

Assessment of ability to earn

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Introduction

Ability to earn (AE) forms part of the formula used to calculate an employee's incapacity payments under Section 19 of the SRC Act.

Important: The claims manager is responsible for determining AE based on medical and other information on the claim file, including information obtained by the rehabilitation authority (the employee's most recent Commonwealth employer). The CM assesses the information to determine the employee's capacity to work and any suitable employment identified as reasonably available to them.

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Actual earnings in any employment

Any income a current or ex employee is actually receiving from any employment, whether suitable employment or not, must be considered when determining the employee's AE.

To determine the amount per week an employee is actually earning, you may need to request from the employee:

- pay slips

- business tax returns
- profit and loss statements, or
- any other relevant business record.

Please note that gross earnings are considered when calculating incapacity payments ie before tax

Bonuses and overtime

Bonuses, commissions or overtime received by an employee that are not part of their initial normal weekly earnings (NWE) figure, should be taken into account as actual earnings (gross) in the period the employee receives them.

In circumstances where a bonus/commission/overtime is likely to be received all at once, with the potential to significantly reduce the employee's incapacity payment in that period, Comcare has the discretion to average out the bonus/commission/overtime over a period of time.

Royalties

A royalty payment is commonly understood as monetary compensation for the use of property, usually copyrighted works, patented inventions, or natural resources. Payment of royalties can only be included in the calculation of AE if they are earnings relating to employment undertaken in a specific week when the employee was incapacitated due to a compensable injury.

The vast majority of royalty payments would be received some time after the completion of the work giving rise to the royalty payment. It is only where the work is undertaken during a week in which incapacity is payable that the royalty payment can be included as AE for that week.

This will usually mean that an incapacity entitlement paid in the past will need to be varied by way of a reconsideration on own motion, likely resulting in an overpayment to be recovered.

Note: Royalty payments can only be taken into account as AE where the payment is in relation to an endeavour that could be classified as employment undertaken by the employee. An inherited right to royalty payments, for example, could not be taken into account.

The Income Support team is responsible for implementing all incapacity determinations relying on the AE figure provided by the claim manager.

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Suitable employment

You must take the employee's ability to earn in suitable employment into account. Where an ability to earn in suitable employment is determined, it will need to be deducted from the NWE or %NWE payable when calculating the weekly amount payable. For further guidance refer to [Calculating incapacity payments](#) page.

The definition of [suitable employment](#) (section 4 of the SRC Act) is divided into two distinct categories:

- for current Commonwealth employees - suitable employment can only be Commonwealth employment, and
- for employees separated from the Commonwealth (ex-employees) - suitable employment is any employment.

You should have regard to the following factors when establishing suitable employment:

- the employee's age, experience, training, language and other skills
- the employee's suitability for rehabilitation or vocational retraining
- 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
- any other relevant matter.

'Any other relevant matter' is designed as a 'catch-all' and allows you to consider other factors that may impact on the employee's ability to undertake suitable employment, such as their compensable condition and/or any non-compensable conditions they may suffer. This factor also you to consider factors such as volunteer work, or any study the employee may be engaged in.

Rehabilitation authority and suitable employment

The employee's rehabilitation authority has a duty to provide suitable employment to an employee, or, to assist the employee to obtain suitable employment where it is not available (section 40 of the SRC Act). For current Commonwealth

employees, the rehabilitation authority will be their current employer. For employees who have left Commonwealth employment, the rehabilitation authority will be their last Commonwealth employer.

Reports obtained by the rehabilitation authority may assist you to determine the employee's ability to earn, as they will include information on the employee's fitness and competency to work, their training needs, their availability and job prospects.

Where relevant, the rehabilitation authority should be encouraged to arrange a rehabilitation assessment, under section 36 of the SRC Act, when an employee separates from employment. This assessment may be used in conjunction with medical information to provide an indication of an employee's ability to earn prior to separation. You could also consider arranging a vocational assessment, with a relevant professional, to assess the employee's fitness and competency for work when they separate from employment.

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Determining an ability to earn (AE)

Section 19(4) of the SRC Act provides the legislative provisions for determining an employee's ability to earn ('determined AE'). A determined AE can only be established for an employee if they have:

- failed to accept an offer of suitable employment
- failed to engage or continue in suitable employment
- failed to complete a reasonable rehabilitation or vocational retraining program, or
- failed to seek suitable employment.

You will also need to consider whether the employee's failure was reasonable in the circumstances and take into account any other matter Comcare considers relevant.

When an AE figure has been determined, it should be reviewed regularly to ensure it continues to apply and where applicable, updated to take into account any changes to the AE figure.

Note: There is no provision in the SRC Act to index an employee's AE figure. An ex-employee's determined AE cannot be indexed under section 8(9B) of the SRC Act, as this section only applies to an employee's NWE figure.

Failed to accept, engage or continue in suitable employment

If an employee has failed to:

- accept an offer of suitable employment,
- engage in suitable employment after accepting an offer of suitable employment, or
- continue to engage in suitable employment which was commenced after they became incapacitated,

The employee's determined AE should be determined based on the amount the employee would have earned had they accepted, engaged or continued to engage in the offer of employment.

When determining whether an employee has failed to accept or engage in suitable employment, you should review the information on the claim file. The type of information that can be used to support a determined AE, could include:

- proof of an offer of suitable employment (in writing)
- details of the duties offered
- information from the employer on the employee's employment history (in writing), i.e. information of redundancy or resignation
- medical information indicating the employee was fit for the duties
- the employee's reasons for not participating in suitable employment
- any other relevant information.

Voluntary separation

An employee may choose to voluntarily separate from Commonwealth employment, i.e. resign or take a voluntary redundancy. Where an employee separates by choice and not due to their compensable condition, the employee may be considered to have failed to accept, engage or continue in suitable employment. You should consider determining the employee's AE figure based on the hours they were working prior to their separation from the Commonwealth.

You should also inform the employee of the potential consequences of voluntary separation from Commonwealth employment once you become aware it is being considered.

If an employee has not been offered suitable employment prior to their separation from Commonwealth employment, you are unable to determine an AE based on their failure to continue in employment. Where an employee has a capacity to work, you should encourage the employer to initiate a rehabilitation program, preferably with obligations for the employee to seek employment. If an employee fails to complete a rehabilitation program or fails to seek employment, you should consider determining AE in line with the relevant provisions under section 19(4) of the SRC Act.

Example 1: Failure to accept an offer of suitable employment

A 48-year-old ex-employee with a psychological injury is receiving total incapacity payments. The employee receives an offer to work as a builder's labourer which is determined to represent suitable employment based on the employee's age, location, skill set, qualifications and experience. The employee fails to accept the offer.

You obtain information from the prospective employer advising the employee would earn \$500 per week in the offered position. The employee's AE is determined to be \$500 per week from the date they would have started working.

Over the next five years the claim manager reviews the employee's AE figure and determines the employee's earnings would have increased had they continued in that offered employment and increases AE accordingly.

After five years the claim manager determines the offered position is no longer suitable employment due to the employee's advancing age and the physical nature of the position. The claim manager then re-assesses the employee's AE to determine whether the employee now has any ability to earn in suitable employment, or whether the amount of AE should be reduced to zero.

Example 2: Failure to continue to engage in suitable employment

A Commonwealth employee is certified unfit to work in their current workplace, however, they are capable of undertaking similar employment with a different Commonwealth employer at reduced hours.

The employee accepts an offer of suitable employment with another Commonwealth employer earning \$500 per week.

Six months later the employee resigns without providing a reasonable excuse. After reviewing the information the claim manager determines the employee has an ability to earn in suitable employment at \$500 per week.

Example 3: Voluntary separation and determining AE

An employee with a compensable condition accepts a voluntary redundancy from her Commonwealth employer. At the time of termination the employee is working 14 hours per week as an APS6 which is supported by medical information. The employee does not obtain new employment following her separation.

As the employee has been separated from the Commonwealth for a short period of time, it is not necessary to obtain additional information around their fitness and competency to engage in other suitable employment. The claim manager therefore calculates the employee's ability to earn figure based on the hours the employee was working prior to separation.

Example 4: Voluntary separation for an employee unfit to work for the Commonwealth

An employee with a psychological condition has been certified as unfit to work for their employer by their treating practitioner. The treating practitioner indicates that the employee may be fit to work for another employer. The employer offers the employee a voluntary redundancy, which they accept. As suitable employment was unable to be provided to the employee, Comcare is unable to determine an AE for the employee.

Comcare advises the employer upon the employee's separation that a rehabilitation program should be set up for the employee with obligations/responsibilities to job seek. If the employee fails to complete their rehabilitation program or fails to seek employment, Comcare will consider determining AE based on the available information.

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Failed to complete rehabilitation or vocational training program

If an employee is offered suitable employment on the condition they complete a rehabilitation or vocational training program, but they fail to complete the program, you should determine the employee's AE based on the amount the employee would have earned from the suitable employment.

When determining whether an employee has failed to complete a rehabilitation or vocational training program, you should review the information on the claim file. The type of information that can be used to support a determined AE, could include:

- information from the employer on the employee's employment history (in writing)
- information on the rehabilitation/vocational program, i.e. required activities, what is expected of the employee
- medical information indicating the employee was fit for the program
- the employee's reasons for not undertaking/completing the program
- any other information you consider relevant.

Example: Failed to complete rehabilitation or vocational training program

A totally incapacitated Commonwealth employee is referred for a rehabilitation assessment following which a rehabilitation plan is developed between the employer, employee and any workplace rehabilitation provider (WRP). The employer locates a suitable position for the employee earning \$900 a week in a different agency. Medical information confirms the employment is suitable.

One of the conditions of transfer is that the employee undertakes a vocational re-training program when he commences with the new agency. The employee refuses to undertake the program on the grounds that the WRP called him at home prior to his commencing work with the new agency and he considered that to be inappropriate. The new agency will not accept the employee without the program in place.

You determine the employee's excuse for failing to undertake the vocational re-training program is unreasonable and based on this determines the employee's ability to earn as \$900 per week.

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Failed to seek suitable employment

Ex-employees or non-ongoing employees who have a capacity for work have a responsibility to seek suitable employment when they have separated from employment with the Commonwealth. If the employee fails to seek suitable employment, you must take into account the amount per week the employee could reasonably earn in suitable employment, having regard to the state of the labour market at the time.

When determining whether an employee has failed to seek suitable employment, you should review the information on the claim file. The type of information that can be used to support a determined AE, could include:

- the employee's employment history from their employer (in writing), i.e., information the employee has been asked to job seek and support offered to job seek
- rehabilitation program, i.e., rehabilitation program outlining job seeking as a requirement and what is expected of the employee
- medical information indicating the employee was fit to job seek
- the employee's reasons for failing to seek employment
- any other information you consider relevant.

Note: If an employee has consistently tried but failed to obtain suitable employment, you should not determine their AE based on their failure to obtain suitable employment. AE can only be determined when an employee has failed to seek employment.

Example: Failed to seek suitable employment

An ex-employee is receiving total incapacity payments for a physical injury. The employee has completed a rehabilitation program and the medical information indicates they would be able to undertake employment as a clerical assistant for up to 20 hours per week. Positions have been identified; however, the employee has failed to attend any of the interviews made by the rehabilitation authority.

You arrange an assessment for the ex-employee with an Occupational Physician to confirm they remain fit to undertake work as a clerical assistant and, with assistance from a labour market expert, identifies a number of employment opportunities for part-time clerical assistants in the ex-employee's area.

The lowest salary is for a part time clerical assistant earning \$400 per week. The highest salary is for a part time executive assistant earning \$600 per week. Information from the labour market expert suggests there is a high unemployment rate for executive assistants. The claim manager determines the employee has an ability to earn of \$400 per week, based on the more readily available employment as a clerical assistant.

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Any other matter considered relevant

You can have regard to 'any other matter that Comcare considers relevant' when determining AE. This can include, but is not limited to volunteer work, and study.

Volunteering or studying may indicate the employee has an ability to engage in paid employment and you should investigate the employee's capacity to work further, having regard to the determining AE provisions.

Volunteer work and study

Where a partially or totally incapacitated employee is undertaking volunteer work and/or study, this may demonstrate that they have a greater ability for employment than they are currently undertaking. However, undertaking volunteer work or study does not necessarily mean that an employee has an ability to undertake suitable employment, and you will need to investigate the employee's capacity further before determining the employee's ability to earn.

You should contact the employee and request information regarding the type of volunteer work and the specific duties they are undertaking. If you want to obtain additional information from the volunteer agency, you should also request the

employee provide them with written authorisation.

Undertaking study may increase an employee's ability to undertake suitable duties and/or expand their skill set which may open up new fields of suitable employment. You should contact the employee and request further information around:

- the type of study they are undertaking
- how long they will be studying for
- the qualifications they will attain as a result of completing the study, and
- the number of hours per week they are engaged in study.

Any other matter

Any other matter' may also include the following:

- state of the labour market
- relocation by an employee to a new area
- unemployment rates
- compensable and non-compensable conditions, and
- childcare arrangements.

You will need to decide what factors may be influencing the employee's ability to undertake suitable employment and if they are reasonable in the circumstances.

Example: Study and ability to earn

An employee with a psychological injury provides information indicating they are currently studying for a social science degree involving 20 hours of study per week. You request a medical report from the employee's treating psychiatrist, seeking details of the employee's ability to work in paid employment, which might involve similar research and analysis as the degree. The psychiatrist states that the employee has the ability to study at home, at their own pace, with no workplace pressures to perform particular tasks. However, due to the employee's condition there would be significant restrictions on the employee's ability to engage in the same activities within a workplace.

In this instance, there would be insufficient information to determine the employee's ability to earn in employment which involved tasks equivalent to their study.

Reasonable excuse

Before determining an employee's AE, you must first consider whether the employee has a reasonable excuse for failing to accept, engage, complete or seek suitable employment. What is reasonable will vary and depend on the individual circumstances of each claim.

If an employee has failed to undertake suitable employment without a reasonable excuse, you should investigate the potential to base the employee's determined AE on what the employee would have been earning if they had undertaken the relevant suitable employment.

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Ability to earn and self-employment

Where an employee is self-employed, their AE should be determined based on their:

- ability to earn in suitable employment (often referred to as 'determined AE'), or
- actual earnings in any employment.

Actual earnings vs determined AE

In some circumstances, an employee will have both actual earnings and a determined AE from self-employment. You must take into account the greater amount when calculating the employee's incapacity payments.

The actual earnings for a self-employed employee will be the gross wages or salary the employee is receiving in their own business. The determined AE for a self-employed employee will be the wages, or salary, the employee would have received

in the same position if they were employed by another business, or, what someone undertaking the same duties would get paid.

For Commonwealth employees, suitable employment can only be Commonwealth employment. Therefore, self-employment cannot be suitable employment for Commonwealth employees and only their gross actual earnings from their self-employment (as opposed to their determined AE) can be taken into account.

Important: For a separated employee engaged in self-employment, it is important you consider the employee's gross actual earnings and their potential determined AE. Incapacity payments are not designed to support the start-up of a new business. Where an employee's wages or salary are below their capacity to work, you should consider whether a determined AE can be applied based on the employee's capacity to work.

Self-employment - small business

Where an ex-employee is the owner/operator of a small business that required minimal or no investment capital, their gross actual earnings/revenue may be the same as their determined AE. This could include businesses along the lines of, but not limited to:

- gardening
- rubbish removal
- handy-person jobs, and
- plumbing.

Example: An employee with a psychological injury starts their own rubbish removal business. As the employee already owns a truck their start-up costs for the business are minimal, as are the overhead costs associated with running a business.

The medical information indicates the employee is fit to undertake work as a rubbish removalist, and strongly recommends they continue to operate the business as being active is assisting their recovery.

You request copies of the employee's profit and loss statements and business tax returns, which indicate the employee is turning a profit of \$250 a week.

Based on the information available you determine the employee has an ability to earn of \$250 a week. You should then

create a diary on the employee's claim to remind you, or your successor to review the employee's ability to earn in 12 months' time, as the business will presumably be more stable and potentially more profitable.

Self-employment - medium to large business

Where a business required significant investment capital, the appropriate measure of an employee's AE is the salary or wages they would have received as an employee performing the same work.

Example: An employee suffering from a psychological injury separates from Commonwealth employment. They lease a farm and purchase goods and equipment associated with growing produce on the farm. The employee demonstrates a capacity to work 20 hours a week on the farm and a further 20 hours a week administratively managing the farm and business. The business recorded a loss for the last two financial years.

As the employee is actually working in their chosen career the CM determines the employee's ability to earn based on the hours and duties they are currently working.

Information on the state of the labour market for the last two financial years is obtained and the salary for a full-time farm manager is found to range between \$500 and \$600 a week. Taking into account the size of the business, the actual or realistic levels of employment in the region, national statistics indicating trends in employment and the employee's demonstrated capabilities, you determine the employee is able to earn approximately \$600 a week.

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Calculating an Ability to Earn figure

The process for determining an AE figure is outlined below:

1. Has the employee been offered suitable employment?

- if yes, continue
- if no, proceed to step 4.

An AE figure cannot be determined if employment has not been offered suitable employment.

2. Has the employee failed to undertake suitable employment?

- if yes, continue
- if no, end procedure.

Failure to undertake suitable employment includes:

- failure to accept an offer of suitable employment
- failure to engage or continue in suitable employment
- failure to complete a reasonable rehabilitation or vocational retraining program, or
- failure to seek suitable employment.

3. Did the employee provide a reasonable excuse for failing to undertake suitable employment?

- if yes, end procedure
- if no, continue.

An AE figure cannot be determined if an employee has a reasonable excuse for failing to undertake suitable employment.

4. **Determine the employee's determined AE figure.** Manually calculate the AE figure. AE can be calculated using the formula:

$$(\text{hours fit to work in one week}) \times (\text{hourly rate of pay for suitable employment}) = \text{AE}.$$

5. **Consider whether the employee has actual earnings from employment (including earnings from employment outside of the Commonwealth).** The greater of the two amounts (determined AE or actual earnings) should be used as the AE figure when determining the weekly rate payable.

6. **Phone the employee.** Your conversation should include:

- your intention to determine an AE figure
- the AE figure
- the reasons for the amount, i.e. what they are actually earning or their determined AE
- that the employee has 14 days to provide a reasonable excuse for failing to undertake suitable employment.

7. Email or send a letter to the employee. Your email/letter should include:

- your intention to determine an AE figure
- the AE figure
- the reasons for the amount, i.e. what they are actually earning or their determined AE
- that the employee has 14 days to provide a reasonable excuse for failing to undertake suitable employment.

8. Create an action plan in Pracsys. Go to '*Manage Action Plan*' (MAP) and create an action plan to check whether a reasonable excuse was provided within 14 days.

9. Was a reasonable excuse provided?

- if yes, end procedure.
- if no, draft your determination for quality assurance (QA) and decision-making by the delegate; and
- following QA and decision-making by the delegate finalise the determination.

10. Where relevant, phone the employee. Your conversation should include:

- where an excuse was provided, why was it 'not reasonable'
- that you will be determining they have an AE
- the AE figure
- the reasons for the amount
- the effective date.

11. Send a letter to the employee and rehabilitation case manager (RCM) providing a clear and concise explanation of your determination. Ensure your letter includes information to support your AE calculations, the AE figure, the effective date and copies of any other information referred in the determination.

12. Email the Income Support team. Email a copy of your letter to the [Income Support team](#) for implementation. The Income Support team will enter the AE figure and effective date into Pracsys.

