



Jurisdictional Policy Advice No. 2007/09
Safety, Rehabilitation and Compensation Act 1988
Amendments to the definition of “suitable employment”

Introduction

1. The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (SRCOLA) received Royal Assent on 12 April 2007.
2. This Act amends provisions of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). The amendments will, among other things:
 - ensure that all potential earnings from ‘suitable employment’ can be taken into account when determining incapacity payments; and
 - facilitate the performance of employers’ rehabilitation functions, particularly in assisting employees to find ‘suitable employment’.
3. In introducing these amendments, the Minister for Employment and Workplace Relations made it clear that the intention of the amendment to the definition of ‘suitable employment’ was to correct an inconsistency with the original policy intent behind that particular provision.

Legislative Amendment

4. The new subsection 4(1) definition of suitable employment is:-

suitable employment, in relation to an employee who has suffered an injury in respect of which compensation is payable under this Act, means:

- (a) in the case of an employee who was a permanent employee of the Commonwealth or a licensee on the day on which he or she was injured and who continues to be so employed—employment by the Commonwealth or the licensed corporation, as the case may be in work for which the employee is suited having regard to:
 - (i) the employee’s age, experience, training, language and other skills;
 - (ii) the employee’s suitability for rehabilitation or vocational retraining;
 - (iii) where employment is available in a place that would require the employee to change his or her place of residence—whether it is reasonable to expect the employee to change his or her place of residence; and
 - (iv) any other relevant matter; and

- (b) in any other case—any employment (including self-employment), having regard to the matters specified in subparagraphs (a)(i), (ii), (iii) and (iv).

Interpretation

5. ‘Suitable employment’ is an important term under the SRC Act, as it has the capacity to affect the amount of weekly incapacity benefits paid under sections 19 to 21A and it also appears in Part III of the Act in respect of the duty of the relevant employer to provide ‘suitable employment’ where an employee is undertaking or has completed a rehabilitation program.

Weekly benefit calculations

6. Section 19 of the SRC Act allows determining authorities to take the earnings from ‘suitable employment’ into account in calculating (reducing) the amount of compensation payable under that section by subtracting from the Normal Weekly earnings (NWE) an **AE** amount which is the greater of the amount that the employee is able to earn per week in ‘suitable employment’ or the weekly amount actually earned, including through self-employment. This process of reducing the compensation payable in section 19, is able to be applied to reducing the amount of compensation or **AC** amount in sections 20, 21 and 21A.
7. ‘Suitable employment’ for a permanent or ongoing employee, is defined as employment with the Commonwealth or a licensee. However, prior to the amendment, suitable employment did not encompass employment outside the Commonwealth or a licensee in respect of amounts that the employee was *able to earn* for those employees who were no longer employed *and* who were separated from their employment by management action, for example through invalidity retirement or some other method.
8. The effect of this was that, for employees who had been separated by management action, determining authorities could only take into account the amount that the employee earned (actual earnings) from outside employment in determining incapacity benefits under sections 19, 20, 21 and 21A.
9. For employees who were no longer employed and who had (themselves) terminated that employment’ (eg by voluntary resignation) – it allowed determining authorities to include amounts that the employee was able to earn, including self employment and employment outside the Commonwealth or licensee.
10. This meant that a permanent employee of the Commonwealth or a licensee, on being separated *by the employer* from employment, and in receipt of weekly incapacity benefits, needed to make no effort to seek other employment. That employee could simply rely on the maximum compensation benefit payable – however work capable they were.

11. The amendment to the definition of ‘suitable employment’ means that, from 13 April 2007, for employees who are no longer employed by the Commonwealth or a licensee, the determining authority can apply this new ‘suitable employment’ definition to the ‘*AE*’ component in calculating incapacity benefits under sections 19 and the *AC* component of sections 20, 21 and 21A. That is, an employee’s weekly compensation benefit can be reduced by the amount per week that the employee *is able to earn* as well as the amount actually earned in suitable employment – regardless of the circumstances of their separation from employment by the Commonwealth or a licensee.
12. The amendment applies to currently separated employees – but only for periods of incapacity determined from 13 April 2007, the date after the day of Royal Assent, as well as employees who may separate in the future.

Rehabilitation

13. Section 40 of the SRC Act imposes a duty on the relevant employer to provide ‘suitable employment’ where an employee is undertaking or has completed a rehabilitation program. The wider application of ‘suitable employment’ following the amendment means that regardless of the method of separation, the relevant employer is now able to use the rehabilitation process to establish an ability to earn in suitable employment and to apply an *AE* figure in determining weekly incapacity benefits for these employees.
14. Consequently, employers should periodically assess these employees on their capability of undertaking a rehabilitation program (section 36) or to respond to written requests from employees for such assessments and to make appropriately considered decisions under section **37 Provision of rehabilitation programs**. Such section 37 decisions would be indicated where the employee demonstrates a capacity to undertake any ‘suitable employment’ including employment in the open labour market or in self employment. Rehabilitation programs involving the use of work trials and job search programs may be effective in demonstrating an employee’s capacity to engage in such suitable employment.
15. A failure to undertake or to continue in such employment would enable determining authorities to consider an *AE* ‘able to earn’ figure in determining weekly incapacity benefits.

Policy Advice

16. The amendment to the definition of “suitable employment” as applied to employees no longer employed:
 - allows the determining authority to take into account both actual earnings as well as potential earnings from suitable employment with suitable employment

not being restricted to employment with the Commonwealth or a licensee for employees who had their employment terminated by the Commonwealth or a licensee; and

- facilitates the carrying out of the employer's duty under section 40 of the SRC Act of assisting an employee to find suitable employment in the open labour market as well as with the employer.

17. The amendment can be applied from 13 April 2007 to the calculation of incapacity benefits under sections 19, 20, 21 and 21A for employees who have separated from Commonwealth or licensee employment. However, in practice, determining authorities must have regard to
 - (i) the employee's age, experience, training, language and other skills;
 - (ii) the employee's suitability for rehabilitation or vocational retraining;
 - (iii) where employment is available in a place that would require the employee to change his or her place of residence—whether it is reasonable to expect the employee to change his or her place of residence; and
 - (iv) any other relevant matter.
18. For those employees who have a known or clearly established capacity to engage in suitable 'outside' employment, eg they may have been recently working (in employment or in self employment), but have discontinued that employment due to choice and not due to the effects of their injury, establishing a capacity to engage in suitable employment will be straight forward.
19. For others, their capacity to engage in suitable employment will need to be assessed. This may require a medical (section 57) and/or a rehabilitation assessment (section 36) with the results of such an assessment being tested against subparagraphs (i) to (iv) of the definition of suitable employment.
20. Provision of a rehabilitation program under section 37 of the Act involving job search or job trial placements for such employees would help to confirm capacity to engage in suitable employment and would therefore make any weekly benefit decision which incorporates an '*AE*' value based on 'capacity to engage in suitable employment' (ie potential employment) more sustainable – consequently such an approach is recommended.
21. Determining authorities are required to incorporate suitable processes and procedures to ensure that incapacity payments for employees who have separated from their employment are calculated in accordance with the new definition of 'suitable employment'.
22. This change applies to amounts of compensation determined in relation to periods of incapacity that begin on or after 13 April 2007.

23. Any queries in relation to this policy advice may be discussed with SRC Policy, phone 1300 366 979 or email SRC.Policy@comcare.gov.au

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