



28 September 2017

Industrial Registrar
Industrial Relations Commission of NSW

Dear Registrar

Notification of Dispute

This is a notification of dispute pursuant to section 130 of the Industrial Relations Act between depa, an industrial organisation of employees and Local Government NSW, an industrial organisation of employers acting on behalf of councils in New South Wales.

The dispute concerns the apparent underpaying by many councils of superannuation obligations to certain employees in the two closed superannuation schemes within Local Government Super, known as the Retirement Scheme and the Defined Benefit Scheme and also in the Accumulation Scheme.

The issue for those in the Retirement Scheme and Defined Benefit Scheme is the concept of "superable salary" and widespread non-compliance by councils with their obligation for employees in those schemes with an "employer-provided vehicle," to include "the value of private use of an employer-provided vehicle" in the calculation of "superable salary".

The concept of "superable salary" is important for two reasons. First, because the obligation to calculate superable salary at the end of each year is the basis of the superannuation Fund calculating the payment required for each employee by each Council in the following twelve months, and second, because in a defined benefit scheme the retirement benefit is a multiple of the average of the last three 31 Decembers before retirement to calculate the "final average salary".

Not complying with the rules of the Fund to include a value of a private use of an employer-provided vehicle means that councils underpay their superannuation obligations (and may, in many cases, have been doing so since 2003) and this has a significant effect upon the final retirement benefit.

Attached as part of this notification is correspondence to the GM of Georges River Council on 20 September about this issue. This is not specifically a dispute notification with that individual Council, but the merger of the former Kogarah and former Hurstville councils to create Georges River has brought to our attention the issue of councils failing to comply with the superannuation Fund's rules to include the value of private use of a Council supplied vehicle. The letter does provide detail and a specific example of potential superannuation losses for an effected employee.

Kogarah did what was required by rules 1.2 and 1.3 of Schedule 4 of the Trust Deed and has included a figure of in excess of \$10, 000 each year but the former Hurstville didn't. And it seems clear from investigations in the intervening week since that letter was sent to Georges River that there is overwhelming non-compliance across the industry. An employee's PAYG payment summary provided at the end of the financial year is required to identify a "Reportable fringe benefits amount" and this which would ordinarily be the figure used by a Council placing a value on the private use of an employer-provided vehicle. While there may be a discretion at each Council to comply with rules 1.2 and 1.3 in the way they "value" private use, the Fund rules do not allow discretion to not value private use.

We will be requesting a thorough and orderly investigation by the unions and employer organisation, assisted by the IRC and with the cooperation of Local Government Super, to determine whether councils have calculated the value of private use and included it in the calculation of superable salary and depending upon what is found, a course of action to resolve every underpayment.

In 2009, following the global financial crisis, Local Government Super increased the employer contribution in the Retirement Scheme and the Defined Benefit Scheme to cover losses incurred during that financial crisis. This led many councils with employees who had a total remuneration package to try to take some of the salary component of the employee's pay to fund the increased superannuation contribution.

As a consequence, depa filed a dispute with LGNSW on behalf of 83 councils to seek the assistance of the Commission in managing the number of councils involved, identify which councils were proposing to erode the salary component, make recommendations about appropriate timeframes and responses and to finally resolve the dispute in a handful of outstanding unresolvable uncooperative councils. The dispute was allocated to Staff J and the Commission was able to assist the unions and the employers to manage what would have otherwise been a multitude of individual Council disputes.

The purpose of this application is to similarly manage what, on the face of it, appears to be a much, much bigger issue. There are currently 120 councils and this issue could affect all of them - I'm only confident at this stage that two councils have complied with their obligations under the Fund's rules, the former Kogarah and Sutherland Shire.

Advice has been sought from Local Government Super to identify those councils that complied with rules 1.2 and 1.3 and, therefore by implication, those councils that have not, but this information is not yet available. However, the implications of this dispute are that we will find the overwhelming majority of councils failing to pay the appropriate superannuation required by law, affecting employees since 2003 in terms of the annual contribution and the final payout to retired employees, as well as employees who remain within the industry in those schemes.

The information about rules 1.2 and 1.3 is found in the LGS Employer Guide issue of 6 March 2017 and an extract of that Guide is included with the Georges River letter as part of this notification in relation to the Retirement Scheme and Defined Benefits Scheme.

However, it appears there may be a similar issue for employees with private use of an employer-provided vehicle who are being paid superannuation contributions consistent with the Superannuation Guarantee. I have included pages 11, 12 and 13 of the Employer Guide and on page 13 is cited information from the ATO about what constitutes Ordinary Time Earnings and the table

lists a range of payments/benefits with advice whether "superannuation contribution required?", or not.

This table confirms that a superannuation contribution is required under SG for "Non-cash benefits (e.g. private use of an employer owned motor vehicle..." etc.

Consistent with this advice would be an obligation on councils to provide a superannuation contribution for all of those employees with private use of a Council vehicle, as an employer-provided vehicle, and the examination of compliance with this requirement should be part of this exercise. The SG was introduced in July 1992.

The convening of a compulsory conference is requested to establish a process and timetable to resolve this matter.

The parties to this dispute are Local Government NSW CEO Ms Donna Rygate, Donna.Rygate@lgnsw.org.au, United Services Union General Secretary Mr Graeme Kelly, gkelly@usu.org.au and Local Government Engineers Association Executive Director Mr Gordon Brock, gbrock@professionalsaustralia.org.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ian Robertson', with a long horizontal flourish extending to the right.

Ian Robertson
Secretary



20 September 2017

Ms Gail Connelly
General Manager
Georges River Council

Dear Gail

A couple of issues about calculating superable salary

I had a meeting of members yesterday about a couple of issues as the merger proceeds. The most significant issue is about leaseback car arrangements that existed at the former Kogarah, arrangements at the former Hurstville and your proposals for the introduction of a Georges River policy and arrangements.

When I say "arrangements" I'm being specific about those members of the Local Government Super Defined Benefit scheme and a discrepancy between the two former Councils on how they included "the value of private use of an employer- provided vehicle" as part of the calculation of "superable salary". As a shortcut I have included in this communication Page 51 of the LGS Employer Guide published by Local Government Super with an issue date of 6 March 2017.

The concept of "superable salary" is critical for two reasons. First, because the Council contributes to the employee's superannuation in the next calendar year based on what was identified as the "superable salary" at the conclusion of the previous year. And second, because being a defined benefit scheme, the final benefit is a multiple of the average of the superable salary at the last three 31 Decembers. There may be a bit of imprecision here, but you get the point.

Former Kogarah valued the private use of the employer-provided car for leaseback employees at \$10,270. They have done this historically, at least for more than the last decade. As an example of the impact of changing this, we have a member who can retire in 2.5 years and LGS has calculated that if the ten \$10270 is not included for the next 2.5 years, the after-tax loss will be over \$40,000. Clearly this is a big deal.

The issue for the employees of former Kogarah is that they have been told that the Council intends to terminate this arrangement. I write to advise you of our view that this is an entitlement protected by section 354D of the Local Government Act and ask you to discuss this with you before you continue with any intention to do so. We would be pleased to have you tell us that you won't.

But, there is also an issue for the employees of the **former Hurstville** who, as far as we are able to tell, did not have "the value of private use of an employer-provided vehicle" included in the calculation of their superable salary. This, despite advice from LGS that the Fund did provide calculations at some stage to the Council to allow this to occur.

This means that employees of the former Hurstville did not have their superable salary calculated by the Council pursuant to rule 1.2 and 1.3 in Schedule 4 of the Trust Deed. I am pursuing this at the moment with LGS to see what information they possess about what happened at the former Hurstville but advise you because it would seem that employees who did not have this component included in the calculation of their superable salary, contrary to the requirements of the rules I have cited earlier, have been financially disadvantaged and continue to be disadvantaged.

And in relation to the development of arrangements for **Georges River**, I ask that you confirm that for those employees in the Defined Benefit Scheme of LGS, the Council will comply with the requirement under rules 1.2 and 1.3 of Schedule 4 of the Trust Deed and include a value of the private use of the Council-provided car in future calculations superable salary.

I have asked LGS whether or not they can advise which councils have properly included this component consistent with the rules and which councils haven't. They have given advice to councils, they have a formula to recommend and while there is a discretion provided under those rules for the Council to calculate the value, there is no discretion to ignore the rule and provide advice to the fund which is not only in breach of the rule, but clearly a disadvantage to employees.

I struggle to believe that this is the case but I have sought advice from three senior and highly experienced HR Managers over the last twenty-four hours or so, but no one knows the answer. It may will be a significant breach of the rules of the Fund across the industry, and the breaches may have continued for more than a decade.

Could you please have your staff determine whether or not employees of the former Hurstville have had a component included in the calculation of their superable salary is recognising the value of private use of an employer-provided vehicle?

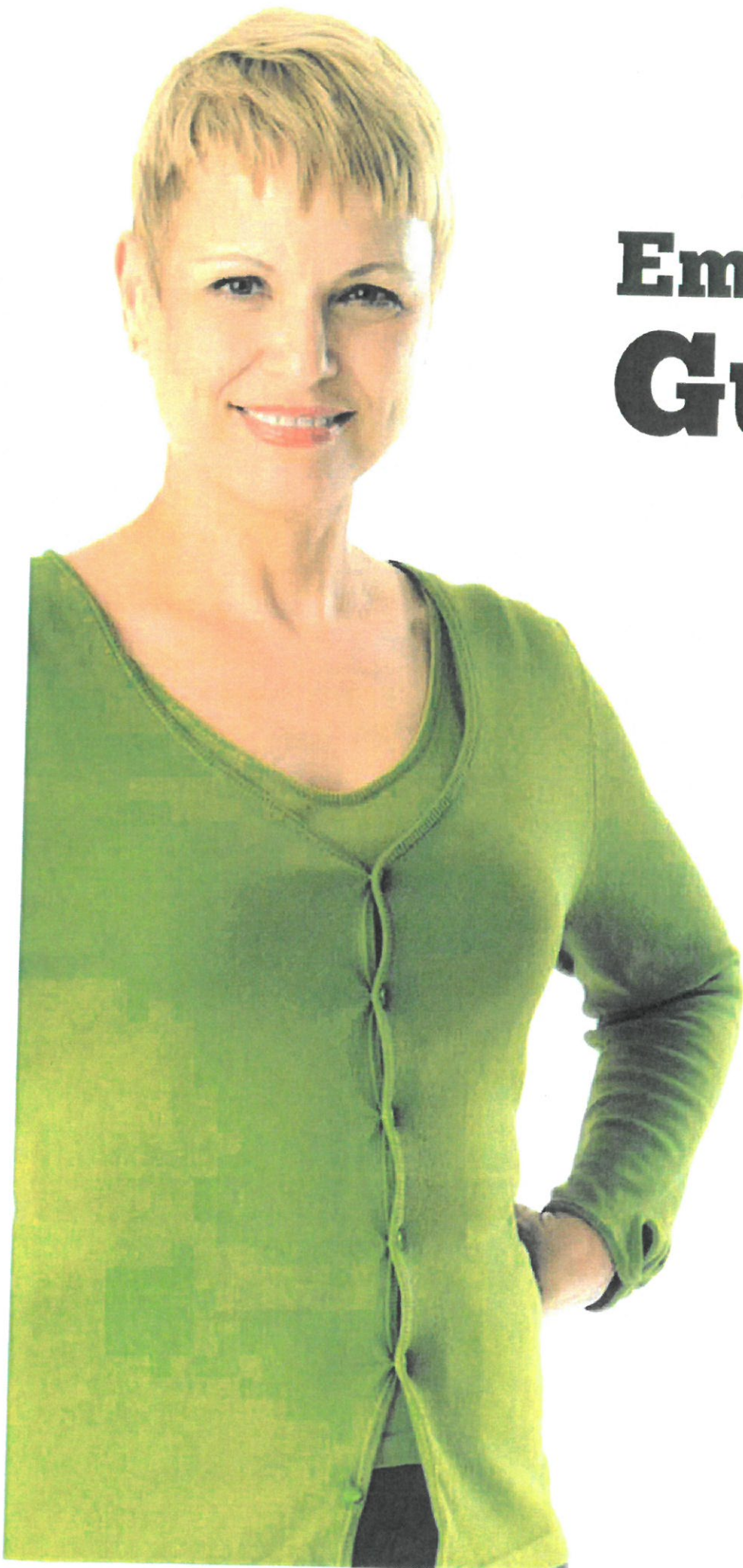
And, in the meantime, provide the undertaking with sought or hold off on proceeding with any proposed arrangements for Georges River employees.

Sometimes there never is a dull minute, is there?

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ian Robertson', with a long, sweeping horizontal line extending to the right.

Ian Robertson
Secretary



Employer Guide



Issue date: 6 March 2017

Contents

Introduction	1	The Retirement Scheme	22
Membership	2	Member defined contributions	24
General information	2	Additional member contributions	26
Members' entitlements	3	Employer contributions	26
The Trustee	3	The Contributions Due Report	29
The Administrator	3	Billing multiple	31
Commonwealth legislation	4	Government co-contributions	32
Salaries	6	Non-concessional contributions	32
Remitting contributions	6	Concessional contributions	33
Contract employees	7	Benefit Certificate	35
Leave arrangements and the		Part-time employees	36
Local Government (State) Award	7	Leave Without Pay (LWOP)	37
Accumulation Scheme	9	'Superable' Salaries	40
Types of member	9	Members transferring between	
New members	9	employers	43
The LGS Induction Pack	10	Ceasing employment	44
Tax File Numbers	10	Executive Officers	44
Superannuation		Members' entitlements	45
Guarantee contributions	11	Membership	46
Other concessional contributions	14	Defined Benefit Scheme	46
Concessional contributions cap	14	Defined member contributions	46
Member personal (post-tax)		Additional member contributions	47
contributions	16	Employer contributions	47
Spouse contributions	16	Government co-contributions	48
Non-concessional contributions cap	16	Non-concessional contributions	49
Age based limitations		Concessional contributions	49
on contributions	17	Superable salaries	51
Government co-contributions	17	Benefit Certificate	53
Reportable employer contributions	18	Members transferring between	
Casual employees and employees on		employers	53
leave without pay	19	Executive officers	54
Terminating employees	19	Leave Without Pay (LWOP)	55
Further information about the		Part-time employees	57
Accumulation Scheme	20	Tax File Numbers	57
Transfer to the Accumulation		Contact details	58
Scheme as an executive officer	21	Employer contact information	58
The Executive Scheme	21	General contact information	58
Introduction	22		

Superable salaries

Members' unit entitlements are calculated on the basis of the salaries advised by the employer. It is therefore important that the reported salaries are correct.

The Rules concerning the calculation of superable salary are found in Schedule 4 of the Trust Deed, (Rules 1.2 and 1.3), available at lgsuper.com.au. The following is a summary of those rules.

Award or wages employees

Superable salary includes:

- the base pre-tax salary actually paid to employee, plus
- allowances (including shift allowances) actually paid during the 12 months immediately preceding the members annual review date and which are taken to be Ordinary Time Earnings (OTE), plus
- the amount of any weekly workers' compensation payments which are taken to be OTE, plus
- the value of private use of an employer-provided vehicle, plus
- the value of any child care facilities provided by the employer, plus
- voluntary salary sacrifice (concessional) superannuation contributions paid on behalf of the employee
- the value of any other salary sacrifice arrangements and any associated fringe benefits tax payable.

Employer services can assist employers in calculating the allowances and shift loadings that are included in the salaries reported.

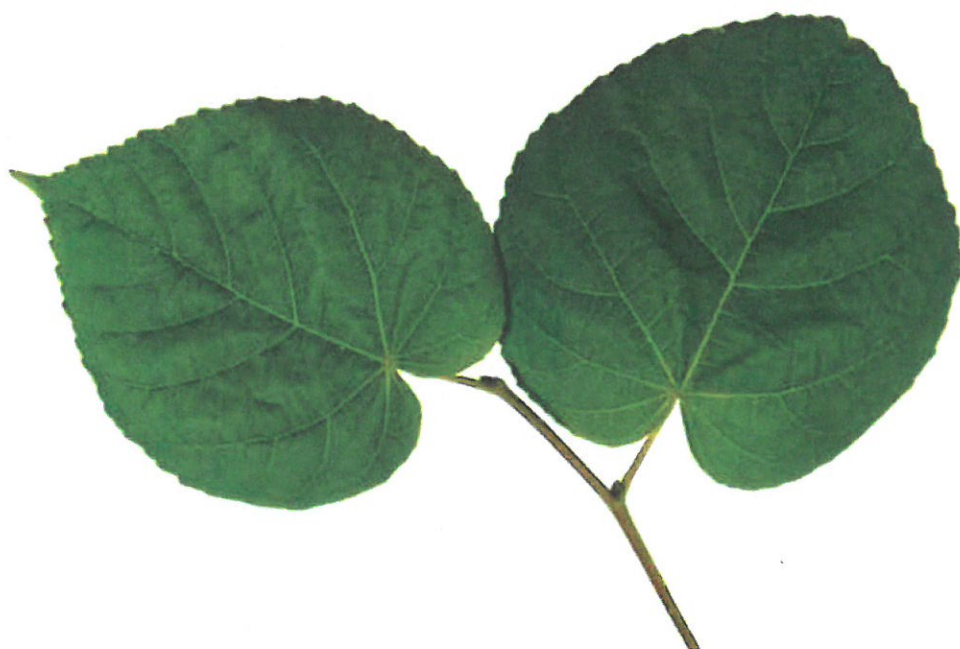
Superannuation Guarantee (SG) contributions

Under the SG legislation most employees are entitled to a minimum level of employer superannuation contributions, known as SG contributions.

The amount an employer is required to contribute is based on a percentage of Ordinary Time Earnings (refer to the next page).

The historical SG rates and proposed future increases are shown below:

Date	SG Rate
1 July 1992 to 31 December 1992	4%
1 January 1993 to 30 June 1995	5%
1 July 1995 to 30 June 1998	6%
1 July 1998 to 30 June 2000	7%
1 July 2000 to 30 June 2002	8%
1 July 2002 to 30 June 2013	9%
1 July 2013 to 30 June 2014	9.25%
1 July 2014 to 30 June 2021	9.5%
1 July 2021 to 30 June 2022	10%
1 July 2022 to 30 June 2023	10.5%
1 July 2023 to 30 June 2024	11%
1 July 2024 to 30 June 2025	11.5%
1 July 2025 onwards	12%



From 1 July 2013 the upper age limit on SG contributions (i.e. age 70) was removed. Employers are required to contribute for eligible employees aged 70 and above.

Ordinary Time Earnings (OTE)

OTE is generally defined as the amount employees earn for their normal hours of work, including amounts such as paid leave, shift loading and some allowances.

OTE generally does not include amounts earned outside of an employee's normal hours of work. Payments such as those for overtime or untaken leave paid as a lump sum are not considered to be OTE.

Under a NSW State Government recommendation, employers may be required to make SG contributions in circumstances where the SG legislation normally provides an exemption.

This includes:

- when an employee's earnings are less than \$450 per month
- when an employee under 18 years of age has been employed for less than 30 hours a week, and
- when an employee's annual earnings exceed the 'maximum earnings base' (\$51,620 per quarter for the 2016/2017 year).

An employer cannot use an earnings base other than OTE to calculate SG contributions. For example, you cannot use an industrial award, existing employer agreement, a super fund's trust deed or a law of the Commonwealth, state or territories.

The table on the next page contains the typical payment types you may make to an employee and confirms whether or not that type of payment should generate an SG contribution. The table also incorporates the NSW State Government recommendations referred to above.

This table is provided as a guide only and is not a complete list. OTE is defined in Super Guarantee Ruling SGR 2009/2, a copy of which can be found on the ATO website at ato.gov.au

Payment type	Superannuation contribution required?
Allowances paid (other than a reimbursement of expenses.)	Yes
Reimburses of expenses (e.g. travel or meal costs)	No
Bonuses—performance bonus, bonus labelled as ex-gratia, but in respect of ordinary hours of work, Christmas	Yes
Bonuses—in respect of overtime only	No
Commission	Yes
Shift loading	Yes
Overtime	No
Agreement supplanting award removes distinction between ordinary hours and other hours	Yes
Casual loading	Yes
Benefits subject to fringe benefits tax	No
Workers compensation payments (including top up payments):	
● Returned to work	Yes
● Not working	No
Top up payments (e.g. when serving on jury duty, with reserve forces, etc.)	No
Paid maternity/paternity/parental/adoption leave	Yes ¹
Paid annual/sick/long service leave	Yes ²
Government (wage) subsidies, e.g. jobs start allowance	Yes
Termination payments:	
● In lieu of notice	Yes
● Unused annual/sick/long service leave	No
Redundancy payments	No
Other payments made by an employer under termination of employment	No
Non cash benefits (e.g. private use of an employer owned motor vehicle, employer provided child care facilities).	Yes

1. No SG payment required under SG legislation, but is included here as it forms part of the NSW State Government recommendation.

2. This includes long service leave at double pay and may include any sick leave paid as a lump sum while the individual is still employed. Refer to the LGS guide 'Information for employers regarding the payment of long service leave taken at half pay or double pay and untaken sick leave paid as a lump sum'. This document is available from the Employer section of the LGS website.