JURISDICTIONAL POLICY ADVICE NO. 2015/01
Safety, Rehabilitation and Compensation Act 1988 (SRC Act)

Adjusting an employee’s Normal Weekly Earnings (NWE) under subsection 8(10)

PURPOSE

1. This Jurisdictional Policy Advice (JPA) provides guidance on the application of subsection 8(10) of the Safety, Rehabilitation and Compensation Act 1988 (SRC Act). It advises determining authorities that subsection 8(10):

   > must be applied in each calculation of NWE, throughout the life of the claim—either paragraph 8(10)(a) or (b) will always be engaged; and

   > caps the NWE of an employee who:

     - continues to be employed by the Commonwealth or a licensee at the amount the employee would receive if they were not incapacitated for work

     - has ceased to be employed by the Commonwealth or licensee at the greater of the amount they would receive if they had continued in the employment they were in at the date:

       • of injury; or

       • on which their employment by the Commonwealth or the licensee ceased.

2. This JPA summarises the principles expressed in case law including:

   > John Holland Group Pty Ltd v Robertson [2010] FCAFC 88

   > Australian Capital Territory v Comcare [2012] FCA 67

   > Comcare v Simmons [2014] FCAFC 4

   > Dunstan and Comcare [2014] AATA 208

   > McGree and Anor and Comcare [2014] AATA 613

BACKGROUND

3. Sections 19, 20, 21 and 21A of the SRC Act provide that Comcare\(^1\) is liable to pay compensation to an employee in respect of any period during which the employee is incapacitated for work.

4. The formula for the calculation of the amount of weekly incapacity compensation in those sections is based on the injured employee’s normal weekly earnings (NWE) less the amount the injured employee actually earns or is deemed able to earn (AE)\(^2\). This JPA provides guidance only in relation to the calculation of NWE. However, when determining the amount of weekly incapacity compensation payable, determining authorities should also consider the employee’s ability to earn.

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\(^1\) With respect to employees of licenced authorities and licensed corporations, subsections 4(10) and 4(10A) define a reference to ‘Comcare’ as a reference to a licenced authority or a licensed corporation.

\(^2\) AE is the greater of the following amounts: (a) the amount per week (if any) that the worker is able to earn in suitable employment, or (b) the amount per week (if any) that the worker earns from any employment (including self-employment) that is undertaken by the worker during that week (subsection 19(2)).
5. NWE is calculated in accordance with section 8 of the SRC Act. The NWE reflects the employee’s average weekly earnings before the date of injury, determined week by week over the life of the claim with adjustments made based on changes to employment and other factors arising after the date of injury.

Subsection 8(10)

6. Subsection 8(10) of the SRC Act must be applied to every calculation of NWE. It provides a cap to the NWE during each week after the injury, calculated differently depending on whether or not the employee continues in the employment of the Commonwealth or a licensee. The subsection is divided into two paragraphs:

> paragraph (a) applies to those who continue to be employed by the Commonwealth or a licensee
> paragraph (b) applies to those who have ceased to be employed by the Commonwealth or a licensee.

Continuing employees—paragraph 8(10)(a)

7. For a continuing employee, the NWE is adjusted to reflect the weekly earnings that the employee would receive if they were not incapacitated for work. Paragraph 8(10)(a) contemplates the possibility that, if not incapacitated by their injury, the employee may have received less in earnings than the value of their NWE as otherwise calculated (under subsections 8(1)–8(9G)). In that circumstance, this provision is designed to reduce the employee’s NWE to ensure that they do not receive compensation higher than the earnings they would have received had they not been injured.

Exited employees—paragraph 8(10)(b)

8. For an exited employee the NWE is capped at the greater of the weekly earnings that the employee would receive if they had continued in the same employment they had at the date:

(i) of their injury; or
(ii) on which their employment by the Commonwealth or a licensee ceased.

9. Since the commencement of the SRC Act, numerous court decisions have examined the manner in which subsection 8(10) should be applied and the different factors that may or may not be taken into account when applying that provision. This JPA conveys the principles arising from recent decisions.

10. Attachment A provides a copy of relevant SRC Act provisions.

POLICY ADVICE

When does an employee continue to be employed or cease to be employed?

11. Whether an employee continues or ceases to be employed must be determined on a case-by-case basis with reference to the specific terms and conditions of employment for that employee. Although the legal cases provide some guidance, the decision maker will always have to look at the individual circumstances and specific terms and condition for a particular employee.

> In Robertson and John Holland, the Tribunal found that an employee engaged on a short-term contract ceased employment at the end of that contract period. It was not necessary for there to be any ‘overt act of the parties’ to terminate the contract of employment in those particular circumstances.

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3 Definition of ‘normal weekly earnings’ in s. 4 of the SRC Act.
4 The legal requirement is for the decision maker to turn their mind to the NWE for each week that incapacity payments are made (John Holland Group Pty Ltd v Robertson [2010] FCAFC per Dowsett J at para [19]; Comcare v Simmons [2014] FCAFC 4 per Perry J at para [50]. Administratively, NWE can be calculated for a period longer than one week, such that the NWE applied in that period is applied for each week in that period.
5 Comcare v Simmons [2014] FCAFC 4 per Perry J at para [17].
6 [2009] AATA 443
> In *McGree and Anor and Comcare*, the Tribunal found that Commonwealth employees who had accepted state employment and subsequently returned to Commonwealth employment as a result of the arrangements to transfer a hospital from Commonwealth to state ownership, had ceased Commonwealth employment when they transferred to the state. The Deputy President concluded that ‘in order for an employee to be regarded as having continued to be employed by the Commonwealth, there must be no break in their service’.

> In *Dunstan and Comcare*, an employee who was suspended continued to be employed however the Tribunal noted that this was due to the particular terms and conditions of employment. In some cases, suspension may terminate employment.

**Calculating a continuing employee’s weekly earnings under paragraph 8(10)(a)**

12. Where the employee continues to be employed by the Commonwealth or a licensee, the decision maker is required to make a notional enquiry as to what the employee’s earnings would be in their actual current employment had he or she not been injured. That enquiry involves consideration of how that employee would have been employed including whether he or she would have continued to perform the same duties as he or she was performing at the time of the accident. Factors that may be relevant are:

- the weekly earnings of non-injured colleagues in the current role or pre-injury role performed by the employee
- whether certain allowances or wage incentives such as overtime or higher duties would currently be available to the employee—or available to the same extent as at the date of injury—if not injured
- whether any particular personal or career choices unrelated to the employee’s injury have reduced their current weekly earnings below their pre-injury weekly earnings.

13. If the decision maker considers—based on these, and other considerations—that the amount the employee would receive if not incapacitated for work is less than the NWE as calculated under subsections 8(1)–(9), the decision maker must reduce the employee’s NWE under paragraph 8(10)(a). The NWE will then reflect the notional weekly earnings the employee would receive if not incapacitated.

**Calculating an exited employee’s weekly earnings under subparagraphs 8(10)(b)(i) and (ii)**

14. Where the employee has ceased to be employed, the decision maker must ascertain under paragraph 8(10)(b) whether their weekly earnings would be greater if he or she had continued in the employment in which he or she was engaged at the date of injury; or the employment in which he or she was engaged upon ceasing employment. This exercise does not involve the notional formulation of conditions of employment that never existed. Rather, it requires the decision maker to:

- refer to the employee’s actual terms and conditions of employment at the date of injury and cessation of employment (not just the classification of the employee’s position)
- assess the likely earnings arising from those terms and conditions at the date of calculation.

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7 [2014] AATA 613
8 [2014] AATA 208
9 *John Holland Group Pty Ltd v Robertson* [2010] FCAFC 88 at [74]
10 Ibid at [76] per Dowsett J.
11 *John Holland Group Pty Ltd v Robertson* [2010] FCAFC 88 at [73] per Dowsett J.
15. Effectively this involves identifying the actual earnings at the relevant dates and adjusting them to reflect changes in circumstances at the date of calculation. For example, the decision maker would need to consider whether any allowances or overtime paid to the employee on the date they were injured or ceased employment would be payable in the particular week of the NWE calculation. The employee’s weekly earnings under paragraph 8(10)(b) should be adjusted if, for example, under the terms and conditions of employment, any entitlement to:

> overtime was conditional upon the actual working of a period of overtime, and in the circumstances at the date of the NWE calculation no overtime was available to be worked

> a specific allowance was dependent on an employee’s performance of particular duties (for example, fire warden), and no such duties were available to be performed in the week of the NWE calculation.

16. Consequently, an exited employee does not have an entrenched right to have included in their weekly earnings at subparagraph 8(10)(b)(i) or (ii) all allowances and/or overtime that was actually paid to them at the date of injury or at the cessation of employment (respectively). Access to these entitlements may vary from week to week after they have ceased employment, depending on the terms and conditions of employment applicable to them (Example A).

**Example A—Application of subsection 8(10) for certain types of contract work (Robertson)**

An employee is employed on a temporary contract to work on a specific construction project. Under the terms and conditions of that employment, the period of the contract is contingent upon the completion of the specified project (that is, once the project is completed the contract ends). On completion of the project, the general practice of the employer is to redeploy individuals employed on that project to another project.

The terms and conditions provide for:

1. The employee to work substantial amounts of paid overtime in addition to their salary. There is no entitlement to overtime. The employee is only paid for overtime actually worked.

2. Certain skill based allowances. One of these allowances is in respect of rigging work undertaken above a height of 50 metres, which is payable regardless of whether such work is actually performed during the week in question.

The employee suffers a workplace injury resulting in incapacity. Shortly thereafter, their contract period comes to an end due to completion of the project.

What does the decision maker need to consider when calculating this employee’s weekly earnings after they cease employment with the employer?

1. Paragraph 8(10)(b) applies because the employee has ceased employment once the project ends.

2. The actual terms and conditions of the employment at the time of the injury and at the time employment ceased must be determined. This is not a notional enquiry so the decision maker should not consider what terms and conditions of employment might have existed in the hypothetical scenario that the employee had been redeployed to another project. The terms of employment identifiable in the above example include:

> the employee is entitled to payment of a salary

> additional amounts will be payable for any overtime performed

> additional allowances will be paid on the basis that the employee has specific skills.
3. The terms and conditions of the employment must then be applied to the circumstances as at the date of calculation. Payments that are dependent on particular tasks being performed that can no longer be performed after completion of the project cannot form part of the weekly earnings under subparagraph 8(10)(b)(i) or (ii). Amounts that would have been payable regardless of whether such tasks can be performed will be included in the weekly earnings under subparagraph 8(10)(b)(i) or (ii). On this basis:

- the salary will be taken into account as this amount is payable regardless of whether the work is available
- overtime will not be taken into account as it would no longer be available following completion of the project
- the skills based allowance for undertaking rigging at heights in excess of 50 metres will be taken into account as it is payable regardless of whether or not the work is available.

An employee’s weekly earnings must be determined on a case-by-case basis. For example, if the employee had a contractual entitlement to a certain number of overtime hours each week, then that entitlement would be included in the weekly earnings under paragraph 8(10)(b) following completion of the project. Similarly, if the skills based allowance was dependent upon actual performance of that type of work, the skills based allowance would not be included in the weekly earnings under paragraph 8(10)(b) following completion of the project, as that work is no longer available.

**Allowances**

17. The payment of certain types of allowances must be included in the calculation of an employee’s NWE. If an employee was receiving an allowance prior to injury, the contribution of that allowance to weekly earnings is included in the calculation of NWE under subsection 8(1) of the SRC Act.

18. For continuing employees, when that allowance no longer applies to their employment, for reasons unrelated to their injury (e.g., the employee takes another role with the same employer for personal reasons, but the new role does not attract the allowance), their NWE should be reduced by the amount of that allowance. This reduction is permitted for current employees under paragraph 8(10)(a) because it requires the decision maker to consider the earnings the employee would receive if he or she were not incapacitated for work. Under paragraph 8(10)(a), the employee’s reasons for changing employment with the same employer can be taken into account. The reasonableness of the employee’s decision is not relevant and should not be considered.

19. However, certain allowances included in the employee’s NWE calculation under subsection 8(1), may continue to be payable after they exit employment regardless of whether the employee ceased employment for reasons unrelated to their injury. A reduction of their NWE is not permitted in such cases because paragraph 8(10)(b) requires NWE to be calculated only by reference to the employment the employee held either at the date of injury or when they ceased employment. Under paragraph 8(10)(b), neither the employee’s reasons for exiting employment nor the reasonableness of that decision are relevant and should not be taken into account.

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13 Subsection 8(1) of the SRC Act provides for allowances payable under the terms and conditions encountered during service, special qualifications, special duties and so on. Allowances intended to offset money expended or likely to be spent by the employee, for example an accommodation or meal allowance, is not included in NWE because they are not remuneration for the employee’s work or merit (Re Sutton and Comcare (1996) AATA 168).

14 Simmons per Flick and Griffiths at para [10-12]

15 The phrase ‘employment in which he or she was engaged’ at paragraph 8(10)(b), means the actual employment or job that the employee was engaged in at that date (see Simmons per Perry J at para [86] endorsing Dowsett J in John Holland Group at paras [66 – 69]).
Example B—Employment continues (Simmons)\textsuperscript{16}

An Australian Federal Police (AFP) employee based in Canberra receives a $20 000 per annum ‘readiness for deployment’ allowance for working in an operational unit within AFP. This allowance is tied to the particular work performed by employees in operational units, and is not available to other AFP staff.

The employee suffers a workplace injury resulting in incapacity. For the purpose of determining their compensation for incapacity, the readiness for deployment allowance is included in the calculation of NWE.

Sometime after the injury the employee declines an offer to remain in the operational unit and is granted a transfer to an AFP regional office in Sydney for personal reasons unrelated to the injury. Their new role does not attract the allowance, resulting in a $20 000 per annum reduction in income.

Should the allowance be disregarded from NWE once the employee commences their new role?

Yes. The employee has no entitlement to the allowance once they commence in the new role because the decision to transfer is not related to their injury. Having changed roles (for reasons unrelated to the injury) the NWE is now based on weekly earnings in the new role as this is what they would have been earning had they not been incapacitated by their injury (paragraph 8(10)(a)). Consequently, the allowance should be removed from NWE to reflect their choice to transfer to a role that does not provide for the allowance.

Example C—Ceased employment with the Commonwealth (Simmons)

Sometime after relocating to Sydney, the employee leaves the AFP to join the NSW Police.

Does subsection 8(10) continue to apply after the employee exits the AFP?

Yes. After the employee exits employment, their NWE continues to be capped under paragraph 8(10)(b). Paragraph (b) caps the NWE of an exited employee to what they would receive if they had continued to be employed in the same employment in which they were engaged in (i) at the date of injury, or (ii) at the date of exit; whichever is greater.

Should the allowance be disregarded from NWE when the employee exits AFP employment?

No. Paragraph 8(10)(b) applies from the week after the employee exits the AFP. In that week, the circumstances which reduced their NWE under paragraph 8(10)(a) no longer exist, and their pre-injury NWE can now only be capped by reference to the greater of subparagraphs 8(10)(b)(i) or (ii). In this example, the employee would receive more if they had continued in the employment they held at the date of injury [subparagraph (i)]. This amount is the same as their NWE, calculated under subsections 8(1)–(9).

As the employee’s NWE calculated under subsections 8(1)–(9) does not exceed the amount under subparagraph 8(10)(b)(i), no reduction of their NWE is required under subsection 8(10) in the week after exiting the AFP. Consequently, the readiness for deployment allowance is reinstated in the employee’s NWE.

\textsuperscript{16} Also see \textit{Spurr and Comcare} [1999] AATA 43
Leave without pay or suspended without pay

20. Where an employee is granted or deemed to be on leave without pay (LWOP) or is suspended without pay during a period of incapacity, their employment may or may not continue. The effect of the LWOP or suspension upon continuity of employment will depend on the employee’s terms and conditions of employment. Determining authorities should assess this on a case by case basis.17

21. If the employment continues during a period of LWOP or suspension without pay, paragraph 8(10)(a) applies and the NWE should be reduced to nil, if the reason for the suspension or LWOP is unrelated to the employee’s injury (Example D).

22. If the suspension or LWOP terminates the employee’s employment NWE must then be calculated in accordance with paragraph 8(10)(b), that is, with regard to either the pre-injury earnings or earnings immediately before employment ceased.

Example D—Employed (Dunstan)18

An Australian Taxation Office (ATO) employee suffers a psychological injury after a workplace conflict with a colleague. Comcare accepts liability for the injury. The ATO redeploys the employee to a new team to avoid further contact with the colleague. The employee receives weekly incapacity compensation during this period.

Sometime later the employee is suspected of engaging in behaviour contrary to his employer’s code of conduct. The employee is temporarily suspended without pay while an investigation is commenced, but continues to be employed for this period.

Does subsection 8(10) continue to apply after the employee is suspended without pay?

Yes. While suspended without pay, the employee’s NWE should be reduced to nil under paragraph 8(10)(a). Paragraph (a) applies because they continued to be employed while suspended and the suspension is for reasons unrelated to their work-related injury for which they are in receipt of compensation. Consequently, incapacity compensation is not payable.

However, the employee’s NWE should be recalculated and incapacity payments reinstated when the employee returns to work or receives earnings while suspended, in accordance with paragraph 8(10)(a).

Reconsiderations

23. If a determining authority had been applying a different interpretation of subsection 8(10) it is not obliged to self-initiate action to identify and reconsider determinations made prior to the date of this publication. However, if a determining authority receives a request for a reconsideration that is in accordance with the requirements of subsections 62(2) and 62(3) of the SRC Act, the determining authority is required to conduct a reconsideration.

24. If a request for a reconsideration is received out of time, the determining authority has discretion to proceed or not. However, it is Comcare’s policy preference that determining authorities do not proceed in such cases.

17 ACT v Comcare [2012] FCA 67 at paras [44–48] referred to in Dunstan and Comcare [2014] AATA 208. The Federal Court and Tribunal have observed that while provision of service and receipt of earnings are indicators of the continuity of employment, they are not necessary for continuity of employment.

18 [2014] AATA 208
FURTHER INFORMATION

Related JPAs

25. This JPA replaces:
   JPA No. 2009/13—Considerations required before reducing Normal Weekly Earnings (NWE) under subsection 8(10)

Review date

26. This JPA will be reviewed by 31 December 2015

Contact Comcare

27. For more information, please contact our call centre on 1300 366 979 or email scheme.management@comcare.gov.au

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14 January 2015
Attachment A

Subsection 4(1)

normal weekly earnings means the normal weekly earnings of an employee calculated under section 8.

Subsection 4(9)

A reference in this Act to an incapacity for work is a reference to an incapacity suffered by an employee as a result of an injury, being:

(a) an incapacity to engage in any work; or

(b) an incapacity to engage in work at the same level at which he or she was engaged by the Commonwealth or a licensed corporation in that work or any other work immediately before the injury happened.

Subsection 8(10)

If the amount of the normal weekly earnings of an employee before an injury, as calculated under the preceding subsections, would exceed:

(a) where the employee continues to be employed by the Commonwealth or a licensed corporation—the amount per week of the earnings that the employee would receive if he or she were not incapacitated for work; or

(b) where the employee has ceased to be employed by the Commonwealth or a licensed corporation—whichever is the greater of the following amounts:

(i) the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in the employment in which he or she was engaged at the date of the injury;

(ii) the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in the employment in which he or she was engaged at the date on which the employment by the Commonwealth or the licensed corporation ceased;

the amount so calculated shall be reduced by the amount of the excess.