SGR 2009/2EC - Compendium

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Ruling Compendium – SGR 2009/2

This is a compendium of responses to the issues raised by external parties to draft Superannuation Guarantee Ruling SGR 2008/D2 – Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'.

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1.	**Fringe benefits and payments-in-kind** ***Requests for clarification and qualification to what is a 'payment in kind'*** Clarification is sought on the application of the *Superannuation Guarantee Administration Act 1992* (SGAA) on fringe benefits, payments-in-kind, and in particular, employee share schemes. • SGR 2008/D2 consistently refers to 'payments' being made, however, at paragraph 51 states that salary and wages 'is not limited to payments made to employees in cash or cash equivalent but can include payments made in kind to the employee'. It is submitted that the reference to 'payments in kind' with respect to all salary and wages is too broad but, rather, that the statement should be limited to the circumstances described in paragraphs (a), (c) and (e) of the extended definition in section 11(1). • In relation to paragraph 51 of the Ruling, as fringe benefits are specifically excluded from the definition of salary or wages and generally payments in kind would constitute fringe benefits, it is our view that it would be useful to include an example of what 'payments made in kind' may include.	**Change made** ***Treatment of payments-in-kind revised – paragraphs 58, 256 and 257*** The Commissioner has revised the statement in SGR 2008/D2 at paragraph 51 which states that salary or wages 'is not limited to payments made to employees in cash or cash equivalent but can include payments made in kind to the employee'. Also, additional discussion (paragraphs 58, 256 and 257 of the Ruling) has been included in the Ruling to address the application of the SGAA on fringe benefits, payments-in-kind, and in particular, employee share schemes (ESS). The existing SG Rulings, SGR 94/4 and SGR 94/5 were silent on the issue of non-cash benefits and ESS but stated that 'benefits subject to fringe benefits tax' were not salary or wages or OTE.

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	Submissions as to why 'payments in kind' (or 'non-cash benefits') should not be included in 'salary and wages' • While the reference to 'fringe benefits' in section 11 of the SGAA might suggest that the section implies that non-cash benefits are included in 'salary and wages' generally, it is submitted that the need for the exclusion of fringe benefits arises due to the extension of the ordinary meaning of salary and wages in section 11, rather than that Parliament is suggesting that 'salary and wages' ordinarily includes non-cash benefits. • The view that the ordinary meaning of the term 'salary and wages' does not include non-cash benefits is supported by the fact that non-cash benefits are dealt with separately in the PAYG provisions in Division 14 of Schedule 1 of the *Taxation Administration Act 1953* (TAA). There were no comparative provisions in the former PAYE provisions contained in Division 2 of Part VI of the *Income Tax Assessment Act 1936* (ITAA 1936) dealing with non-cash benefits prior to their repeal and replacement by the PAYG provisions in Schedule 1 of the TAA. In particular, taking into account paragraph 1.101 and paragraphs 1.104 to 1.106 in the Explanatory Memorandum to A New Tax System (Taxation Laws Amendment) Bill (No.1) 1999 which introduced PAYG), given that the PAYE provisions applied to salary and wages (former section 221A(1) of the ITAA 1936), there would be no need for specific reference in Division 14 of the TAA if the ordinary meaning of the term 'salary and wages' was considered to include non-cash benefits.	Fringe benefits as defined in the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) are excluded under subsection 11(3) of the SGAA. Additionally, the Commissioner takes the view that other 'benefits', within the meaning of that Act, given by employers to employees that are neither fringe benefits nor salary or wages within the meaning of that Act are not salary or wages for SGAA purposes. Examples of such 'benefits' that are not salary or wages for SGAA purposes includes: • contributions made by an employer to a complying superannuation fund for the benefit of an employee (including those required to be made by the superannuation guarantee legislation itself); and • the acquisition of a share, or of a right to acquire a share, under an employee share scheme (within the meaning of Division 13A of Part III of the ITAA 1936). In forming this view the Commissioner takes into account the intent evidenced by subsection 11(3) and the general distinction drawn for income tax, fringe benefits tax and Pay as You Go purposes between salary or wages and other kinds of employment benefits.

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	Employee share schemes Employee share schemes (ESS) have been previously excluded from ordinary time earnings (OTE) but there is no mention of ESSs in SGR 2008/D2. As such it would be useful to provide clarity around this issue in the Ruling. • It is submitted that the provision of shares and rights under employee share schemes (which are employee share schemes for the purposes of Division 13A of the ITAA 1936) should not be considered to be OTE of the relevant employee, for the following reasons: • They are not 'salary and wages' within the ordinary meaning of that term; • Shares and rights provided under ESSs are generally provided to align employee's interests with the interest of shareholders in driving improved future profitability, shareholder returns and share price. Thus in many cases it would be difficult to say that the benefits were provided with respect to past performance or ordinary hours of work, rather than future employment; • Where they are 'salary and wages', the terms of ESSs may vary greatly and it would be necessary to consider the many variations between the terms of ESSs to determine whether or not benefits provided under the various types of plans should be considered OTE. Generally, the policy approach to ESSs would suggest that the superannuation guarantee charge (SGC) should not be applied. In addition, it is noted that significant difficulties are inherent in the application of the SGC to ESSs given the structure of such schemes and the variations between schemes, particularly relating to the time at which the benefits would be considered to be included in OTE (for example when are they 'earned'?), potential forfeitures and the valuation of such benefits. If SGC were to be applied to ESSs, careful consideration would need to be given to such issues;	

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	• Where they are 'salary and wages', it is submitted that benefits under ESSs should be considered to be excluded from the scope of 'salary and wages' due to the exclusion of 'fringe benefits' under section 11(3). Section 11(3) provides an exclusion for 'fringe benefits' within the meaning of the FBTAA. 'Fringe benefits' are defined in section 136(1) of the FBTAA though, as noted above, paragraphs (ha) to (hc) of that definition exclude ESSs. Without the specific exclusion, benefits under ESSs would clearly be considered to be fringe benefits as defined within section 136(1). ESSs have been excluded from the definition of fringe benefits for the purpose of ensuring that the tax treatment of ESSs is consistent with the approach in Division 13A as double taxation would arise if FBT was imposed on the employer, when Division 13A provides for taxing of the employee on either an up-front or deferral basis. It is submitted that the reference to fringe benefits in section 11(3) is to the broader meaning of the term 'fringe benefit' rather than to the meaning of that term as limited by the exclusions and, if section 11 was thought to apply to ESSs, Parliament would have included a specific exclusion. • The determination of whether employee share entitlements form part of OTE depends on whether or not share based awards are considered 'earnings'. An award of shares, being a capital asset, is not ordinary income/earnings and, indeed, specific legislation is required to treat these awards as income for taxation purposes (and exclude it from the FBT net).	

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2.	**Overtime – interpretative and compliance/administrative issues** ***Submissions on the interpretation of section 6(1) of the SGAA*** • The inclusion of the second limb of the definition is to make clear that over award payments, shift loadings and commissions are to be included in OTE in order to avoid any contrary suggestion. Indeed, over award payments, shift loading and commissions are expressly included, while overtime payments (and other like payments) are not. It is contended that this is a strong indication that Parliament did not intend to include overtime payments (or any other payment not expressly referred to in the definition) as part of OTE. • The specification of OTE as the universal earnings base designed to further the objective of administrative simplicity for employers, by allowing employers to disregard overtime payments in the case of employees whose employment is governed by an industrial award. This objective will not be achieved if the approach in SGR 2008/D2 is adopted. • It would have been open to the legislature to specify 'salary or wages' as the basis for contributing. Parliament deliberately chose OTE to allow employers to ignore overtime for the purpose of calculating superannuation contributions both as a matter of administrative simplicity and for consistency with the general approach that had been adopted under industrial awards before the introduction of the superannuation guarantee regime (of requiring superannuation to be provided only in respect of OTE as defined in an industrial award).	**Change made** ***Change of the Commissioner's view on the meaning of 'ordinary hours of work' – paragraphs 13-18, 189-210*** Pursuant to further consideration of the relevant case law, the Commissioner now accepts that the view expressed in SGR 94/4 in relation to overtime is the better view legally, and that the case law does not compel a departure from the position in SGR 94/4. The discussion on the meaning of 'ordinary hours of work' at Paragraphs 13-18 and 189-210 of the Final Ruling reflects and explains in detail this revised view.

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	• It is a well recognised concept that overtime is quite different to 'ordinary hours of work'. A request by an employer for an employee to work overtime must be reasonable and an employer cannot force an employee to work overtime. Overtime is often paid at a higher rate to compensate the employee for having to work outside their usual hours and to compensate the employee for the fact that overtime does not attract leave entitlements and (until now at least) superannuation. • The conclusion on overtime in SGR 2008/D2 has been 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. 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. • The comments regarding regular patterns of overtime' being more akin to ordinary hours are correct, because the individual employee has an established pattern of work. However, this may also raise additional questions as to what is regular, customary, normal or usual' (refer paragraph 15 of the ruling). Inevitably, one problem with providing general guidance is that there will always be some areas open to interpretation.	

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	Submissions on the interpretation of court decisions contained in SGR 2008/D2 • SGR 2008/D2 is consistent with relevant decisions in the Courts. As such it is reasonable to reflect these decisions. However, there is no definition of what is meant by 'regular'; the current definition of OTE, which is predicated in respect of ordinary hours of work, the mere regularity of overtime surely cannot, by itself, cause the overtime payment to change its character from non-ordinary hours to ordinary hours. For example, overtime payments paid to an employee who regularly works voluntary overtime (that is by 'election') rather than compulsion should not be treated as ordinary time earnings. This is different to the situation where regular overtime is required to be worked under an Award or employment contract. • It is submitted that SGR 2008/D2 incorrectly interprets Court decisions – placing great weight on early decisions and little or no weight on later decisions which conflict with the earlier decisions; and that the content of SGR 94/4 remains accurate and relevant based upon the latest Court decisions. • SGR 2008/D2 places great reliance on the High Court decision of *Kezich v. Leighton Contractors Pty Ltd* (1974) 131 CLR 362 which is cited at length, and the subsequent decision of Justice Gray of the Federal Court in the Quest case [*Quest Personnel Temping Pty Ltd v. Commissioner of Taxation* [2002] FCA 85]). It is contended that neither of these decisions are appropriate authorities because:	

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	- *Kezich* has, in effect, been overturned by the High Court's later decision in *Catlow v. Accident Compensation Commission* (1989) 167 CLR 543. 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* is also an inappropriate authority as: it was decided before the *Ace* decision by the Full Federal Court was overturned by the High Court (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); it involved an unusual set of facts (award-free casual employees with letters of engagement which only specified a minimum number of shifts which the employees could expect to be offered); and legislation did not exist prescribing an entitlement to a maximum number of ordinary working hours. 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. 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. • *Prushka Fast Debt Recovery v. Commissioner of Taxation* [2008] AATA 762 (28 August 2008) is not a binding precedent of a court.	

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	• Other cases discussed in SGR 2008/D2 were in the context of workers' compensation and the expressions used were not identical to OTE as defined in the SGAA. It is submitted that these cases are of limited relevance to the issue, given the very different context. • Cases cited in support of retaining the view that overtime does not fall under OTE includes: *Catlow v. Accident Compensation Commission* (1989) 167 CLR 543; *Scott v. Sun Alliance Australia Ltd* (1993) 178 CLR 1; *Thompson v. Roche Bros Pty Ltd* [2005] HCA 230; *Moloney v. Beverage Engineering Pty Ltd* (2007) 212 FLR 385; AIRC's Reasonable Hours Case. ***Other matters cited as to why overtime should not be included in OTE*** • Beyond workplace relations, the term 'ordinary time earnings' has relevance in various other fields, including statistics. ABS and other statistics do not include overtime earnings within definitions of 'ordinary time earnings', for example ABS Cat No. 6306.0 (Employee Earnings and Hours, Australia) and ABS Cat No. 6302.0 (Average Weekly Earnings) the definition of 'ordinary time cash earnings' expressly excludes all overtime payments. • Under the new workplace relations system 'ordinary hours of work' for award/agreement covered employees will be those hours set out in the relevant award or enterprise agreement, for example section 20 of the *Fair Work Bill 2008*. SGR 2008/D2 at paragraph 15 is directly inconsistent with section 20 of the Bill. • 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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	• The ATO's interpretation of 'ordinary hours of work' is completely at odds with the industrial relations concept of 'ordinary hours of work'. Overtime and ordinary hours of work are generally mutually exclusive in awards across Australia, and having a separate definition applying to superannuation is not only confusing, but it will also be difficult to interpret. ***Practical implication and compliance/administrative issues with the inclusion of overtime in the definition of OTE*** • Paragraph 169 of SGR 2008/D2 states that the purpose of standardising contributions to OTE was to reduce complexity. This purpose is not achieved by requiring that the work pattern of each employee be monitored to determine his or her regular work pattern. A far simpler approach would be to allow OTE to be determined according to the particular industrial award that applies to the particular employee. It is submitted that there will be significant increases in operating (including employment) costs for all employers if the view on overtime as espoused in SGR 2008/D2 is adopted as the final Tax Office position. The increase in costs is attributable to: • negotiation of employment contracts, industrial agreements and the like, and associated forward budgeting and estimates of labour costs have been based on the interpretation of OTE by the ATO as expressed in SGR 94/4; • likewise, organisations have tendered or contracted to provide services in the future have based their estimated employee costs on the basis of the definition of OTE in SGR 94/4. For some, the unexpected increase in superannuation costs will mean that such tenders and contracts will be operated at a loss;	

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	• payroll and IT systems, recently updated due to the 1 July 2008 standardisation of ordinary time earnings as the only earnings base on which an employer can calculate the contribution necessary to meet their superannuation guarantee obligations under the SGAA, have also been based on the interpretation of OTE by the ATO as expressed in SGR 94/4; • there will be ongoing compliance costs and issues in determining the point at which overtime pay is included in OTE due to the non-objective nature of the test. For large employers, applying subjective definitions (in relation to what payments are included in OTE) to an automated pay system with large volumes of employees is difficult to administer and manage. It is a difficult judgment call to determine concepts such as 'occasional overtime', and it could in fact be impossible, systems-wise, for employers to process these pay elements. ***Submissions on the impact of the potential retrospective effect of the SGR 2008/D2 view on overtime*** • As compliance with the Superannuation Guarantee legislation relies largely on a self-assessment basis, there is concern that employers who have relied on SGR 94/4 in relation to overtime will technically have been in breach in every year from 1992 to the present. On a self-assessment basis, employers would need to lodge the relevant SG statements and incur the relevant penalties (which the ATO may not have power to waive). • There will be an expected increase in litigation costs for employers, both in relation to the Industrial action that can be anticipated seeking payment of the SG component potentially payable in previous years in respect of regular overtime, and by employers seeking to dispute the new ATO view in the Courts.	

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	Requests for further and/or more specific examples on overtime to be included in Ruling Clarification on existing examples, and further examples were requested on the following issues: • an extension of the examples to cover the situation where there is usually some overtime worked, but the amount of the overtime is significantly different from week to week; • use of the words 'normally, usually, regularly or customarily'. Further guidance is required to quantify what type of frequency would fall into their definition, for example Does once a fortnight constitute regular? Does six times every two months denote customarily? Etcetera; • seasonal overtime; • piece rates; • payments for shift loading paid in respect of irregular overtime.	***Requests for further and/or more specific examples on overtime to be included in Ruling*** As a result of the Commissioner's revised view, further examples to clarify when an overtime element becomes 'regular' (including frequency thresholds) will not be required. All examples in Appendix 1 have been reviewed and amended where relevant to reflect the Commissioner's revised view. See, in particular, Examples 1-8 in Appendix 1 of the Final Ruling (paragraphs 79-119).
3.	**Shift-loading – paragraphs 225-227** Request for an example to be included in the document to address the following issue [Entity 8]: …Security Officer working shift, who has requested that they be paid 12.75% superannuation on a shift loading of 33.9% instead of the calculation being made with 9% and the higher amount is in this case the 12.75% on the normal wages without consideration of the shift loading. A point of contention with employees who are on the block pay system is the refusal of the employer to pay the 12.75% superannuation on the block pay. … [employees] are on a 33.9066% loading and are paid at the rate of 1.339066 of a normal day worker.	**Material added to clarify** ***Shift-loading – paragraphs 225-227*** The treatment of shift-loading is discussed at paragraphs 22 and 220 to 222 of the Ruling. The SGAA requires that employers make a minimum superannuation contribution of 9% of ordinary time earnings, including any shift-loading amount. A particular award or agreement may provide for higher contributions to be made in some circumstances, but that is not relevant for superannuation guarantee purposes.

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	It is submitted that whichever is the highest value either 12.75% on the base day pay level or the 9% on the 1.33 …… times the normal pay for shift workers. There is a loading that is about 47% for a few officers and the 9% is higher in this case and is paid.	
		On the facts given in the comment it appears that the relevant agreement may contemplate superannuation contributions being paid at the rate of 12.75% of ordinary time earnings *excluding* the relevant shift-loading. But that is not the contribution required for SG purposes. The contribution required is 9% of ordinary time earnings *including* the shift-loading.
4.	**The interpretation of the phrase 'in respect of' in the definition of OTE** Comments suggested the ATO has expanded the scope of the words 'in respect of' in the definition of OTE. In SGR 94/4 it is stated that these words require a 'connection' between the employee's earnings and the employee's ordinary hours of work (SGR 94/4, paragraph 11). The ATO took the view that for a payment to be earnings 'in respect of' ordinary hours of work, it had to be made: • for attendance or for work done in those hours; or • to satisfy an entitlement that accrued as a result of attending or working in those hours (SGR 94/4, paragraph 11). This interpretation meant that some payments are currently considered to be 'in respect of' the employment relationship under SGR 94/4, rather than ordinary hours of work. Examples include maternity and paternity leave payments, annual leave loadings and workers' compensation payments (SGR 94/4).	**Change made/ Material added to clarify** In the final version of the Ruling, the Commissioner explains that all earnings in respect of employment are considered to be in respect of the employee's ordinary hours of work, unless they are remuneration for working overtime hours (or are otherwise referable only to overtime or to other hours that are not ordinary hours of work). The Commissioner does not consider that the services or attendance of an employee specifically during certain hours of work is necessary for the earnings to be 'in respect of ordinary hours' and therefore OTE.

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	The draft Ruling states that 'in respect of' requires a discernable rational link (SGR 2008/D2, paragraph 14). This has resulted in the ATO changing the test of 'connectivity' to whether attendance or services of the employee during ordinary hours of work is a reason or one of the reasons for the amount earned (SGR 2008/D2). The ATO has also introduced the words 'attendance or services during' to expand the expression 'ordinary hours of work', even though these words do not appear in the statutory definition. This appears to significantly alter the intent of Parliament. It is noted that Parliament required a direct connection to ordinary hours of work, not an indirect connection to 'services'. If Parliament had intended such a broad test, it would arguably have simply used the word 'employment'. According to this new test, to fall outside of OTE a payment must be wholly unconnected with ordinary hours of work or only incidental to ordinary hours of work (SGR 2008/D2, paragraph 26). This means that items such as retention allowances and release from work duties on full pay are now included, whereas previously they would arguably have been incidents of the employment relationship. Similarly, maternity and paternity leave payments, which were stated in SGR 94/4 not to be payments in respect of ordinary hours of work, are included in OTE in draft SGR 2008/D2. This is a very significant change to the superannuation guarantee requirements as they have long been understood and applied by employers. In addition, according to the ATO's revised position, redundancy payments and notice payments would appear to be included in OTE as part of the 'reward' for an employee's services, while previously they were considered to be in respect of the termination of employment.	The Commissioner believes that the expression 'in respect of ordinary hours of work' was intended to ensure that overtime payments (and related amounts) were excluded from the earnings base. The Commissioner does not believe the expression was intended to exclude amounts paid at a worker's ordinary time rate solely on the ground that they were not earned as a direct result of actually working particular hours in ordinary time (for example. during annual leave). Redundancy payments are not considered OTE in the final version of the Ruling as they are not considered to be 'salary or wages' see paragraph 74.

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5.	**Paid leave entitlements** It was noted that the draft ruling took the view that all leave payments should be considered to constitute ordinary time earnings unless the payment could be clearly associated with service outside ordinary hours. This approach links an entitlement arising from an employment relationship to 'ordinary hours of work' even though there may be no service requirement to qualify for the entitlement and no clearly discernible link to working or attending during those hours. It was submitted that, given a perceived weakness of the nexus to ordinary hours of work, the current test for assessing whether a payment is in respect of ordinary hours of work should be retained and, therefore, the payment would be taken to be earnings if it is made for attendance or work done during those hours or an entitlement accrued as a result of that attendance or work. It was further submitted that there are leave types (such as maternity leave) which require an additional trigger event to occur before any entitlement arises. For such type of payments, the entitlement arises as a result of being employed and a trigger event occurring. It was viewed that there is no 'discernable rational link' between the payment and service in ordinary hours. ***Example 17*** Comments were also received in relation to Example 17 (dealing with Jury Duty), requesting clarification of various points.	**Change made/ Material added to clarify** The Commissioner acknowledges that different types of leave may be subject to particular tests of entitlement. However, the Commissioner is of the opinion that there is no basis for making any distinction between the differing types of paid leave for OTE purposes. The Commissioner's view, as expressed at paragraphs 235 and 236 in the final Ruling, is that all types of paid leave allow for an employee's salary or wages to continue to be paid while he or she is absent from work. However, as paragraph 4 of the final Ruling explains, on 12 May 2009, the Government announced that it intends to clarify the superannuation guarantee status of certain kinds of leave payments. Accordingly, the Ruling does not deal with the status of payments made to employees who are on parental leave. The Ruling also does not deal with the status of payments made to employees who are on other ancillary kinds of leave, including 'top-up payments' (as described in paragraph 37 of the Ruling). ***Example 17*** This example from the draft Ruling has been deleted in the final Ruling due to the Government announcement as stated at paragraph 4.

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6.	**Comments on the List of Examples in Appendix 1 and suggested inclusion of checklist as per SGR 94/4** ***Misleading terms in Appendix 1*** Some of the wording used in Appendix 1 is misleading: • the description 'annual leave' without indicating whether it is annual leave taken or unused annual leave paid out on termination of employment is misleading and this could result in many employers (particularly those employers with inexperienced payroll staff) paying contributions on amounts that they are not required to; • the use of the term 'accrued bonus' where the bonus is not accrued in the accounting sense but is paid to the individual at the time that the bonus is being classified as OTE/salary or wages. ***Request for inclusion of SGR 94/4-style checklist and additional items to the list*** The checklist that should be included as part of the final ruling should include all of the items included in the previous SGRs as well as any new items included in SGR 2008/D2 when it is finalised. The Appendix and/or any inserted checklist should also include a more general comment on ex-gratia bonuses so as to accommodate a greater range of scenarios.	**Material added to clarify** ***Appendix 1 – index of examples*** No change is needed to the index of examples in Appendix 1 of the Ruling as the text/facts of Example 19 – annual leave clearly indicates that the scenario under analysis is of annual leave taken rather than paid out on termination. The example dealing with accrued bonus (Example 20 – Accrued bonus in SGR 2008/D2) has been deleted. Due to further development of the technical analysis of the phrase 'earnings in respect of ordinary hours of work' in the definition 'ordinary time earnings' in subsection 6(1), the example is no longer relevant. ***Request for inclusion of SGR 94/4-style checklist and additional items to the list*** The index to the examples at paragraph 78 of the serves as a summary and guide to the classification of certain types of employment remuneration and payments. The checklist in Attachment A of SGR 94/4 was substantially to the same purpose. As such, there is no need for inclusion of the checklist in the Ruling. The discussion on bonuses is at paragraphs 28 to 29 and 274 to 278 of the Ruling. Example 22 of the Ruling describes the treatment of bonuses labelled as ex-gratia but is in respect of ordinary hours of work.

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7.	**Issues relating to the inclusion and/or exclusion of certain types of bonuses – general issues** An observation was made that a discretionary payment made as a free gift and which is made on a personal basis rather than in an employment context is not OTE and not 'salary or wages.' However, discretionary payments (such as an ex-gratia bonus) which have no connection to ordinary hours will still be 'salary and wages' if the payment would not have been made but for the employment relationship. If the payment made has a connection with the work performed during ordinary hours, the bonus would be included in OTE, regardless of how it is described. As such, it was submitted that when the bonus fits the above description (such as a Christmas bonus does), it should constitute 'salary or wages'. In a similar comment, it was submitted that, per paragraph 12 of SGR 94/5, ex-gratia bonus payments should form part of 'salary and wages'. This is because but for the employment relationship, the bonus would not have been paid. In other words, a bonus payment is necessarily related to the recipient's services as an employee. It was also submitted that it would be rare that a Christmas bonus would be paid to an employee on long term leave without pay. Non payment of Christmas bonus to employees on leave without pay should not preclude payment of the superannuation guarantee on the Christmas bonus of all other employees, received by reason of service.	**Change made** The treatment of bonuses as contained in the final Ruling (see paragraph 274) is now consistent with these suggestions.

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	Christmas bonus/gratuity It was also submitted that no employer would give a Christmas bonus to a person who was not an employee, which necessarily means that the Christmas bonus would be paid for services.	***Christmas bonus/gratuity*** The Commissioner maintains that in cases where a payment is made and there is a family or other clear private connection between the employer and the employee, such a gift is not necessarily 'salary or wages', (although that may be the case). For example, a gift from a parent employer to their child employee at Christmas is not automatically treated as 'salary or wages' purely because an employment relationship also happens to exist. However, as explained in paragraph 274 of the final Ruling, only in those very limited cases in which the Commissioner would accept that the payment is not assessable income of the employee for income tax purposes would the Commissioner accept that the payment is made on a personal basis and so is not salary or wages, and therefore not OTE, for SGAA purposes.
	Example 22 It was submitted that paragraph 159 was incorrect because a cash Christmas bonus is a form of salary or wages. In addition, cash bonuses are excluded from the definition of a fringe benefit in accordance with section 136 of the FBTAA. Accordingly, a cash bonus cannot be a minor benefit. Wording suggestions (treating the payment as 'salary or wages' but not OTE) and an additional scenario (involving non-cash benefits) for this example were submitted.	***Example 22*** The Christmas bonus has been treated as salary and wages in the equivalent example in the final Ruling (Example 23). In addition, the reference to minor benefit has been removed. As the payment is not solely referable to hours of work outside ordinary hours, it is considered to be 'in respect of ordinary hours of work' and therefore OTE.

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		The final Ruling now contains a discussion on non-cash benefits (see paragraph 58).
	Tax guidance It was suggested that guidance should be provided as to whether bonuses and other ex-gratia payments in kind excluded from 'salary and wages' would be subject to various forms of taxation such as fringe benefits tax.	***Tax guidance*** Obligations other than superannuation guarantee were considered to be outside the scope of this Ruling.
	Sign-on bonuses Additional wording was suggested in relation to sign-on bonuses.	***Sign-on bonuses*** The Commissioner believes the current discussion on sign-on bonus to be sufficient for the current purpose.
	Accrued bonuses It was submitted that the use of the term 'accrued' in Example 20 differs from the general accounting use of this term. For accounting purposes, accrued is generally interpreted to mean a liability/asset which has accumulated over time but has not yet been paid. As superannuation would not apply to a bonus until it has actually been paid, the use of the word accrued in this example is likely to be confusing to readers.	***Accrued bonuses*** As mentioned above, the Commissioner's interpretation of the phrase 'in respect of' differs slightly from the draft Ruling, and is no longer reliant on entitlements being accrued. As such, the example which involved an accrued bonus has been removed.
	Other bonuses There were requests for inclusion of discussions on other specific types of bonuses.	***Other bonuses*** The Commissioner believes the current tests explained throughout the Ruling can be applied to various scenarios without the need for addressing specific scenarios.

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	Training bonuses It was noted that a bonus (not ex-gratia) for completing specific training was considered as assessable income in the high court case of *Smith v. Federal Commissioner of Taxation*. Where such a bonus is part of a company's scheme (for example an 'encouragement to study' scheme), it is assessable income. It is submitted this case supports the conclusion that in order for a bonus to be 'salary or wages', the bonus should be paid out as a consequence of the employment relationship, rather than as a payment made to a person who happens to be an employee but does not have the characteristic of 'salary or wages'. It was also suggested that the training bonus received in example 23 had no connection to the ordinary hours worked, and was therefore not OTE for the purposes of SGAA In terms of 'salary or wages', it was submitted that the payment was paid out as a direct consequence of employment, that is, the employee would not have received the payment but for his employment. Hence, the bonus is remuneration for his services and is thus 'salary or wages'. ***Retention payments*** It was submitted that the discussion in paragraph 264 provides insufficient connection between the retention payment and the ordinary hours worked by the individual and does not provide sufficient reasoning as to why such payments should be included in OTE.	***Training bonuses*** Training bonuses are no longer discussed in the final Ruling. The Commissioner considers the discussions on other types of bonuses to be sufficient to convey the correct interpretation of the law. ***Retention payments*** Discussion on retention payments in the final Ruling has changed slightly from the draft Ruling in order to reflect the Commissioner's interpretation of the phrase 'in respect of' as discussed above. It is believed the new discussion addresses the concerns raised.

Issue No.	Issue raised	Tax Office Response/Action taken
	It was also noted that OTE relies on the ordinary hours worked by one individual rather than ordinary hours worked by the employer overall. In order to qualify as OTE, it was submitted that whilst the ordinary hours worked contribute to the company's overall results, the payment should also be in some way connected to performance criteria for the individual employee. For example, the bonus payment may require that employees must reach certain targets (for example a minimum revenue target) in order to be eligible for the payment. This will create a more logical link between the payment and the ordinary hours worked by the individual, rather than the company as a whole. New wording for the discussion of retention payments in paragraph 264 was also submitted. ***Performance bonus based on overall company results*** It was requested that guidelines be included in the Ruling on bonus schemes which are structured so employees may be eligible to a bonus based on a number of components reflecting the employee's performance, the performance of the employee's business unit, the overall performance of the employer, that is a 'layering' of bonus payments.	***Performance bonus based on overall company results*** The Commissioner considers the discussions on other types of bonuses to be sufficient to convey the correct interpretation of the law.

Issue No.	Issue raised	Tax Office Response/Action taken
8.	**Workers' compensation payments** ***Comments on paragraph 57*** • It is submitted any workers' compensation payments received by an injured employee where the employee performs work or is required to attend work forms part of 'salary or wages'. In contrast, where the employee has terminated employment, the payment would be characterised as compensation for loss of employment rather than 'salary or wages'. In the situation where the employee does not attend work due to injury but intends to return to work later, any workers' compensation payments should be characterised as 'salary or wages' since these payments are made as a direct consequence of the employment relationship. • Paragraph 57 needs to be revisited, particularly as a result of the Federal Magistrates' Court decision of *Lee v. Hills Before & After School Care 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 *Workplace Relations Act 1996*. Therefore, employers currently do not terminate the contracts of employment in such circumstances. In SGR 2008/D2, it would appear that an employer would be forced to pay superannuation for services not rendered, because they are 'required to attend work' and their employment is ongoing. • Suggested amendment to paragraph 57: Any workers compensation payments received by an injured employee where the employee performs work or is required to attend work forms part of 'salary or wages'. ~~In contrast, w~~Where the employee has terminated employment the payment would be characterised as ~~compensation for loss of employment rather than~~ 'salary or wages', unless it has specifically been characterised as not being 'salary or wages'	**Change made/ Material added to clarify** ***Comments on paragraph 57*** The relevant paragraphs in the final version of the Ruling are now paragraphs 39, 68 and 76. The final Ruling at paragraph 76 now clarifies that an injured person may not be required to attend work because of incapacity rather than just termination of employment. The treatment of workers' compensation payments in the final version of the Ruling remains effectively unchanged from SGR 94/4 and SGR 94/5.

Issue No.	Issue raised	Tax Office Response/Action taken
	Comments on paragraph 238 • It is submitted that the statement at paragraph 238, that where workers' compensation payments are received whilst work is not being performed, then usually the employment contract will have been terminated, is not necessarily correct. It is quite common for an injured employee to be unable to work for a period of time but to later return to work. The Ruling should include a comment as to whether such a payment will constitute OTE and/or 'salary or wages' rather than stating that there been a termination of the employment contract. If there has been a termination of employment, this could have significant consequences for the employee in relation to other employment entitlements, including qualification for long service leave. It is submitted the payment in the circumstances above should not be treated as OTE as no work has been performed by the employee during the period of absence. As such, the payment cannot be said to be given as a reward for services of the employee or as an entitlement which has accrued. However, the payment will be 'salary or wages' as it has been made because of the employment relationship, and not to compensate the employee for loss of work. ***Comments on paragraph 239*** • Workers' compensation payments when no work is performed should not be included in OTE because such payments are made as compensation for an injury or illness and not in relation to ordinary hours of work. These payments do not accrue based on an employee's period of service; rather they apply equally to an employee who is injured on day one of employment and an employee who is injured after many years of service.	

<table>
<tr><th>Issue No.</th><th>Issue raised</th><th>Tax Office Response/Action taken</th></tr>
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Suggested wording in relation to workers' compensation discussion in Ruling

Appendix 1

<table>
<tr><th>EG no</th><th>Payments to an employee in relation to …</th><th>OTE?</th><th>Salary or wages?</th><th>Paragraph references</th></tr>
<tr><td colspan="5">Employer payments</td></tr>
<tr><td>N/A</td><td>Payments for workers' compensation — paid while employee performs/attends work</td><td>Yes</td><td>Yes</td><td>57, 190, 236</td></tr>
<tr><td>N/A</td><td>Payments for workers' compensation — paid where employment has been terminated</td><td>No</td><td>No</td><td>57, 190, 236</td></tr>
<tr><td>N/A</td><td>Payments for workers' compensation — paid while employee is unable to attend work and the employment has not been terminated (ie. the intention is for the employee to return to work)</td><td>No</td><td>Yes</td><td>57, 190, 236</td></tr>
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Issue No.	Issue raised	Tax Office Response/Action taken
	Paragraph 236: • Workers' compensation payments, including top-up payments received by an injured employee where the employee performs work or is required to attend work is considered 'salary or wages'. In addition, workers' compensation payments where the employee is unable to attend work due to the injury but remains an employee of the employer will also be considered to be 'salary or wages'. This is despite the fact the workers' compensation may be paid by another party such as an insurance company rather than the employer. *Paragraph 239:* Workers' Compensation and other payments made by an employer or on behalf of an employer will form part of an employee's OTE if it is paid in respect of ordinary hours of work. Payments made when the employee is unable to work due to injury are not 'in respect of ordinary hours worked' and are therefore not OTE.	
9.	**Allowances** ***Example 13*** It was suggested that the payment in Example 13 represented salary or wages, noting that at common law allowances paid to employees are considered to be salary or wages. In addition, from an income tax perspective such payments are treated as employment income for the individual. The crux of the explanation should be to point out that a per kilometre reimbursement is not OTE as such a payment is akin to a reimbursement and is paid with the intention of compensating the employee for an expense that they incur, rather than as a reward for services performed during ordinary hours of work.	**Material added to clarify** ***Example 13*** The Commissioner believes that payment (in Example 16 in the final Ruling) is a reimbursement for the expense calculated on a reasonable basis according to income tax laws, and is not 'salary or wages'.

Issue No.	Issue raised	Tax Office Response/Action taken
	On-call allowances Further guidance on on-call allowances, common in a number of industries, was requested. In some instances employees may be required to be on call outside of their usual working hours. In these cases, employees generally receive an on-call allowance for the period they are on call as well as receiving an hourly wage in the event that they are called in to work. ***Availability allowances*** It was requested that availability allowances (paid to employees in respect of that employee making themself available to be called into work outside of ordinary hours of work) are quite common and popular and that specific mention to this type of allowance be made. ***Treatment of various types of allowances*** It was commented that by applying the principle stated in paragraph 27, it was difficult to discern the rationale behind the determination that an overtime meal allowance does not form part of OTE yet an allowance paid for poor living conditions does form part of OTE as all allowances relate in some way to being deployed on duty, including a meal allowance paid while working overtime.	***On-call allowances*** Discussions relating to on-call allowances have been added to the final version of the Ruling (see paragraphs 44-45). ***Availability allowances*** This type of allowance has been included in the discussion of on-call allowances. ***Treatment of various types of allowances*** The Commissioner explains in the final Ruling that all earnings in respect of employment are in respect of the employee's ordinary hours of work unless they are remuneration for working overtime hours, or are otherwise referable only to overtime or to other hours that are not ordinary hours of work (see paragraph 27).

Issue No.	Issue raised	Tax Office Response/Action taken
10.	**Definition of 'earnings' and 'salary or wages'** It was noted that the draft Ruling treated the terms 'remuneration' or 'earnings' and 'salary or wages' as being synonymous, and it was recommended that all references to earnings being interchangeable with salary or wages be removed from the Ruling. ***Paragraph 13*** It was also noted that paragraph 13 indicates that 'earnings' refers to 'the remuneration paid to an employee, as a reward for the services of the employee'. Commonly, remuneration is taken to include fringe benefits and other items such as salary sacrifice superannuation contributions. Whilst it was thought that later sections of the draft Ruling clearly indicate that these are not included in OTE, it was suggested that the inclusion of a cross reference to these in paragraph 13 would be appropriate.	**Material added to clarify** In the Commissioner's opinion, when used in the context of the SGAA, the ordinary meaning of 'earnings' is sufficiently similar to the meaning of 'salary or wages' that the two may be regarded as synonymous. This practical effect is mentioned in new paragraph 11. ***Paragraph 13*** The Commissioner's equivalent reference to 'earnings' in the final Ruling (paragraph 12) relates to the larger concept of earnings rather than just 'ordinary time earnings'. As such, it was not considered appropriate to bring in discussion about OTE at that point. Further, as mentioned above, the final Ruling equates (for the purposes of the SGAA) earnings with 'salary or wages'.
11.	**Prospective effective date of the Ruling** Comments were made regarding the prospective nature of the effective date (1 July 2009) of the Ruling. Issues identified as a cause for potential confusion an uncertainty for employers and employees in the period up to 1 July 2009 includes: • whether the Commissioner would exercise his discretion to remit penalties if the employer relies on SGR 94/4 until 1 July 2009; • whether an employee could sue their employer for insufficient superannuation contributions based on the approach outlined in SGR 2008/D2;	**Material added to clarify** ***Date of effect of Ruling will be 1 July 2009*** 1 July 2009 will remain the effective date of the Ruling. The Commissioner is of the view that retrospective application of the change in view in a number of areas will create legal uncertainty and will make the implementation and administration of the updated view highly burdensome.

Issue No.	Issue raised	Tax Office Response/Action taken
	• it is questionable whether the intended deferral would be effective as there is no legal basis for the Commissioner to say that his opinion does not apply until a particular date; • not taking retrospective enforcement in this instance will mean that employees who will miss out on past superannuation entitlement where they were eligible (rather than the ATO or the Government who usually bears the loss of revenue when there is a change in ATO view with a prospective enforcement date); • the interpretation should not be applied retrospectively as the current checklist available (in SGR 94/4) specifically and clearly stated that overtime is not OTE.	Paragraph 77 in the Ruling now states: This Ruling applies to payments made to employees in the quarter beginning on 1 July 2009 and all later quarters. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute with the Commissioner agreed to before the date of issue of this Ruling.
12.	**Termination of employment** ***Payments in settlement of a dispute*** • There is no clear rationale why SGR 2008/D2 discriminates between unpaid salary or wages recovered where 'the settlement contains an identifiable and quantifiable amount of unpaid salary and wages' and the case where amounts are undissected. All salary and wages recovered through a Court Order should be included. ***Redundancy payments*** • The Ruling should consider the application of SG to genuine redundancy payments as well as other forms of eligible termination payments in further detail.	**Change made/ Material added to clarify** ***Payments in settlement of a dispute*** The Commissioner considers that the view in SGR 2008/D2 is legally correct and consistent with the Commissioner's view of the treatment of these payments for income tax purposes. The relevant paragraph containing this discussion is now paragraph 63. ***Redundancy payments*** The Commissioner's view has changed from the statement at paragraph 58 of SGR 2008/D2, and paragraph 23 of SGR 94/5, that redundancy and employment termination payments are salary or wages. See paragraph 74 of the Ruling.

Issue No.	Issue raised	Tax Office Response/Action taken
		Additional discussion has been included in the Final Ruling to address the issue. Redundancy payments made on termination of employment are not a reward for services rendered by an employee, even if part of the payment is calculated by reference to the employee's period of service with the employer. They are payments to compensate the employee for the loss of their job; not a reward for their services.
	Unfair dismissal • It is submitted that there is an error in the ruling at paragraph 63 of SGR 2008/D2. The origins of jurisprudence in relation to unfair dismissal payments lie in the South Australian Industrial Commission and that for unfair dismissal payments the commission has '…tended to concentrate solely on the wages or other fringe benefits lost from the date of dismissal to the actual projected date of new employment being found'. • Paragraph 63 is inconsistent with the decision of the Full Bench of the Australian Industrial Relations Commission in *Sprigg v. Paul's Licensed Festival Supermarket* (1998) 88 IR 21, in relation to the amount of money that should be paid to a person who had been unfairly dismissed.	***Unfair dismissal*** For similar reasons to genuine redundancy payments, it remains the Commissioner's view that payments by way of compensation for unfair dismissal are not 'salary or wages'. See paragraph 75 of the Ruling.

Issue No.	Issue raised	Tax Office Response/Action taken
	Payment in lieu of notice It is noted that though the checklist in SGR 94/4 for salary and wages and ordinary time earnings shows payment in lieu of notice as not being an OTE, the Ruling should take into consideration the NSW Court of Appeal decision of *Peter Willis v. Health Communications Network Ltd* [2007] NSWCA 313 (6 November 2007) which found that where there is a contractual entitlement to make super contributions, employers are obliged to do so when paying out notice.	***Payment in lieu of notice*** Additional discussion has been included in the Ruling to address the issue. An employee may be entitled to a period of notice before the employer's termination of his or her employment takes effect. Awards and agreements often provide that, instead of giving this notice, the employer may simply pay an amount equivalent to the ordinary time rate of salary or wages that the employee would have earned during the notice period. Such payments are OTE. See paragraph 38 of the Ruling.
13.	**Coverage of SGAA** Payments for work wholly or principally of a private or domestic nature and Remuneration of local government councillors should be included within the ambit of the SGAA.	**No change** Policy comment on the Superannuation Guarantee legislative framework which is not within the technical scope of the Ruling.
14.	**Date of effect of standardisation of Superannuation Guarantee contributions base** A question was raised as to the correctness of the reference in paragraph 2 of the draft Ruling to the Explanatory Memorandum (EM) to the Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004. Paragraph 4.14 of the EM states that this standardisation only comes into effect on 1 July 2010, not 2008 as stated in the draft Ruling.	**No change** The Commissioner is satisfied that the reference in the final Ruling (also in paragraph 2) is correct. The reference immediately following the effective date is correctly to the *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004* itself. Reference to the EM is made at a later stage in the paragraph, and relates to the general discussion on standardising OTE. It appears that the EM may have incorrectly mentioned 1 July 2010 instead of 1 July 2008. The date of effect in the amending Act itself is 1 July 2008.

Issue No.	Issue raised	Tax Office Response/Action taken
15.	**Citation issues** It was noted that there was an error regarding the name of the *Federal Workplace Relations Act 1996* as cited in the draft Ruling.	**Change made** The relevant correction has been made in the final Ruling.
16.	**Over-award payments, shift-loadings and commissions** At paragraph 24 of the Draft Ruling, it is stated that: *Over-award payments, shift-loadings and commissions do not have to be paid in respect of ordinary hours of work. They are specifically included within the definition of OTE irrespective of whether or not they are earnings in respect of 'ordinary hours of work'.* On a strict reading of the definition of OTE such an interpretation is open. However, we submit that such an interpretation could not have been intended. For example, if irregular overtime was paid above award rates, then the Commissioner is asserting the 'over award' component would form part of OTE under the second limb of the definition of OTE. However, the Commissioner accepts the award component of such overtime is not OTE under the first or second limbs of the definition. It would seem strange that Parliament would have intended this result. It is much more likely that Parliament was merely intending to confirm that the over award component of any amount payable in respect of ordinary hours also formed part of OTE.	**Change made** The Commissioner agrees with this comment and has made changes to the final Ruling at paragraphs 21 and 22 and 217 to 222. This is also a change in the Commissioner's view as stated at paragraph 13 of SGR 94/4.