

Superannuation in the Entertainment Industry

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Superannuation in the Entertainment Industry

Overview

All Australian employers are required to make compulsory superannuation payments to their employees, in accordance with the *Superannuation Guarantee (Administration) Act 1992* (“the Act”).

These contributions are based on a percentage of an employee’s *ordinary time earnings* (9.5% as at 1 July 2017), and must be paid at least quarterly.

It is important to remember that the legislation only prescribes a minimum requirement, and additional amounts may be required by an award, enterprise agreement or employment contract.

1. Who must be paid superannuation?

The Act requires, as a minimum that employees (including casuals) be paid super if:

- They are over 18, **OR** under 18 and work more than 30 hours per week; and
- Earn \$450 or more per month (before tax)

Who is an “employee?”

An employee has its ordinary common law meaning of a worker engaged under a contract of employment.

However, contractors engaged as individuals who fall within the below definition in section 12(8) of the Act are entitled to be paid superannuation as if they were an employee:

1.2. Interpretation: employee, employer

(8) The following are employees for the purposes of this Act:

- a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;*
- a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;*
- a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.*

Paragraph (a) requires active participation in the performance or presentation. A performer or dancer would usually fit within this category.

Even where active participation is not provided, per paragraph (b), a person who provides services in connection with a performance or presentation is deemed to be an employee.

What about companies and partnerships?

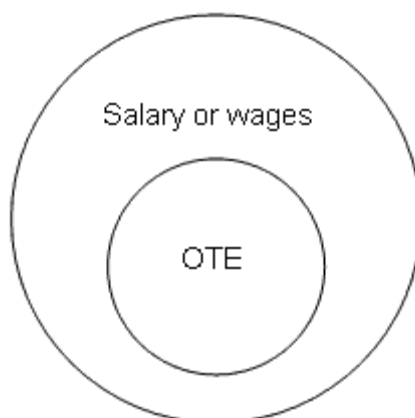
The above rules apply where an organisation engages an individual. Super is not payable where an organisation contracts with a company, partnership or group to provide services.

Special rules for juveniles in the live performance industry

Under the Act, employees under 18 are only entitled to be paid super if they work more than 30 hours per week. The Live Performance Award 2010 and Performers' Collective Agreement offer an additional entitlement to certain young performers. For further information on this point, please contact LPA.

2. On which amounts is superannuation payable?

Super is payable on **ordinary time earnings "OTE"** as defined in the Act. An amount can only be OTE if it is also **"salary or wages"**. The below diagram illustrates this:



What is included within the definition of "salary or wages"?

"Salary or wages" have their ordinary common law meaning, and include payments made to contractors within the definition of section 12(8), above.

If an amount is not "salary or wages", it cannot be OTE.

What is included within the definition of OTE?

The Act defines OTE as:

"earnings in respect of ordinary hours of work" including; "earnings consisting of over-award payments, shift-loading or commission"

The term "ordinary hours of work" is not defined in the Act but is worked out by referring to the hours specified as "ordinary" in the employee's applicable award, enterprise agreement or other documents governing conditions of employment.

Hours described as overtime will almost certainly not constitute ordinary hours of work, however this must be contrasted with shift loadings and penalties which are within the span of ordinary hours, even though they may be paid at a higher hourly rate.

The Super guarantee ruling provides guidance about what amounts are considered to be OTE, as shown in the Appendix 1 of this document. Please note that this table is non-exhaustive and is for general guidance only.

Maximum contribution base

Employers are required to pay super on ordinary time earnings to a maximum of \$51,620 per quarter, or \$206,480 per year. This means the maximum super contribution an employee is entitled to be paid is \$4903.90 per quarter.

Appendix 1 – OTE reference guide

Payments to an employee in relation to...	Salary or wages?	OTE?
A simple overtime situation	Yes	No
Overtime hours - agreement prevailing over award	Yes	No
Agreement supplanting award removes distinction between ordinary hours and other hours	Yes	Yes
No ordinary hours of work stipulated	Yes	Yes
Casual employee - <i>shift-loadings</i> <i>overtime payments</i>	Yes Yes	Yes No
Casual employee whose hours are paid at overtime rates due to a 'bandwidth' clause	Yes	No
Allowance by way of unconditional extra payment	Yes	Yes
Expense allowance expected to be fully expended	No	No
Reimbursement	No	No
Workers' compensation - <i>Returned to work</i> <i>Not working</i>	Yes No	Yes No
Annual leave payments for leave taken	Yes	Yes
Termination payments - <i>In lieu of notice</i> <i>Unused annual leave</i>	Yes Yes	Yes No