court of the Supreme Court of Western Australia in *Thompson v Roche Bros Pty Ltd*<sup>7</sup>. Special Leave to appeal to the High Court was refused.
50. In *Moloney v Beverage Engineering Pty Ltd*<sup>8</sup>, Federal Magistrate O’Sullivan considered an employee’s entitlement to payment in lieu of notice on termination under the *Workplace Relations Act 1996* which was to be calculated on the basis of “the employee’s ordinary hours of work (even if they are not standard hours)”.
51. The employee argued the relevance of *Kezich* and *Quest* and sought that regular overtime be included.

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<sup>6</sup> *Scott v Sun Alliance Australia Limited & Anor* (1993) 178 CLR 1.

<sup>7</sup> *Thompson v Roche Bros Pty Ltd* [2005] HCA 230

<sup>8</sup> *Moloney v Beverage Engineering Pty Ltd* (2007) 212 FLR 385.

52. O’Sullivan FM decided that regular overtime is not contemplated by the term “the employee’s ordinary hours of work (even if they are not standard hours)” in the Act. The following extracts from the decision are relevant:

[53] As had been acknowledged in many of the authorities referred to above in particular *Catlow* and *Scott* the words ‘ordinary hours of work’ or the ‘standard hours’ need to be considered in context. Both those decisions, which occurred after *Kezich*, noted the role of industrial awards and agreements in setting the ordinary hours of work.

[54].....it was submitted on behalf of the applicant in this case that ‘ordinary hours of work’ for the purposes of s 661(5)(a) ought include overtime as it was submitted such overtime was included in the applicant’s regular, normal, customary or usual hours in the *Kezich* sense.....

....

[66] In this case:

- the Site agreement applied to the applicant;
- ordinary hours of work were defined in the Site agreement;
- the Site agreement provided for a higher rate of remuneration for hours worked outside those ordinary hours....

[67] In this case, unlike the situation in *Quest*, there was an industrial instrument that set ordinary hours not just minimum hours.

.....

[83] Given the agreed facts in this matter, the weight of the recent authorities and the plain meaning of the words I am not satisfied it is appropriate to read the words ‘ordinary hours of work’ in the *Kezich* sense.

[84] As Grey J said in *Quest*:

The fixing by collective means of standard hours of work; coupled with a premium for remuneration at a higher rate for 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”.

[85] I am not satisfied.....that ordinary hours even if they are not standard hours means as that phrase is generally understood in the sphere of industrial relations in this country the overtime or usual or customary time or even in this case the average actual hours”.

53. Along with *Catlow* and *ACE*, the Courts' decisions in *Scott*, *Thompson* and *Moloney* are powerful authority for the view that overtime, whether regular or irregular, is not OTE.

## The AIRC's Reasonable Hours Test Case Decision

54. The terms "ordinary time", "ordinary time earnings" and "ordinary hours of work" are used extensively in awards of the AIRC and State Commissions. These terms have a widely accepted meaning. The most central aspect of these terms is that overtime is not included.

55. In the AIRC's *Reasonable Hours Case*, the ACTU endeavoured to overturn the widely accepted meaning of "ordinary time" "and "ordinary hours of work" and include regularly worked overtime. This was rejected by the Commission. In its decision<sup>9</sup>, the five member Full Bench (including the President and two Vice Presidents) said:

"[49] The expression "ordinary time hours of work" in s.89A(2)(b) is a conflation of two well-established expressions in the industrial relations vocabulary - "ordinary hours of work" and "ordinary time." It is to be inferred that the composite term refers to hours which may be worked without the payment of overtime and to the regulation of those hours. The ACTU submitted that the expression should be construed to mean "regular, normal, customary or usual hours". We doubt that this is so. The distinction between ordinary hours and overtime is one which is deeply embedded in the Commission's awards and agreements." (Emphasis added)

56. The above ACTU claim (which the Full Bench rejected) was unusual. Typically unions have accepted and applied the widely understood definitions of "ordinary time", "ordinary time earnings" and "ordinary hours of work".

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<sup>9</sup> PR072002

57. For example, in 2001 the CFMEU applied to the AIRC to vary a number of superannuation clauses in construction industry awards to align the award definition of “ordinary time earnings” with the Superannuation Guarantee definition of OTE. The CFMEU pursued award variations to include four additional allowances but did not seek to include regular overtime. The proceedings were eventually settled on appeal before a Full Bench of the Commission in mid-2002.<sup>10</sup>
58. The Ruling, if issued in the terms drafted, will lead to a raft of industrial claims and increased industrial disputation.

### **“Ordinary time earnings” has a widely accepted and similar meaning in other fields**

59. Beyond workplace relations, the term “ordinary time earnings” has relevance in various other fields, including statistics.
60. ABS and other statistics do not include overtime earnings within definitions of “ordinary time earnings”.
61. In ABS Cat No. 6306.0 (Employee Earnings and Hours, Australia) the definition of “ordinary time cash earnings” expressly excludes all overtime payments as set out below:

#### **“Ordinary time cash earnings**

Payment for award, standard or agreed hours of work, including allowances, penalty payments, payments by measured result and regular bonuses and commissions. Amounts salary sacrificed are also included. Excluded are non-cash components of salary packages, overtime payments, retrospective pay, pay in advance, leave loadings, severance pay, and termination and redundancy payments. See conceptual framework for measures of employee remuneration in Appendix 1.” (Emphasis added)

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<sup>10</sup> PR918011

62. In ABS Cat No. 6302.0 (Average Weekly Earnings) the definition of “weekly ordinary time earnings” excludes all overtime payments:

**“Weekly ordinary time earnings**

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. It is calculated before taxation and any other deductions (e.g. superannuation, board and lodging) have been made. 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; payments under incentive or piecework; payments under profit sharing schemes normally paid each pay period; payment for leave taken during the reference period; all workers' compensation payments made through the payroll; and salary payments made to directors. 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.” (Emphasis added)

## **ATO's Memorandum of Interpretative Advice to BlueScope Steel – December 2005**

63. The Draft Ruling directly conflicts with a detailed Memorandum of Interpretative Advice which the ATO provided to Ai Group Member company, BlueScope Steel, in December 2005.
64. The background to the Interpretative Advice is set out in a letter dated 18 December 2008 from BlueScope Steel to Ai Group which is included as **Annexure A** to this submission, together with Attachments 1, 2 and 3 to that letter.
65. BlueScope's letter is further discussed below in **Section 7 – Industry Impacts**.

## 5. Piece rates

### *[References in the Draft Ruling: Paragraphs 31, 97-106 and 266-270]*

66. In various industries (eg. transport, timber) it is common for employees to be remunerated on the basis of a piece rate. The piece rate is calculated with reference to the relevant weekly award rate and typically includes an industry loading of 25% (timber industry) or 30% (transport industry).
67. Piece rates sometimes include an overtime component and the industry practice is to not pay superannuation on the overtime loading.
68. The awards in industries where piece rates apply have typically set out how ordinary time earnings are to be calculated for superannuation purposes (eg. the *Timber Industry Award*). However, since 1 July 2008 such earnings bases, where less generous than the definition of OTE under the SGAA, no longer have effect.
69. In the case of the *Transport Industry (Long Distance Drivers) Award*, advice was sought from the ATO from transport industry representative organisations regarding the calculation of superannuation for long distance drivers paid a cents per kilometre rate. The cents per kilometre rate in the award comprises a 30% industry allowance and a further 20% overtime loading.
70. In correspondence dated 1 September 2005, the ATO advised that the overtime allowance is not included in OTE. This is consistent with industry practice.
71. The Draft Ruling erroneously deems the overtime component of piece rates to be OTE.

72. The overtime component is not part of OTE for the reasons set out in **Section 4** of this submission. Overtime, whether regular or irregular, is not OTE for the purposes of the SGAA.
73. The interpretation in the Draft Ruling would have a huge cost impact upon the transport industry. Such impact is explained below in **Section 7 – Industry Impacts** and in **Annexure D**.

## **6. Payment of superannuation contributions on parental leave and jury duty**

*[References in the Draft Ruling: Paragraphs 32, 33, 56, 136-144 and 271-279]*

74. Ai Group is also concerned by the ATO's change of position, as reflected in the Draft Ruling, regarding the treatment of:
- Payments made when on maternity or paternity leave; and
  - Top up payments, eg. when serving on jury duty or with reserve forces etc.
75. While not as considerable as the impact of the ATO's draft position on overtime payments, the ATO's change of position on these payments has implications for businesses that do not currently treat such payments as OTE, consistent with SGR 94/4.
76. In Ai Group's view, no case of law or principle has been made out as to why the approach to such payments as set out in SGR 94/4 is no longer correct.
77. SGR 94/4 provides the following explanations as to why these payments are excluded from OTE (clause 19):

Payments when on maternity or paternity leave	These are payments made in respect of employment and parenthood, not in respect of ordinary hours of work
Top-up payments eg when serving on jury duty or with reserve forces etc	These are payments made either by obligation (eg an award) or gratuitously, and are not in respect of ordinary hours of work

78. Top up payments are further considered at clause 23 of SGR 94/4 as follows:

“Top up payments are paid by the employer, either by obligation (eg. an award) or gratuitously. In general, the payment is made to compensate the employee for a reduced income when the employee serves, for example, on jury duty, or with the reserve forces. The payment is not in connection with work for the employer and is therefore not a payment in respect of ordinary hours. The payment is not included in OTE.”

79. In Ai Group’s view, the approach set out in SGR 94/4 is correct, and represents a sensible and pragmatic approach to the treatment of these payments. The Commissioner has sought to determine what in substance is the character of such payments and on that basis, determine whether or not the payment is included in OTE.

80. Such payments are not “in respect of” ordinary hours of work because they are not made for attendance, or for work done, in those hours, and cannot sensibly be understood as being made to satisfy an entitlement that accrues in ordinary hours of work.

81. The Draft Ruling applies a very expansive interpretation to the term “in respect of” ordinary hours of work. In reality, this approach would see no real distinction between a payment made “in respect of” ordinary hours of work and a payment made “in respect of” employment *per se*. In Ai Group’s view, this approach is erroneous. The term “in respect of” requires a meaningful connection with ordinary hours of work, so that the payment can realistically

be said to have accrued on the basis of ordinary hours of work, rather than the mere fact of employment and some other event (eg. parenthood or being called upon to serve on a jury).

82. There are also reasons of public policy for maintaining the current approach as reflected in SGR 94/4. The most obvious of these is the value of good policy administration, which requires that a Ruling which has been in place for over ten years and which is widely relied upon as the means of determining legal obligations is not to be departed from lightly. The Draft Ruling does not rely on any case law in support of the change in view. In Ai Group's view, a change in approach in such circumstances risks the perception that the change is being used as a tool of public policy in itself. This role is more appropriately left to Parliament.
83. More specifically, the particular consequences of the proposed change in approach should be taken into account. The main consideration, from a public policy point of view, is the desirability of not imposing an additional cost on payments which, for many employees, are made on the basis of goodwill by employers (or at least on the basis of company policy, which can be reviewed) and are highly valued by the employees that receive them as a way of making up for lost income.
84. If payments made when an employee is on maternity or paternity leave are treated as OTE, an additional cost would need to be factored in to the cost of administering paid parental leave schemes. To the extent that such payments are made gratuitously or as part of a company policy which may be subject to change, it could be expected that, going forward, employers would factor in this additional cost in designing their scheme, which may result in schemes of less generosity in terms of, for example, duration of paid leave or the level of payment which is made.

85. The change in approach to jury service top up pay also raises issues. In many cases, such payments are made pursuant to an obligation under an industrial instrument (or in Victoria, under legislation). There may be no option for an employer to pass on the cost of superannuation contributions by downscaling the generosity of such payments, resulting in an additional cost at a time when a business is dealing with the absence of an employee for an often indeterminate, and sometimes prolonged, period. In other cases, such as where an employee is award free, an employer's decision as to whether to make payments on jury service, or what level of payment to make, could be expected to be affected by superannuation obligations.
86. It should be noted that payments when on jury service are likely to become increasingly the domain of gratuitous payments or company policy in the future. The Government's planned National Employment Standards (NES), which are part of the *Fair Work Bill* introduced into Parliament in November 2008, contains an entitlement to ten days paid jury service leave. The AIRC has now indicated, through the release on 17 December 2008 of its priority modern awards, that it does not intend to supplement the NES in this area by continuing the existing entitlements in many awards under which employees are entitled to uncapped top up payments when on jury service.
87. While many businesses see the business case or other value in making payments to employees when on maternity/paternity leave or jury service, it is reasonable to expect that cost factors will continue to be a relevant consideration. This is particularly the case in the current financial climate.

## **7. Industry impacts**

88. The Draft Ruling disturbs interpretations which have been applied widely throughout industry since the Superannuation Guarantee Legislation came into operation.

89. The following correspondence is attached, setting out the impact of the Draft Ruling (as it relates to the treatment of overtime) on three Ai Group member companies:

- **Annexure A – BlueScope Steel Limited**

BlueScope has calculated that *“The additional cost of applying the Draft Ruling would be in the order of \$3-4 million per annum, at current wage rates.”*

- **Annexure B – Thiess Pty Ltd**

Thiess estimates that *“The additional cost of applying the draft Ruling on existing projects would be in the order of \$3-4 million.”*

- **Annexure C – Austral Refrigeration Pty Ltd**

The Chief Executive of Austral Refrigeration, Rob Kirkham sent the unsolicited letter in **Annexure C** to Ai Group advising of the environment of intense global competition in which the Company operates and stating that *“The imposition of a 9% superannuation payment on overtime, which already carries at least a 50% allowance to ordinary rates, could well make it impossible for the Company to compete with imported product”*. Mr Kirkham goes on to state that it is *“essential for the survival of the Australian manufacturing industry”* that superannuation not be payable on overtime earnings.

90. **The above three companies have common shift and overtime arrangements. and therefore it is evident that the Ruling would result in a massive increase in industry costs.**

91. The inclusion of regular overtime as OTE results in additional superannuation costs for every overtime hour worked multiplied by the penalty paid (eg. double-time). Consequently, the cost impact of including regular overtime within OTE is particularly high.
92. Some industry awards (eg. the *Graphic Arts – General – Award*) require the payment of shift loadings as well as overtime penalties for overtime hours and the Draft Ruling would require that superannuation be calculated on the total payment made for overtime hours.
93. **Annexure D** sets out the Draft Ruling’s negative impact upon the **transport industry** in respect of drivers remunerated on a cents per kilometre basis.
94. At the current time when business is struggling to cope with very difficult economic circumstances and the global financial crisis, imposing additional costs is highly inappropriate and damaging.
95. The additional costs which would result from the Ruling would lead to:
- Reduced industry competitiveness;
  - Reduced employment;
  - Higher prices; and
  - Increased infrastructure costs for Governments and other project owners.
96. The Draft Ruling states that the final Ruling will apply from 1 July 2009 but where it conflicts with a previous Ruling (eg. SGR 94/4) the new Ruling prevails. If the interpretations in the Draft Ruling stand:
- Thousands of employers will be faced with increased costs for future superannuation contributions; and
  - Employers will be exposed to enormous costs for past liabilities (both direct costs and administrative costs).

97. The impact of the additional costs will be heavy on both small and large businesses.
98. The interpretations in the Draft Ruling will have a particularly harsh impact upon companies in the manufacturing, construction, transport and mining industries where regular overtime is commonly worked.
99. The impact upon the labour hire and contracting sectors will be very severe because labour hire companies and contractors have provided labour and services to their clients based upon the superannuation costs which they understood would be incurred. The increased superannuation contributions which will arise due to the Ruling are not recoverable.
100. The Draft Ruling has extremely wide implications given legislative amendments which came into operation on 1 July 2008 requiring that all employers make superannuation contributions on an earnings base no less favourable than OTE, as defined in the SGAA. From 1 July 2008, employers were no longer entitled to apply less generous earnings bases in awards or trust deeds.
101. In addition to the massive costs which would be imposed by the interpretations in the Draft Ruling, thousands of employers have incurred substantial additional costs from the 1 July 2008 legislative amendments because they are now required to make superannuation contributions on performance bonuses, commissions and most allowances. The earnings base under the *Metal, Engineering and Associated Industries (Superannuation) Award 1998* and numerous other awards did not require superannuation contributions to be made on these aspects of remuneration.

102. The interpretations set out in the Draft Ruling has not commonly been adopted or pursued by trade unions. The Ruling, if issued in the terms drafted, will lead to a raft of industrial claims and increased industrial disputation.

## **8. Conclusion**

103. The Draft Ruling incorrectly interprets Court decisions – placing great weight on early decisions and little or no weight on later conflicting decisions.

104. If the ATO perceives that there is insufficient clarity in the Court decisions then the appropriate course of action is for the Federal Government to introduce legislation into Parliament to amend the law to ensure that the interpretations which are currently being widely applied within industry prevail. Ai Group intends pursuing this issue with relevant Ministers.

105. In some areas the ATO's interpretation has changed without any new case law to support the change of view. In Ai Group's view, a change in approach in such circumstances risks the perception that the change is being used as a tool of public policy in itself. This role is more appropriately left to Parliament.

106. SGR 94/4 has been in place for over ten years and is widely relied upon as a means of determining legal obligations and should not be departed from unless it is essential. Ai Group submits that it is not essential, warranted or in the public interest.

107. The latest Court decisions support the interpretations in SGR 94/4.