



## Jurisdictional Policy Advice No. 2006/13

### *Safety, Rehabilitation and Compensation Act 1988*

#### Meaning of ‘required’ and ‘regular’ overtime when calculating Normal Weekly Earnings – Section 8

#### Introduction

This advice has been developed by Comcare in response to recent Federal Court decisions relating to the calculation of Normal Weekly Earnings (NWE) where overtime is a component of the calculation and about the definition of ‘required’ and ‘regular’ in relation to that calculation.

#### *Summary Advice*

A recent Federal Court decision in *Pires* now means that an employee must be **required to work overtime on a regular basis**, as provided in subsection 8(2), before an additional amount for overtime (as calculated under subsection 8(2)) may be added to the initial amount calculated for ‘ordinary time’ hours under subsection 8(1).

In *Peisley*, the Full Federal Court found that an employee will be ‘required’ to work overtime where there is an agreement that constitutes authority to work the additional hours.

#### Background

Section 8 of the SRC Act prescribes the method of calculation of NWE. This is the principal component in the calculation of the amount of compensation payable to an employee who is incapacitated for work (section 19).

The recent Federal Court judgement, *Comcare Australia v Pires* [2005] FCA 747 (*Pires*), and Full Federal Court judgement, *Telstra Corporation Limited v Peisley* [2006] FCSFC 79 (*Peisley*), provide direction on how overtime hours that are ‘regular’ and ‘required’ are calculated and how ‘regular’ and ‘required’ are defined for the purposes of the calculation.

#### Zarb

The long-standing decision in *Zarb v Comcare* (1997) 48 ALD 718 (*Zarb*) held that overtime that is not ‘required’ and ‘regular’ must be included in the normal hours (NH)

component in the calculation of NWE under subsection 8(1). *Zarb* also held that overtime that is 'required' and 'regular' must be calculated under subsection 8(2).

The Administrative Appeals Tribunal (AAT) also considered *when* an employee is 'required' to work overtime and *what* constitutes a 'regular' basis. The Tribunal held that the employee must be directed to perform overtime for it to be 'required' for the purposes of subsection 8(2) and considered that it should be worked on a uniform or symmetrical pattern over time for it to be 'on a regular basis'.

### *Pires*

In *Pires*, the AAT relied on the *Zarb* decision and found that overtime worked by Mr Pires, during the relevant period prior to his injury, was excluded from the NWE calculation under subsection 8(2) because it was not 'required' and 'regular'. But the AAT, again relying on *Zarb*, found that the hours of overtime worked by Mr Pires, during the relevant period prior to his injury, were to be included in the NH component in the calculation of NWE under subsection 8(1).

Comcare appealed this decision, contending that *Zarb* was incorrectly decided and that only subsection 8(2) makes a provision for the payment of overtime. In other words only an employee who is required to work overtime on a regular basis can be compensated for overtime. The Federal Court agreed with Comcare's contention<sup>1</sup>.

This judgment overturns the AAT decision in *Zarb* and means that an employee must be **required to work overtime on a regular basis**, as provided in subsection 8(2), before an additional amount for overtime (as calculated under subsection 8(2)) may be added to the initial amount calculated for 'ordinary time' hours under subsection 8(1).

### *Peisley*

The question that arose in this case was whether hours of overtime which are not 'required' and 'regular', fall for inclusion under the NH component of subsection 8(1).

Wilcox, Conti & Stone JJ, in the judgement handed down on 9 June 2006, found that overtime can be seen to be 'required' by the employer irrespective of whether the employer or the employee initiates the idea that certain overtime should be worked.

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<sup>1</sup> Jacobson J said:

'It seems to me that the Second Reading Speech of the Act makes clear the Minister's intention in providing for the inclusion of overtime in the calculation of normal weekly earnings. It was to bring to account regular overtime which the employee is required to work as a condition of employment. There is nothing to suggest that irregular or non-required overtime hours should be included in the calculation.....

It might be thought that the construction which I have adopted works some unfairness to the respondent. This is because he receives no compensation for overtime which he performed as result of strong moral obligation.

However, if there be unfairness in the result, it seems to flow from the construction of the work 'required' in subsection 8(2) by the Tribunal in *Zarb*. That construction was not challenged.

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While in this judgement the Full Federal Court considered the meanings of ‘required’ and ‘regular’ and found them to be broader than those put forward in *Zarb* and applied in *Pires*, the method of calculating overtime as part of NWE as established in *Pires* stands – that is, where an employee is required to work overtime on a regular basis, as provided in subsection 8(2), an additional amount for overtime calculated in accordance with 8(2) will be added to the initial amount calculated for Normal Hours under subsection 8(1).

## **Legislation**

Subsection 4(1) provides the following relevant definitions:

*Normal weekly earnings* means the normal weekly earnings of an employee as calculated under section 8;

*Normal weekly hours*, in relation to an employee, means the average number of hours (including overtime) worked in each week by the employee in his or her employment during the relevant period as calculated for the purpose of applying the formula in subsection 8(1) or (2).

### Subsection 8(1)

For the purposes of this Act, the normal weekly earnings of an employee (other than an employee referred to in subsection (2)) before an injury shall be calculated in relation to the relevant period under the formula:

$$(NH \times RP) + A$$

where:

*NH* is the average number of hours worked in each week by the employee in his or her employment during the relevant period;

*RP* is the employee's average hourly ordinary time rate of pay during that period; and

*A* is the average amount of any allowance payable to the employee in each week in respect of his or her employment during the relevant period, other than an allowance payable in respect of special expenses incurred, or likely to be incurred, by the employee in respect of that employment.

### Subsection 8(2)

Where an employee is required to work overtime on a regular basis, the normal weekly earnings of the employee before an injury shall be the amount calculated in accordance with subsection (1) plus an additional amount calculated in relation to the relevant period under the formula:

NH × OR

where:

*NH* is the average number of hours of overtime worked in each week by the employee in his or her employment during the relevant period; and

*OR* is the employee's average hourly overtime rate of pay during that period.

Subsection 8(5)

Where, because of the shortness of the relevant period, the normal weekly earnings as calculated in relation to the relevant period under subsection (1) or (2) would not fairly represent the weekly rate at which the employee was being paid in respect of his or her employment before the injury, the normal weekly earnings before the date of the injury shall be calculated in relation to such other period as Comcare considers reasonable for the purpose of arriving at an amount that does fairly represent the weekly rate at which the employee was being so paid.

Section 9 prescribes the relevant period for calculating the normal weekly earnings of an employee before an injury.

Section 19 relevantly provides compensation for injuries resulting in incapacity.

*The intent of the legislation*

‘An employee’s normal weekly earnings will be based on his or her pre-injury salary and will take into account certain allowances and regular rostered overtime which the employee is required to work **as a condition of his or her employment.**’<sup>2</sup>

### **Policy Advice**

The determining authority should first determine NWE in relation to average hours worked under subsection 8(1) not including any overtime hours worked. It should then be established whether the employee was ‘required to work overtime on a regular basis’ and, if so, an additional amount under subsection 8(2) should be added to the amount calculated under 8(1).

Procedurally, the employer provides the information relevant to the calculation. However, if the determining authority is uncertain of the facts it may obtain additional information from the employee under section 58, or in relation to Comcare insured employers, Comcare may obtain information from such an employer under section 71 of the SRC Act.

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<sup>2</sup> Second Reading Speech

In making this consideration it is important to have regard to the following three terms.

### *Relevant period*

The relevant period for employees who are claiming overtime is 2 weeks prior to the date of injury (see subsection 9(1)). However, where 2 weeks would be too short to fairly represent the employee's pre-injury NWE (including overtime), a longer period may be considered (see subsection 8(5)).

### *Required*

The ordinary everyday meaning of 'required' is the imposition, by the employer in an authoritative fashion, of an obligation upon the employee to work overtime on a regular basis. Required does not mean that the employer 'needed' someone to work overtime. However, if there is an expectation by the employer or an inherent condition of the position that the employee work overtime, then that overtime will be 'required'.

In *Peisley* the Full Federal Court found that an employee will be 'required' to work overtime where there is an agreement that constitutes authority to work the additional hours.

### *Regular*

In *Zarb* the AAT defined 'regular' within its ordinary everyday meaning - a uniform or symmetrical pattern, overtime which can be described as usual or customary.

The Full Federal Court in *Peisley* broadened the meaning of 'regular' in *Zarb* by considering that where an employee is 'required' to work overtime to the extent that such an authority to work additional hours would occur in the normal course of events, the statutory notion of 'on a regular basis' would also be satisfied. It further concluded that it is not the overtime that must occur periodically or systematically, but rather the requirement to perform overtime work.

## **Application**

The principles of this advice apply to all claims with a date of injury on and from the commencement of the SRC Act (1 December 1988).

For practical purposes, decision-makers should apply these principles to new claims received and to reconsiderations made in relation to incapacity payments on and from the date of this advice.

## **Further information**

Any issues relevant to this advice may be discussed with Comcare's SRC Policy Group, telephone 1300 366 979 or email [SRC.Policy@comcare.gov.au](mailto:SRC.Policy@comcare.gov.au)

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19 December 2006