Superannuation

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Introduction to superannuation

An employee who receives a pension and/or lump sum under a superannuation scheme as a result of their retirement, must have their incapacity payments determined as per Sections 20, 21 or 21A of the SRC Act. This scenario is also relevant to some AAT Implementation matters.

Confirmation if an employee has access to super benefits for any period that they are entitled to incapacity payment must be obtained. Once a completed Authority and consent for the release of superannuation information form from the employee is received, CAIS is able to request confirmation from the superannuation fund.

Retired and received

An employee must be both retired and be receiving a superannuation benefit as a result of that retirement to satisfy the superannuation provisions of the SRC Act.

Meaning of 'retired'

The SRC Act does not define retired or retirement. Generally, retirement is linked to eligibility to receive the age pension or to access superannuation. In the context of the SRC Act, retirement includes any separation from Commonwealth employment, if that separation results in the employee receiving a superannuation benefit.

Superannuation schemes also take a broad view of retired and retirement. For superannuation benefits to become payable, retirement generally means that the retiree does not intend to become gainfully employed in the future. As a guide, gainful employment is considered to be more than 10 hours a week.

Retirement can therefore include, but is not limited to:

- voluntary or involuntary redundancy
- age retirement
- resignation
- dismissal
- retirement on the grounds of inefficiency, or
- retirement due to ill health/invalidity retirement.

An employee can retire at any age, however, most employees cannot access superannuation benefits until they have reached their preservation age.

Meaning of 'received'

Comcare will consider an employee has received their superannuation amount if they have retired from Commonwealth employment and:

- accessed their superannuation, or
- reached their minimum preservation age and rolled over their superannuation benefits to another fund (whether or not by election).

When an employee receives any employer-financed superannuation benefits, Comcare will take the employer-financed amount into account when calculating an employee's ongoing incapacity payments.

For an employee who has reached preservation age, 'rolling over' a superannuation amount demonstrates an 'unequivocal power of disposition' over that amount because the employee has notionally received the superannuation amount and chosen to roll it over [see: to *Archer v Comcare (2000)*]. As a result, when calculating an employee's incapacity payments, the superannuation amount must be taken into account even though the employee does not have access to the funds in the ordinary sense.

If an employee receives a superannuation pension or lump sum prior to undertaking Commonwealth employment, Comcare cannot take this superannuation into account when determining incapacity payments.

Meaning of 'each week after the date of retirement'

For an employee who is retired and has received their superannuation, the SRC Act provides that compensation is payable under the superannuation provisions for 'each week after the date of the retirement during which the employee is incapacitated.' This is taken to apply from the week the employee is both retired and in receipt of their superannuation benefit.

Example: An incapacitated employee separates (retires) from employment in March 2012. The employee reaches preservation age in November 2012 and decides to access their superannuation benefit. Although the employee accessed their superannuation a significant amount of time after they 'retired,' their incapacity payments will be calculated under the superannuation provisions (sections 20, 21 or 21A) from the date they actually received their superannuation in November 2012. The provision will not be backdated to when the employee was considered 'retired'.

This example can be distinguished from the case of *Webley and Telstra (2003)* in which the employee retired but it took over 12 months to organise the superannuation benefits which were eventually paid to the employee with effect from the original retirement date. In this case, the provisions of section 20, 21, 21A apply from the original retirement date.

Deferred/preserved superannuation benefits

Superannuation benefits that have been deferred or preserved in an existing superannuation fund have not been 'received' for the purposes of the SRC Act. Deferred/preserved benefits should not be taken into account when calculating an employee's incapacity entitlements [see *Dunstan v Comcare (2014*].

What superannuation is taken into account?

An employee's superannuation benefit is made up of a number of components. When calculating an employee's incapacity payments under the superannuation provisions of the SRC Act, Comcare only takes into account the employer-financed component of the superannuation benefit. Section 4(1) of the SRC Act defines 'superannuation amount'. Personal or employee-financed contributions are not taken into account.

Note: In situations where an employee's superannuation has been split following a divorce/separation arrangement, Comcare will only take into account the employer-financed superannuation amount the employee actually receives.

Productivity benefit

In some cases, a Productivity Benefit may form a separate part of the employer-financed contribution. Generally, the productivity benefit cannot be accessed by employees until they reach preservation age (except in certain defined circumstances). In cases where the productivity amount must be compulsorily preserved until preservation age, it cannot be taken into consideration where calculating an employee's incapacity benefits prior to preservation age.

When an employee reaches preservation age, irrespective of whether an employee chooses to defer or roll over the productivity benefit, the benefit must be added to any existing superannuation amount and taken into account when calculating an employee's incapacity benefits under section 20, 21 or 21A of the SRC Act.

Superannuation 'insurance' amounts

An insurance benefit is sometimes paid by a superannuation fund to, or on behalf of, an employee in the event of death or disability, commonly referred to as a 'TPD' payment or 'Total and Permanent Disability' payment. The TPD insurance benefit is considered an integral feature of many superannuation funds and provides benefits for those employees who have retired totally and permanently from their employment due to disability or ill health.

The insurance arrangement is usually funded by premiums paid by the superannuation fund to an insurer. Effectively, there is an amount taken each month from fund members' superannuation accounts to fund the insurance cover.

If a triggering event occurs such as an employee retiring due to ill health and an insurance amount (TPD) becomes payable, upon exiting the superannuation scheme, the 'insurance' lump sum the superannuation fund trustee receives from their insurer is credited to the employee's superannuation account and paid to the employee. This brings the insurance amount within the definition of a lump sum for the purposes of section 21(1)(b) of the SRC Act. Please note that the gross amount of the TPD is considered in incapacity calculations.

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Calculating the superannuation amount

The superannuation amount is defined in section 4 of the SRC Act as an amount equal to:

1. the amount the employee's superannuation scheme identifies as employer-financed contributions
2. if the superannuation scheme cannot identify the employer's contributions, the amount Comcare assesses to be attributable to employer contributions, or
3. if Comcare cannot assess an amount to be attributable to the employer's contributions, the entire amount an employee receives is taken into account.

Where the employee is a member of an accumulation style superannuation scheme, such as PSSap, option 2 is commonly used. That is, Comcare would estimate the amount attributable to that part of the benefit funded by employer contributions.

When estimating a superannuation amount under option 2, the preferred method would be to ascertain from the superannuation fund the raw contribution figures going into the employee's superannuation account from both the employer and the employee and apportion employer and employee contributions based on the raw figures (i.e. without interest, fees, charges etc. applied).

Example: if the fund states that the employer's raw contributions into the member's account totals $100,000 and, in addition to this, the employee's raw contributions are $20,000, Comcare can estimate with reasonable accuracy that 83.3 per cent of the benefit (including any insurance/TPD payout) is employer-financed and proceed from there.

If for some reason there is no way of calculating the employer-financed component, it is open to Comcare to consider all of the benefits as being employer-financed (i.e. option 3).

In some cases, particularly for defined benefit schemes, the superannuation fund is able to provide details of the employer-financed amount to Comcare upon request. It is only when the superannuation scheme cannot identify the employer-financed amount that Comcare will use options (2) or (3).

In the unlikely event an employee is receiving a total permanent disability benefit and there was no employer contribution to the benefit, this should not be considered as earnings from employment under section 19(2) or a superannuation amount under section 4(1), 20, 21 and21A of the SRC Act. As such, the benefit should not be taken into account when determining an employee's incapacity entitlements.

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Employees on Xpay

Generally, employees on Xpay have separated from Commonwealth employment. As Comcare is not their employer, Comcare is not required to make contributions to their superannuation fund.

An employee is able to make their own employee-financed (personal) contributions to their superannuation fund. These contributions must be non-concessional (after-tax) contributions. Comcare does not have the mechanisms available to make concessional (before-tax) contributions to an employee's superannuation fund.

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Accessing superannuation

As superannuation is money invested for a person's retirement, strict government rules prevent early access to preserved benefits except in very limited and restricted circumstances, such as:

- permanent departure from Australia
- severe financial hardship
- serious illness or surgery, or
- compassionate grounds.

Generally, eligibility for access to superannuation benefits depends on an employee's preservation age. 'Preservation age' refers to the minimum age a person can draw on their superannuation benefits based on their date of birth. Most of the grounds under which early access is permitted are administered by the superannuation funds and are subject to strict legal criteria.

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Calculating payments under section 20, 21 or 21A of the SRC Act

An employee who is retired from Commonwealth employment and receives a superannuation amount by way of a pension and/or lump sum under a superannuation scheme must have their incapacity payments determined in accordance with section 20, 21 or 21A of the SRC Act.

The formula used to determine the amount of compensation payable will depend on:

a) when the employee had retired and was in receipt of their superannuation and

b) if the period of incapacity is before or after 27 April 2007.

The reason for this is the *Safety, Rehabilitation, Compensation and Other Legislation Amendment Act 2007* (SRCOLA 2007) changed the formula used to calculate incapacity determined under section 20, 21 and 21A of the SRC Act.

This was to ensure that an employee's superannuation benefits would always be considered, regardless of whether an employee was incapacitated or not on the date they retired.

Employees retired before 27 April 2007 (Pre-SRCOLA) with a period of incapacity on or after 27 April 2007

If an employee is retired and in receipt of their superannuation before 27 April 2007, the following formulas apply:

If the employee is receiving a...	Then use formula...
Pension (section 20)	AC - (SA + SC)
Lump sum (section 21)	AC - (WI + SC)
Pension and lump sum (section 21A)	AC - (SA + WI + SC)

Note: Definitions for the formulas are outlined below.

Employees retired before 27 April 2007 (Pre-SRCOLA) with a period of incapacity before 27 April 2007

If an employee is retired, in receipt of their superannuation and claiming incapacity for a period before 27 April 2007, the following formulas apply:

If the employee is receiving a...	Then use formula...
Pension (section 20)	AC - (SA + SC)
Lump sum (section 21)	AC - (Lump Sum/520 + SC)
Pension and lump sum (section 21A)	AC - (SA + Lump sum/520 + SC)

Note: Definitions for the formulas are outlined below

Employees retired on or after 27 April, with a period of incapacity on or after April

If an employee is retired and in receipt of their superannuation after the 27 April 2007, the following formulas apply:

If the employee is receiving a...	Then use formula...
Pension (section 20)	AC - (SA + 5% of NWE)
Lump sum (section 21)	AC - (WI + 5% of NWE)
Pension and lump sum (section 21A)	AC - (SA + WI + 5% of NWE)

Note: Definitions for the formulas are outlined below.

Definitions:

Amount of compensation (AC)

Amount of compensation is based on the amount that an employee would otherwise be entitled to receive at the time of retirement under section 19(3) of the SRC Act, regardless of whether the employee has reached 45 weeks of incapacity or not.

Superannuation amount (SA)

The superannuation is defined in section 4 of the SRC Act (**see**: Calculating the superannuation amount).

Weekly interest on the lump sum (WI)

The formulas for section 21 and s21A provide for an amount to be deducted known as the 'weekly interest on the lump sum'. This part of the formula provides the mechanism to convert an employer-financed superannuation lump sum amount into a weekly amount.

Once the employer-financed amount of the superannuation lump sum is established, an interest rate as specified by the Minister is applied to the lump sum in order to convert the lump sum into a weekly amount. The interest rate specified by the Minister commences on 1 July each year and is available here.

The rationale behind the interest rate being applied to the lump sum is that it represents the notional amount of interest that the employee would be considered able to earn if their lump sum was invested.

Note: Once the superannuation lump sum figure is initially established, the lump sum figure remains 'frozen' and the weekly lump sum amount to be deducted will only be varied by the interest rate on 1 July each year.

Reduction of compensation amount by five per cent of the employee's normal weekly earnings

Refers to the reduction of the employee's compensation amount by five per cent of the employee's normal weekly earnings (i.e. the total NWE, not just the base salary NWE). This part of the formula ensures that the combined workers' compensation and superannuation weekly amount cannot exceed 70 per cent of the retired employee's normal weekly earnings, as originally intended by the legislation.

Superannuation Contribution (SC)

The 'SC' or 'superannuation contribution' amount is an amount equivalent to the minimum contribution amount required by a superannuation fund. As there are numerous superannuation funds with different contribution rules, the percentage contribution rate of an employee would commonly range anywhere between 0% and 10%.

The SC amount is adjusted each year with reference to the NWE that applied on their birthday that year.

The SC amount is only applied to those with a retirement date prior to 27 April 2007.

The Claim Administrative and Income Support (CAIS) – Assessment Team is responsible for calculating and determining an employee's incapacity payments.

Any changes, questions or issues with an employee's incapacity payments should be raised with the Assessment Team.

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Preservation age

Generally, employees cannot access their superannuation benefits until they reach preservation age. 'Preservation age' refers to the minimum age a person can access their superannuation based on their date of birth.

Employee date of birth	Minimum age for accessing superannuation

Employee date of birth	Minimum age for accessing superannuation
After June 1964	60
1 July 1963 - 30 June 1964	59
1 July 1962 - 30 June 1963	58
1 July 1961 - 30 June 1962	57
1 July 1960 - 30 June 1961	56
Before 1 July 1960	55

Conditions of release

Conditions of release are the circumstances an employee needs to satisfy in order to access their superannuation benefits. The conditions of release may be different according to an employee's superannuation fund, but the most common conditions of release include:

- **retirement** - employees can access their superannuation benefits when they have reached preservation age and retired from employment. A retired employee cannot access their superannuation if they have not reached preservation age. Actual retirement will depend on the employee's age and their future employment intentions.
- **transition to retirement (attaining preservation age)** - employees who are under age 65 and have reached preservation age, but remain gainfully employed, may access their benefits as a non-commutable income stream. Superannuation accessed through a transition to retirement arrangement cannot be taken into account when calculating incapacity payments unless the employee is also retired.
- **attaining age 65** - an employee who reaches age 65 can access their superannuation benefits at any time, regardless of whether they have retired from employment or not.

Accessing superannuation prior to preservation age

For incapacity purposes, if an employee accesses their superannuation benefit prior to reaching preservation age, Comcare would need to consider whether the employee was:

- retired
- receiving superannuation, and
- in receipt of superannuation as a result of that retirement.

In most circumstances, early superannuation access is unlikely to meet all the criteria outlined above.

For example:

- an employee might be retired and receiving superannuation but the superannuation benefit was not received as a result of the retirement but due to financial hardship, or
- an employee may still be working but receiving superannuation on compassionate grounds.

Generally, superannuation benefits received prior to preservation age due to the circumstances listed above are unlikely to be taken into account under the superannuation provisions of the SRC Act.

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