HERBERT SMITH FREEHILLS

SUPERANNUATION GUARANTEE AND ANNUAL LEAVE LOADING

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HISTORICAL ATO APPROACH TO ANNUAL LEAVE LOADING AND THE SUPERANNUATION GUARANTEE

The ATO's position has historically been that annual leave loading was not earnings in respect of ordinary hours of work, or ordinary time earnings (**OTE**), and that accordingly superannuation was not payable in respect of such earnings.[1] This position was changed in 2009 – annual leave loading *was* earnings in respect of ordinary hours of work, however with one exception: the ATO recognised that annual leave loading payable under some awards and industrial agreements was not OTE if **demonstrably referable to a notional loss of opportunity to work overtime**.[2] The ATO made private rulings in 2014 and 2017 to this effect.[3]

THE INSTITUTE OF CHARTERED BOOKKEEPERS (ICB) LETTER FROM THE ATO

We note that the ICB has published an extract of the ATO's response to it in relation to its query in relation to annual leave loading, which stated in relation to the ATO's interpretation of paragraph 238 of SGR 2009/2:

> 'Accordingly if an employee is demonstrably working overtime on a permanent regular basis, any annual leave loading that is applicable to that overtime is not considered OTE and therefore no SGC is payable. Because this type of overtime isn't part of the normal annual leave loading, then the normal does not apply (sic).
>
> Of course if the employer and employee have a specific arrangement or contract that specifies otherwise then what is agreed to specifically in that contract would apply.'

In relation to the above quote, the second sentence is cryptic. However, we note that the ATO's position in its letter to ICB has been interpreted as requiring analysis at an individual employee level to determine whether the annual leave loading is demonstrably referable to overtime that the employee would have had the opportunity to work had they not been on annual leave. However, this does not seem consistent with the ATO's stated position in SGR 2009/2 or the private rulings that are referred to above, which indicates that a payment identified in an award of industrial agreement as annual leave loading will generally be sufficient evidence to establish that payment as annual leave loading provided that the payment can be genuinely characterised as compensation for a notional loss of opportunity to work overtime.

ATO REMINDER TO EMPLOYERS

On 12 March 2019, the ATO updated its website in relation to employers' compliance approach to annual leave loading and its superannuation guarantee obligations. While the ATO has not updated its existing Superannuation Guarantee Ruling from 2009, it has reiterated its position that, unless the annual leave loading is demonstrably referable to a notional loss of opportunity to work overtime, it will be OTE and fall within the superannuation guarantee.

The ATO recognises that most awards do not state the basis for the annual leave loading entitlement. However, the ATO states that if an employer has self-assessed on the basis that annual leave loading is not OTE, they will be liable for historical superannuation guarantee shortfalls if there is a lack of evidence to demonstrate the purpose of the entitlement. The ATO will not, however, scrutinise the purposes of historical annual leave loading where the employer had a reasonable position to believe the annual leave loading was for a notional loss of opportunity to work overtime and there is no recent evidence that suggests otherwise.

ATO POSITION GOING FORWARD

In respect of future compliance, the ATO states that it would be satisfied that the entitlement is demonstrably referrable to a lost opportunity to work overtime **if there is written evidence in support of this position**. If the relevant instrument creating the entitlement states the basis for the entitlement, or other evidence such as a policy clarifies the reason for the entitlement and reflects the understanding of the parties to the agreement giving rise to the entitlement, this evidence would be accepted by the ATO.

If employers do not have evidence of the entitlement to annual leave loading as referrable to a lost opportunity to work overtime, the ATO expects employers to obtain evidence as soon as practicable or assess any future entitlements as falling within OTE.

BLUESCOPE STEEL COMPLICATION

To make compliance more complicated for employers, the Federal Court of Australia last year held that hours which are worked beyond fixed hours may be so regular and normal that they become 'ordinary hours' of work.[4] If employees do regularly work beyond fixed hours, employers should be careful before characterising annual leave entitlements in respect of such employees as non-OTE. This decision is contrary to the position that is currently taken by the ATO and we note that:

- the ATO was not a party to this decision; and
- the decision is currently being appealed and the ATO is seeking to intervene (ie become a party to the proceedings).

ENDNOTES

1. See Superseded Superannuation Guarantee Ruling SGR 94/4 'Superannuation guarantee: Ordinary time earnings'; Superannuation Guarantee Ruling SGR 2008/D2 'Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'.
2. Superannuation Guarantee Ruling SGR 2009/2 'Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages''.
3. Private ruling: Authorisation number 1012709113999; Private ruling: Authorisation number 1051276197366.
4. *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd* [2018] FCA 80.

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