Defence Determination 2014/55, Reserve employer support payments – amendment

I, STUART ROBERT, Assistant Minister for Defence, make this Determination under section 58B of the Defence Act 1903.

Dated 25 November 2014

[Signature]

Assistant Minister for Defence

Ref958
1 Citation

1. This Determination is Defence Determination 2014/55, Reserve employer support payments – amendment.

2. This Determination may also be cited as Defence Determination 2014/55.

2 Commencement

This Determination commences on 1 December 2014.

3 Amendment

Defence Determination 2012/68, Reserve employer support payments, as amended,¹ is amended as set out in this Determination.

4 Part 1 (Preliminary)

before Part 1, insert the table of contents in the Schedule

5 Subsection 3.1 (Repeal, saving and transitional)

omit

(Employer Support)

insert

(Employer Support Payments)

6 Subsection 3.3 (Repeal, saving and transitional)

omit

or contribution

7 Subsection 3.3.a (Repeal, saving and transitional)

omit

or incur an obligation in relation to a contribution for the corresponding allowance or reimbursement
8 Application and transitional

insert after section 3

3A Application and transitional – amendments commencing 1 December 2014

3A.1. In relation to a person who provided defence service before 1 December 2014, the amendments made by Defence Determination 2014/55, Reserve employer support payments – amendment, apply only to claims to which both the following circumstances apply:

a. The claim is made on or after 1 December 2014.

b. The claim relates to a period of defence service that starts on or after 1 December 2014.

3A.2. If a claim deals with multiple periods of defence service, any period of service which commenced prior to 1 December 2014 must be decided under the rules as they were in place prior to the commencement of Defence Determination 2014/55.

3A.3. Despite subsections 1 and 2:

a. Administrative decisions currently in place relevant to a claim can continue to be relied upon until a fresh decision is required or made under the Determination as amended.

b. If a claim was made before 1 December 2014 and notice of the decision on the claim was not received by the claimant before that date, or notice of the decision on the claim was received by the claimant after 31 October 2014 and before 1 December 2014, sections 56, 57 and 58, as in force on or after 1 December 2014, apply in relation to the decision, and to later decisions made in relation to the claim.

c. If a claim is made on or after 1 December 2014 and the claim relates to a period, or periods, of defence service that started before that date (whether or not the claim also relates to a period, or periods, of service that started on or after that date), sections 56, 57 and 58, as amended by Defence Determination 2014/55, apply in relation to the claim.

4. To avoid doubt, the amendments made by Defence Determination 2014/55 apply to a person who first provides defence service on or after 1 December 2014.

9 Section 4 (Definitions), definition of AWOTE

after the definition of AWOTE, insert

<table>
<thead>
<tr>
<th>business</th>
<th>includes a sole trader business, a company, a partnership and a trust, as relevant to a claim.</th>
</tr>
</thead>
<tbody>
<tr>
<td>claimant</td>
<td>includes an employer and a self-employed member, as relevant to a claim.</td>
</tr>
</tbody>
</table>
10 Section 4 (Definitions), definition of member

*omit first occurring*

as

*insert*

has

11 Section 5 (Decision-makers)

*substitute*

5.1 A decision that is required to be made for the purpose of this Determination may be made by a Service Chief in the Service to which a claim relates, or a delegate of the Service Chief.

**Exception:** The power to approve a class of claims under section 46 cannot be delegated.

**See:** Section 46, Approval of cost effectiveness for classes of claims

5.2 A Service Chief may make any decision under subsections 56.5 or 56.6 and section 56A and may only delegate those powers to:

a. An officer at or above the rank of Brigadier (or equivalent rank).

b. An Australian Public Service employee at or above the classification of Senior Executive Service Band 1.

**Notes:**

1. A Service Chief or their delegate, exercising power vested in them under subsection 2 is sometimes called a *senior review officer* in this Determination.

2. The power to review a decision includes the power to make a decision on that subject in accordance with the review provision. An additional delegation of the power to the senior review officer under subsection 5.3 is not required.

**Related Information:** Part 5 Review

5.3 The Service Chief may delegate any of their other powers under this Determination, except the power to approve a class of claims, to:

a. An officer at or above the rank of Lieutenant-Colonel (or equivalent rank).

b. An Australian Public Service employee at or above the classification of Executive Level 1.

**See:** Section 47 provides that a claimant must be notified in writing of a decision to refuse a claim made under this Determination.

5.4 The Service Chief may give written directions about how a delegation made under this section is to be exercised.

5A Decision-making

5A.1 A decision-maker may refer a claim to the Director Employer Support Payment Scheme for advice on any matter relating to the claim.
5A.2 A decision-maker must not act to decide any matter relating to a claim if they have an interest in the employing body or related entity.

**Related Information:** Defence Instruction (General) 25-6, Conflicts of interest and declarations of interests.

5A.3 A claimant must be notified in writing of a decision made under this Determination. If a claim is not approved this must include any reasons for refusing the claim.

12 **Subsection 8.1 (Hobbies and volunteers)**

*at the end of subsection 8.1, insert*

**Note:** Whether a person is conducting a hobby or volunteering may be determined by looking at the continuous period of at least 26 weeks that occurred immediately before the period of absence on Defence service to which a claim relates, or over another relevant period mentioned in section 16.

**See:** Section 16, Working hours each week in employment

13 **Subsection 12.2 (Conditions for self-employment)**

*substitute*

12.2 A member who has any of the roles or interests in an entity or natural person detailed in subsection 12.1 may only receive employer support payments in relation to employment by that entity or natural person as a **self-employed member**. If the member does not meet the requirements of Division 2 of Part 2 to be a self-employed member, the member is not eligible to receive employer support payments.

12.3 For a member to be self-employed, the member's business must meet both of the following conditions.

a. It provides the member's principal source of income or the member's principal source of employment.

b. For at least the previous 12 months, it also provided the member's principal source of income or principal source of employment.

**See:**
Division 5: Principal Source of Income
Division 6: Principal Source of Employment and Section 39, Limit on claims relating to self-employment

14 **Section 12 (Conditions for self-employment)**

*after section 12, insert*

12A **Payment to self-employed member**

A payment to a self-employed member is made to the member in that member's capacity as an employer, for and on behalf of the business.
15  Paragraph 14.2.b (Work that is not employment for this Determination)

Substitute

a. Casual work, being employment on an irregular and unreliable basis.

Example: An employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 3 months. Although the employment is not described as permanent part-time, there is a pattern of regular shifts which is expected to continue. The employment is not treated as casual for the purpose of eligibility to make a claim.

16  Paragraph 14.2.c (Work that is not employment for this Determination)

Renumber the paragraph as 14.2.b

17  Subsection 16.2 (Working hours each week in employment), table item 3

Substitute

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
</table>
|3. | Work out the number of days of absence when the member was on Defence leave, up to a maximum of 4 weeks. These are days when the member was granted leave (however described), whether paid or unpaid, in order to undertake Defence service.

Note: If the member took more than the maximum of absence, that period of the absence is not excluded

18  Subsection 16.2 (Working hours each week in employment)

Insert at the end

Note: It is up to a decision-maker to test and evaluate evidence relating to a member’s working hours. A decision-maker may accept or reject evidence when it comes to making findings.

19  Subsection 16.3 (Working hours each week in employment), table item 5, subparagraph a.i

Substitute

1. ended no more than 2 years before the start of a period of absence on Defence service to which a claim relates; and
20 **Subsection 16.4 (Working hours each week in employment)**

*omit*

21 **Subsection 16.5 (Working hours each week in employment)**

*omit*

The member’s employer

*insert*

A claimant

22 **Subsection 16.6 (Working hours each week in employment)**

*omit*

employer

*insert*

claimant

23 **Subsection 17.2 (Full-time or part-time work), table**

*substitute*

<table>
<thead>
<tr>
<th>Item</th>
<th>If the member is employed to work for...</th>
<th>and the number of hours the member is employed to work for is, in relation to the workplace instrument...</th>
<th>and the member’s normal working hours for the period of defence service claimed are...</th>
<th>the member’s employment is taken to be...</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>at least 35 hours per week</td>
<td>not specified as the full-time hours each week for that work</td>
<td>at least 28 hours each week</td>
<td>full-time work.</td>
</tr>
<tr>
<td>2.</td>
<td>at least 35 hours per week</td>
<td>specified as the full-time hours each week for that work</td>
<td>at least 28 hours each week</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>less than 35 hours per week</td>
<td>specified as the full-time hours each week for that work</td>
<td>at least 80% of the number of hours specified as full-time work hours</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>less than 35 hours per week</td>
<td>not specified as full-time hours</td>
<td>at least 35 hours each week</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>at least 35 hours per week</td>
<td>specified as the full-time hours each week for that work</td>
<td>less than 28 hours each week</td>
<td>part-time work.</td>
</tr>
<tr>
<td>6.</td>
<td>less than 35 hours per week</td>
<td>specified as full-time hours</td>
<td>less than 80% of the number of hours specified as full-time work hours</td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>less than 35 hours per week</td>
<td>not specified as full-time hours</td>
<td>less than 35 hours each week</td>
<td></td>
</tr>
</tbody>
</table>
24  **Section 18 (Change in working hours)**

*omit*

an employer must notify a change in the working hours of the employee

*insert*

a claimant must notify a change in the working hours of the employee (this may be a self-employed member)

25  **Division 5 of Part 2 (Income), title only**

*substitute*

**Division 5: Principal source of income**

26  **Subsection 19.1 (What income includes)**

*substitute*

19.1  Income is the amount received by a member (in the form of earnings, moneys or profits) for the member's own use or benefit.

27  **Section 20 (When income is earned), title only**

*omit*

earned

*insert*

received

28  **Subsection 20.1 (When income is received)**

*omit*

earns, derives or

29  **Subsection 20.2 (When income is received)**

*omit*

If the member earns, derives or receives the amount from the sale of stocks or assets, the amount is only income if

*insert*

If the member receives the amount from the sale of stocks or assets, the amount is only income received from the business if
30 Subsection 20.2 (When income is received), example
   after
   as part of the member’s income
   insert
   from the business

31 Paragraph 20.3.a (When income is received)
   after
   An amount is income
   insert
   from the business

32 Subsection 20.4 (When income is received)
   after
   is the member's income
   insert
   from the trust

33 Subsection 20.5 (When income is received)
   after
   is only the member's income
   insert
   from the partnership

34 Subsection 20.6 (When income is received)
   after
   is only the member's income
   insert
   from the business
35 Subsection 21.1 (Evidence of principal source of income), table

omit

ABN

insert

Australian Business Number

36 Subsection 21.1 (Evidence of principal source of income), table reason 2

substitute

<table>
<thead>
<tr>
<th>Reason 2</th>
<th>Documents and information about whether the business or company is trading or otherwise operating</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>At least one of the following:</td>
</tr>
<tr>
<td></td>
<td>2.1 a copy of the current Business Activity Statement for the business or company;</td>
</tr>
<tr>
<td></td>
<td>2.2 a copy of a current financial statement for the business or company, certified by the</td>
</tr>
<tr>
<td></td>
<td>accountant or financial adviser for the business or company to be accurate;</td>
</tr>
<tr>
<td></td>
<td>2.3 if the member is a sole trader:</td>
</tr>
<tr>
<td></td>
<td>2.3.1 the member’s current tax return, including business and professional items in the</td>
</tr>
<tr>
<td></td>
<td>Supplementary section; and</td>
</tr>
<tr>
<td></td>
<td>2.3.2 the notice of assessment in relation to the member’s current tax return (which</td>
</tr>
<tr>
<td></td>
<td>must be given as soon as practicable after it has been issued by the Commissioner of</td>
</tr>
<tr>
<td></td>
<td>Taxation);</td>
</tr>
<tr>
<td></td>
<td>2.4 if the member is not a sole trader—the current tax return of the business or company;</td>
</tr>
<tr>
<td></td>
<td>2.5 other relevant evidence from an accountant or financial adviser for the business or</td>
</tr>
<tr>
<td></td>
<td>company, certified by the accountant or financial adviser to be accurate</td>
</tr>
</tbody>
</table>

37 Subsection 21.1 (Evidence of principal source of income), table reason 3

omit

6 months

insert

12 months
38 Subsection 21.2 (Evidence of principal source of income)

substitute

21.2 The decision maker must reduce the income from a business or company for a self-employed member over any period by any amount of employer support payment that was paid to the member over the period, unless satisfied of any of the following matters.

a. There is documentary evidence that the amount was used to address a loss or shortcoming directly caused by the absence of the member on defence service.

b. Ownership or control of the business or company is shared by the member with another person or persons and there is documentary evidence that the share of the employer support payment was received by that person or persons and not, either directly or indirectly, by the member.

c. It is reasonable to count the income, having regard to the outcome under this Determination.

Note: Any decision made under this subsection must be notified to the claimant in the reasons for decision on the claim.

Example: The member has receipts to show that the amount of the employer support payment was used to pay a locum who filled the member's place in the business for the period of the absence.

39 Subsection 21.3 (Evidence of principal source of income)

substitute

21.3 A document or information mentioned under item 3.1, 3.2 or 3.3 of the table in subsection 1 may be used for a part of a year, with the following effects on calculations.

a. Calculations made in support of a claim using the document or information must be made on a proportional basis, by reference to a financial statement or income tax return mentioned in items 3.1 or 3.2.

b. If no financial statement or income tax return mentioned in items 3.1 or 3.2 of the table is available, calculations that are made using the document or information must be made on a proportional basis using the same methods and principles that are intended to be used in preparing the member’s income tax return for the income year in which the defence service was undertaken.

c. The decision-maker may approve or reject a submission from the member to use, in support of a claim, a statement that is not calculated on a proportional basis or that was prepared using methods or principles other than those mentioned in paragraph b.

21.4 If a self-employed member wishes to continue to rely on evidence of principal source of income, the member must provide updated evidence, as detailed in subsection 1, 2 years after the period covered by the previous evidence.

Example: The member has provided principal source of income evidence covering the period 1 July 2013 to 30 June 2014. This can be relied upon for service between 30 June 2014 and 30 June 2016. For service after 30 June 2016 to be eligible for an employer support payment, updated principal source of income evidence would be required.
21.5 A decision-maker may treat evidence of principal source of income provided by a self-employed member as not being current, if the information contained in it was last up-to-date more than 3 months before the service to which the claim relates, and may require the member provide up to date information.

**Example:** The member has submitted a claim, with supporting principal source of income evidence, for service in November 2014. The principal source of income evidence covers the period 1 July 2013 to 30 June 2014. As this period finishes more than 3 months before the service, the decision-maker may accept the evidence or may require more up to date information be provided.

21.6 If a self-employed member relies on a document or information mentioned under item 3.3 of the table in subsection 1, the member must provide both of the following documents as substantiation, in the timeframes described.

a. The member’s tax return must be provided as soon as practicable.

b. The notice of assessment in relation to the member’s tax return must be provided as soon as practicable after it has been issued by the Commissioner of Taxation.

21.7 If the member fails to respond to a requirement to substantiate evidence within a specified period or provides a response that does not, in the opinion of the decision maker, wholly substantiate the evidence; then the decision maker may:

a. if the claim has not already been paid:
   
   i. pay so much of the claim as he or she considers reasonable; or
   
   ii. reject the claim.

b. if the claim has been paid:
   
   i. require repayment of so much of the claim as he or she considers reasonable; or
   
   ii. require full repayment of the claim amount as a debt owing to the Commonwealth.

**See:** Rule 11, *Public Governance, Performance and Accountability Rule 2014*.

**40 Section 21 (Evidence of principal source of income)**

*after section 21, insert*

**Division 6: Principal Source of Employment**
21A Evidence of principal source of employment

21A.1 A self-employed member must provide the information described in the table with their first claim seeking approval under the principal source of employment provisions:

<table>
<thead>
<tr>
<th>Item</th>
<th>Member must provide evidence...</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>that the business is bona fide.</td>
</tr>
<tr>
<td>2.</td>
<td>that the business is operating, including documentary evidence of quotes, invoices or similar business records over the previous 12 months.</td>
</tr>
<tr>
<td>3.</td>
<td>that the business provides the member’s principal source of employment.</td>
</tr>
<tr>
<td>4.</td>
<td>that the business has provided the member’s principal source of employment for at least the previous 12 months.</td>
</tr>
<tr>
<td>5.</td>
<td>of the member’s normal weekly hours of work in the business.</td>
</tr>
</tbody>
</table>

21A.2 A self-employed member’s evidence that they meet the principal source of employment provisions may only be relied upon to approve claims for up to a maximum total period of 2 years, unless exceptional circumstances apply.

**Example:** A self-employed member may be approved as meeting the principal source of employment provisions over a two year period from 1 July 2014 to 30 June 2016. The member may only receive a further approval for ESPS payments under the principal source of employment provisions if exceptional circumstances apply. This is because the principal source of employment test is meant to help a claimant provide evidence to support their claim at the start of their time in the business. For longer term claims, the member would reasonably be expected to show that they meet the principal source of income test, as they would have had time for the business to become their principal source of income.

**Note:** Approval that a self-employed member meets the principal source of employment provisions over a specified period does not guarantee approval of the member’s claims over that period. For approval of a claim, the member will also need to satisfy the cost-effectiveness requirement and other provisions of this Determination.

**See:** Section 36, Cost effectiveness

21A.3 A decision-maker may determine that exceptional circumstances apply and approve ESPS payments beyond the 2 year limit.

**Example:** The member’s business is affected by a major external disaster (such as flood, bushfire or drought) that prevents the business providing the member’s principal source of income over an extended period.

21A.4 If a decision-maker determines that exceptional circumstances apply, the self-employed member must provide updated evidence, as detailed in subsection 1, 2 years after the period covered by the previous evidence.

21A.5 An approval under the principal source of employment provisions made before 1 December 2014 is not taken to be an approval for the purposes of subsection 21A.2.
Section 22 (Overview)

The following overview sets out some actions that could be used to assist in working out eligibility for employer support payment.

<table>
<thead>
<tr>
<th>Step</th>
<th>For a self-employed member</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Consider cost-effectiveness (must be determined before the service is undertaken).</td>
</tr>
<tr>
<td>2.</td>
<td>Check whether the member meets the conditions for self-employment, including either the principal source of income test or the principal source of employment test.</td>
</tr>
<tr>
<td>3.</td>
<td>Work out the member’s normal hours of work and assess whether the employment is full-time or part-time.</td>
</tr>
<tr>
<td>4.</td>
<td>Check whether the member has met the qualifying period for a Defence absence.</td>
</tr>
<tr>
<td>5.</td>
<td>Work out the period of eligible service the member performs.</td>
</tr>
<tr>
<td>6.</td>
<td>Work out the amount of employer support payment payable to the member.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Step</th>
<th>For any other kind of employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Consider cost-effectiveness (must be determined before the service is undertaken).</td>
</tr>
<tr>
<td>2.</td>
<td>Check whether the member is employed by the employer.</td>
</tr>
<tr>
<td>3.</td>
<td>Work out the employee’s normal hours of work and assess whether their employment is full-time or part-time.</td>
</tr>
<tr>
<td>4.</td>
<td>Check whether the member has met the qualifying period for a Defence absence.</td>
</tr>
<tr>
<td>5.</td>
<td>Work out the period of eligible service the member performs.</td>
</tr>
<tr>
<td>6.</td>
<td>Work out the amount of employer support payment payable to the employer.</td>
</tr>
</tbody>
</table>

Section 23 (Qualifying period (was 4(1), (1BA, 1BB)), title only

omit

(was 4(1), (1BA,1BB))

Subsection 23.2 (Qualifying period)

omit

For their employer

insert

For a claimant
44 Paragraph 23.2.c (Qualifying period)

substitute

c. The member’s service meets the cost-effectiveness requirements detailed in section 36.
d. Paragraphs a, b and c are met for a total of 2 weeks of eligible defence service in a financial year

Note: This applies whether the member is a self-employed member or a member who is employed by an employer claimant.

45 Subsection 25.2 (Qualifying period – continuous Defence service across financial years), note

omit

46 Subsection 25.2 (Qualifying period – continuous Defence service across financial years)

insert at the end

25.3 If the qualifying period is completed in the first year, then the portion of the period of continuous Defence service that is provided in the second year is taken to be service in the second year. After the completion of this service, the member must complete a new qualifying period for the second year before a claimant is entitled to any employer support payment for any further service in the second year.

47 Section 26 (Qualifying period if illness or injury results from Defence service)

omit

meets the test of material contribution

insert

is accepted as a service injury or service disease in accordance with the definitions of those terms

48 Subsection 27.1 (Calculating absence on Defence service)

substitute

27.1 For the purpose of calculating an absence on Defence service, a period of continuous service is taken to include public holidays, authorised stand-downs and days on which the member is unable to work due to illness or injury.

Note: Separate provisions cover public holidays, authorised stand-downs and sick days. Inclusion of these days in calculating an absence on Defence service does not mean that these days are counted towards the qualifying period requirement or eligible for an employer support payment.
49 **Subsection 27.2 (Calculating absence on Defence service)**

*omit*

*employee*

*insert*

*member*

50 **Paragraph 27.2.b (Calculating absence on Defence service)**

*omit*

*their employer, unless*

*insert*

*their employer or for their business, unless*

51 **Subparagraph 27.2.b.ii (Calculating absence on Defence service)**

*substitute*

ii. Performed with a written permission from the member’s Commanding Officer or Branch Head, which specifies what work the member is authorised to perform and that the days on which the member performs such work may be counted towards a period of absence on Defence service for the purpose of eligibility for employer support payments.

**Note:** Attempts by members to continue to run businesses in off-duty hours, while meeting their Defence obligations, and to also be entitled to employer support payments should not be approved under this section.

52 **Part 3, Division 3 (Rules about the member’s employment)**

*at the start of the Division, insert*

27A **Australian Business Number**

A claimant is not eligible to make a claim for employer support payment in relation to defence service undertaken by a member unless the claimant’s business had been allocated an Australian Business Number that was active at the time that the service was undertaken.

53 **Section 29 (Minimum period of employment)**

*substitute*

29.1 In relation to employment other than self-employment, an employer cannot claim an employer support payment for a period of absence on Defence service that begins before the member has been employed by that employer for 3 months.
29.2 The qualifying period cannot be served within the first 3 months of the employment.

**Related Information:** Part 2 Division 2 sets a 12 month period that must be met by a member before they can claim as a self-employed member.

54 **Subsection 30.2 (Continuous full-time service and employment)**

Substitute 30.2

A claimant is only eligible to make a claim for employer support payment in relation to any further defence service undertaken by the member if the member has spent a period of 26 continuous weeks in the employment, since the start of the continuous full-time service periods making up the 2 year total period, during which the member did not undertake continuous full-time service.

**Example:** The member undertakes 12 months continuous full-time service followed, after a one week break, by a further 12 months continuous full-time service. The claimant is not eligible to make a claim for employer support payment in relation to any further defence service until the member has spent a period of 26 continuous weeks back in their employment. If the member had a nine month gap between the periods of continuous full-time service and had returned to their employment during this period, section 30 would not apply.

55 **Section 31 (Trading or operation of employer – before or during Defence service), title**

Omit employer

*Insert* claimant

56 **Section 31 (Trading or operation of claimant – before or during Defence service)**

Omit

An employer is

*Insert* A claimant is

57 **Paragraph 31.a (Trading or operation of claimant – before or during Defence service)**

Substitute

a. The employing entity has not traded or operated for a continuous period of 26 weeks or longer, starting before or during the member's Defence service.

**Exception:** Paragraph a. does not apply if the 26 week period was only broken because a self-employed member was on continuous full-time Defence service for a period.
32 Trading or operation of self-employed member – after continuous full-time service

A self-employed member is not eligible to claim an employer support payment if their employing entity does not operate for a period of 3 months or longer following a period of continuous full-time service by the member and, during this period, the member undertakes no further continuous full-time service.

Note: If the member’s business resumes trading or operation after this time, the member may become eligible to make a claim again.

Example: The member undertakes 12 months continuous full-time service. After the service is completed, the member does not resume business activities. 4 months after the end of the continuous full-time service, the member undertakes some Reserve service (the business is still not operating). The member is not eligible to claim an employer support payment.

33.2 Service by a participant in the Australian Defence Force Gap Year program is never eligible service for the purpose of calculating a qualifying period or an employer support payment.

36 Cost-effectiveness

36.1 In determining a claim for employer support payment, a decision-maker may reject a claim if not satisfied that the employer support payment is a cost-effective means of delivering the capability required by the Chief’s Service.

36.2 A decision to reject a claim under subsection 1 must be based on evidence that the cost effectiveness of the service was determined before the start of the service to which it relates.

Example: A member is offered a period of duty to complete a project. The decision to engage the member and determination of cost-effectiveness may be delegated to unit command level within a Service. The member is informed that the service has been determined to not be cost effective for the purpose of an employer support payment. Later, after they have completed the project, the member makes a claim. The decision-maker refuses it based on the evidence that the service had been determined not to be cost effective before it was commenced.
This section does not apply in relation to Defence service if the service is compulsory under a call out.

**Note:** This section may apply to service by either a self-employed member or a Reservist who is an employee.

**See:** Section 46, Approval of cost-effectiveness for classes of claims

**Section 37 (Absence not due to Defence service)**

*omit*

employer support payments

*insert*

payment of an employer support payment or for counting towards the annual qualifying period requirement

**Paragraph 37.b (Absence not due to Defence service)**

*substitute*

b. The absence is on a public holiday, unless the member undertook a whole day of Defence service on the day.

**Paragraph 37.d (Absence not due to Defence service)**

*omit*

the member is on a day on which

**Section 38 (Member with 2 or more employers), title**

*omit*

employers

*insert*

employment relationships

**Section 38 (Member with 2 or more employment relationships)**

*omit*

employer is eligible for employer support payment when a member has more than one employer

*insert*

claimant is eligible for employer support payment when a member has more than one employment
### Section 38 (Member with 2 or more employment relationships), table

Substitute

<table>
<thead>
<tr>
<th>Item</th>
<th>If the member has this kind of employment...</th>
<th>and also this kind of employment...</th>
<th>then an amount of employer support may be paid to...</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>full-time</td>
<td>any part-time or self-employment (whether full-time or part-time)</td>
<td>the full-time employer only, worked out under section 48.</td>
</tr>
<tr>
<td>2.</td>
<td>full-time self-employment</td>
<td>part-time</td>
<td>the member only See: Part 2 Divisions 2 and 3, and section 17</td>
</tr>
<tr>
<td>3.</td>
<td>part-time</td>
<td>part-time</td>
<td>each employer of the member See: Part 2 Divisions 2 and 3, and section 17</td>
</tr>
<tr>
<td>4.</td>
<td>part-time self-employment</td>
<td>part-time</td>
<td>the member and each employer of the member, worked out under section 50. See: Part 2 Divisions 2 and 3, and section 17</td>
</tr>
</tbody>
</table>

### Subsection 39.1 (Limits on claims relating to self-employment)

Omit

### Subsection 40.1 (Change in circumstances)

Omit

Employer type

Insert

Claimant type

### Subsection 40.1 (Change in circumstances), table subheading

Omit

For all employers:

Insert

For all claimants:
70 Subsection 40.1 (Change in circumstances), table subheading

.after

For a self-employed member

.insert

claimant

71 Subsection 40.1 (Change in circumstances), table subheading

.omit

For an employer who is not also a self-employed member

.insert

For an employer claimant

72 Paragraph 41.1.b (Extended eligibility if illness or injury results from Defence service)

.omit

meet the test of material contribution

.insert

be accepted as a service injury or service disease in accordance with the definitions of those terms

73 Subsection 41.3 (Extended eligibility if illness or injury results from Defence service)

.substitute

41.3 For an employer claimant, the decision-maker may approve the claimant to continue to be eligible for an employer support payment until the day any of the following circumstances apply.

a. The member is reasonably able to return to full duties.

b. The member ceases to receive medical treatment for the injury or illness from the Joint Health Command and ceases to receive compensation payments from the Department of Veterans’ Affairs in relation to the injury or illness.

c. The member’s claim is rejected (after any appeals are finalised) by the Department of Veterans’ Affairs.
For a self-employed member claimant, the decision-maker may approve the claimant to continue to be eligible for an employer support payment until the day any of the following circumstances apply:

a. The member is reasonably able to return to full duties.

b. The member commences to receive compensation payments from the Department of Veterans’ Affairs in relation to the injury or illness.

c. The member’s claim is rejected (after any appeals are finalised) by the Department of Veterans’ Affairs.

If either of the following circumstances apply, then subsection 41.3 applies and subsection 41.3A does not apply to a self-employed member claimant.

a. The member is a partner in a partnership that is not a family partnership.

b. The member is a director of a company and does not have a controlling interest in that company as detailed in Division 2 of Part 2.

Note: Section 12A notes that a payment to a self-employed member is made to the member in his or her capacity as an employer, for and on behalf of the business.

Subsection 41.4 (Extended eligibility if illness or injury results from Defence service)

74 Subsection 41.4 (Extended eligibility if illness or injury results from Defence service)

75 Subsection 41.4 (Extended eligibility if illness or injury results from Defence service)

after subsection 41.4, insert

If the member is able to perform duties related to their employment but the illness or injury prevents the member from performing the full duties of their work, the decision-maker may determine a weekly rate of employer support payment to be paid which is less than the AWOTE.

Section 43 (Employer can claim), title

Making a claim
Subsection 43.1 (Making a claim)
omit
An employer
insert
A claimant

Paragraph 43.1.b (Making a claim)
omit
employer
insert
claimant

Subsection 43.2 (Making a claim)
omit

Subsection 43.3 (Making a claim), example
omit

Subsection 44.1 (Time for claiming), note
omit
absence on

Subsection 44.3 (Time for claiming)
substitute
44.3 Despite subsection 1, a decision-maker may accept a claim that is made between 6 and 12 months after the start of the period for which that claim seeks payment, if satisfied that it is reasonable to do so for reasons beyond the claimant's control, such as illness or injury.

Subsection 44.3 (Time for claiming)
after subsection 44.3, insert
44.4 Despite subsection 1, a claim may be accepted more than 12 months after the first day of defence service for which the claim seeks payment. If a claim is accepted after that 12 month period, employer support payment is not payable for any day that occurred more than 12 months before the claim was made.
Section 46 (Approval of classes of claims)

substitute, including title

Approval of cost effectiveness for classes of claims

46.1 A Service Chief may, in writing, make a decision to determine that a class of claims provides a cost effective means to get the capability. The class may relate to:

a. A particular part of the Reserves.

b. A particular class of members in the Reserves.

46.2 The cost effectiveness of a claim to which a class decision relates is determined on that basis. However, for the purposes of review, the cost effectiveness of each claim is taken to have been determined separately by the Service Chief who made the class decision.

See: Section 36, Cost-effectiveness

Subsection 48.1 (Amount of employer support payment – full-time work), Example 1

omit

or self-employed member

Subsection 48.1 (Amount of employer support payment – full-time work), Example 2

Example 2: This example shows how to calculate a payment for a claim period of 18 continuous full days of service.

<table>
<thead>
<tr>
<th>Step</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Confirm that the member’s claimed period of Defence service meets the time condition - it must comprise a period of at least 5 continuous days of service.</td>
</tr>
<tr>
<td>2.</td>
<td>Calculate the number of full weeks of service. In this case, the first 14 days = 2 weeks.</td>
</tr>
<tr>
<td>3.</td>
<td>Calculate how much of a week the remaining service amounts to. In this case, the 4 remaining days = 0.8 week.</td>
</tr>
<tr>
<td>4.</td>
<td>Add the full and part weeks. In this case = 2.8 weeks.</td>
</tr>
<tr>
<td>5.</td>
<td>Multiply AWOTE by the length of the claim period. In this case, AWOTE x 2.8.</td>
</tr>
<tr>
<td>6.</td>
<td>The answer is the amount of employer support payable to the claimant for that period of service.</td>
</tr>
</tbody>
</table>
48.3 The maximum amount that can be paid for a single period of absence on continuous Defence service is 52 weeks AWOTE.

Note: Even though the absence may cross two years, payments stop once 52 weeks' AWOTE has been paid.

See: Section 37, Absence not due to Defence service

Section 49 (Amount of employer support payment – part-time work with one employer)

omit, wherever occurring, including title

1 employer

insert

one employment relationship

Section 49 (Amount of employer support payment – part-time work with one employment relationship)

omit, twice occurring

one employer

insert

one employment relationship

Example: This example shows how to calculate a payment for a claim period of 18 continuous full days of service, using the part week formula.

<table>
<thead>
<tr>
<th>Step</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Confirm that the member’s claimed period of Defence service meets the time condition – it must comprise a period of at least 5 continuous days of service.</td>
</tr>
<tr>
<td>2.</td>
<td>Find out how many hours the member works in a week in their employment. Divide that number of hours by 35</td>
</tr>
<tr>
<td>3.</td>
<td>Multiply the result of step 2 by the weekly amount of AWOTE. This provides a weekly payment figure.</td>
</tr>
<tr>
<td>4.</td>
<td>Calculate the number of full weeks of service. In this case, the first 14 days = 2 weeks.</td>
</tr>
<tr>
<td>5.</td>
<td>Calculate how much of a week the remaining service amounts to. In this case, the 4 remaining days = 0.8 week.</td>
</tr>
<tr>
<td>Step</td>
<td>Action</td>
</tr>
<tr>
<td>------</td>
<td>--------</td>
</tr>
<tr>
<td>6.</td>
<td>Add the full and part weeks. In this case = 2.8 weeks.</td>
</tr>
<tr>
<td>7.</td>
<td>Multiply the weekly payment figure from Step 3 by the length of the claim period. In this case, weekly payment figure x 2.8.</td>
</tr>
<tr>
<td>8.</td>
<td>The answer is the amount of employer support payable to the claimant for that period of service.</td>
</tr>
</tbody>
</table>

91 Subsection 49.4 (Amount of employer support payment – part-time work with one employment relationship)

substitute

49.4 The maximum amount that can be paid for a single period of absence on continuous Defence service under this section is the full week formula applied to 52 weeks of service.

Note: Even though the absence may cross two years, payments stop once 52-weeks' AWOTE has been paid.

See: Section 37, Absence not due to Defence service

92 Section 50 (Amount of employer support payment – part-time work with 2 or more employers), title

omit

2 or more employers

insert

two or more employment relationships

93 Section 50 (Amount of employer support payment – part-time work with two or more employment relationships)

omit, twice occurring

two or more employers

insert

two or more employment relationships

94 Subsection 50.3 (Amount of employer support payment – part-time work with two or more employment relationships)

omit

with each employer

insert

with each claimant
95 **Section 51 (Maximum amount payable for a single period of absence on Defence service)**

_substitute_

51 **Maximum amount payable for a single period of absence on Defence service**

The maximum claim period that can be paid for a single period of absence on continuous Defence service under this section is 52 weeks.

_Note 1:_ Even though the absence may cross two years, payments stop once 52-weeks’ AWOTE has been paid.

_Note 2:_ The single period of continuous Defence service may the subject of any number of claims.

See: Section 37, Absence not due to Defence service

96 **Paragraph 52.1.a (Additional employer support payments)**

_omit_

an employer or self-employed member

_insert_

a claimant

97 **Paragraph 52.2.a (Additional employer support payments)**

_omit_

employer or self-employed member

98 **Paragraph 52.2.c (Additional employer support payments)**

_omit_

claimant’s

_insert_

member’s
Subsection 52.5 (Additional employer support payments)

A decision-maker may only approve the application if satisfied of the following matters in relation to any relevant claim period:

a. The claimant has suffered, or will suffer, substantial financial hardship or substantial financial loss caused by the absence of the claimant’s employee on defence service (or caused by absence due to injury or illness resulting from the member’s defence service) during the claim period.

b. It was not possible in the circumstances for the claimant to make arrangements to avoid the substantial financial hardship or substantial financial loss.

c. The claimant has made, or is making, a reasonable effort to avoid or limit substantial financial hardship or substantial financial loss.

d. Any allowances the claimant has received, or is eligible to receive, under any other Determination made under section 58B of the Act are insufficient to avoid substantial financial hardship or substantial financial loss.

e. The claimant applied for the additional payment as soon as reasonably practicable after becoming aware that the claimant would suffer substantial financial hardship or substantial financial loss because of the employee’s absence during the claim period.

Subsection 53.1 (Capability and employer support payments)

If satisfied that the following circumstances exist, Head Cadet, Reserve and Employer Support Division may recommend to the Chief of the Defence Force that a capability employer support payment be payable.

a. The capability relates to more than one Service.

b. The conditions in subsection 53.1 are met.

c. The Service Chiefs involved with the provision of the capability required by the Defence Force have been consulted and support the recommendation that a capability employer support payment be payable if a claim is made in relation to that capability.

Subsection 53.2 (Capability and employer support payments)

Omit

Service Chief

Insert

Service Chief or Head Cadet, Reserve and Employer Support Division
102 Subsection 53.5 (Capability and employer support payments)

substitute

53.5 If the Chief of the Defence Force has approved a capability employer support payment, a claimant may apply for the payment in the same way as normal, subject to any modified, replaced or inapplicable conditions.

103 Subsection 54.1 (Change or revocation of capability support payment)

substitute

54.1 A Service Chief or Head Cadet, Reserve and Employer Support Division may recommend to the Chief of the Defence Force that the limits that have been placed on a capability support payment that has been approved should be varied or revoked. The recommendation may relate to a past period only if it would be beneficial to any affected claimants.

54.2 The Chief of the Defence Force may approve the recommendation, specifying the date of effect for a variation or revocation of any limits placed by the original approval.

Note: The decision to revoke a limit may either increase or decrease the amount that is payable.

54.3 The Chief of the Defence Force must provide a copy of the approval to the Minister.

104 Section 55 (When the amounts are paid)

omit

employer

insert

claimant

105 Paragraph 55.a (When the amounts are paid)

omit

absence on

106 Paragraph 55.b (When the amounts are paid)

omit

continuous absence on
107 Paragraph 55.c (When the amounts are paid)

omit

absence on

108 Section 55 (When the amounts are paid), note

omit

employer

insert

claimant, business or company

109 Subsection 56.4 (General)

substitute

56.4 Within 30 days of receiving a notice of a decision or a notice of a reconsideration of a decision under subsection 1, a claimant may request a senior review officer to review the decision. The request must be in writing and must set out the reasons for making the request.

110 Subsection 56.5 (General)

substitute

56.5 The senior review officer may, if they consider it reasonable, accept a request under subsection 4 despite the fact that it was made more than 30 days after receipt of a decision.

111 Subsection 56.6 (General)

substitute

56.6 In relation to a request for review made under subsection 4, the senior review officer must reconsider the claim and the earlier decision relating to the claim and must, in writing:

a. confirm the decision; or

b. substitute a new decision.
Section 56 (General)

after section 56, insert

56A Review initiated by senior review officer

56A.1 Within 12 months of the date on which a decision is made in relation to a claim for an employer support payment, a senior review officer may review the decision to determine whether it was made in accordance with the Determination.

56A.2 If a review is initiated under subsection 1, the senior review officer must notify the claimant to whom the review relates and provide an opportunity for the claimant to give the officer further information about the original decision or about the claim to which it relates.

56A.3 If the senior review officer considers that the decision was not made in accordance with this Determination, they may substitute a new decision in place of the first decision.

Note: The effect of the decision can be to authorise a payment that occurs after the new decision is made, or require a repayment in accordance with the Public Governance and Accountability Rule 2014, in relation to a past period.

56A.4 A senior review officer acting under this section must notify the claimant of the result of the review as soon as practicable, regardless of whether any new decision is made on a claim.

Section 57 Transitional – review under sections 15D or 15E

substitute, including title

57 Review by Administrative Appeals Tribunal

Application may be made to the Administrative Appeals Tribunal for review of a senior review officer's decision made under any of the following.

a. Subsection 56.6.

b. Subsection 56A.3.

114 Transitional – review by Administrative Appeals Tribunal

substitute, including title
58 **Investigation by Ombudsman**

58.1 A person who is not a member may request the Commonwealth Ombudsman to investigate a decision made under this Determination.

58.2 A member may request the Defence Force Ombudsman to investigate a decision or process under this Determination.

58.3 To avoid doubt, a person may request the investigation of a process under either subsection 2 or 3.

*Note:* Under the *Ombudsman Act 1976* the Ombudsman has discretion as to whether to investigate a complaint.

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**NOTE**

1. Defence Determination 2012/68, as amended to date. For previous amendments see Defence Determination 2013/33 and amendments made by Defence Determination 2014/14.
Reserve employer support payments

Part 1: Preliminary

Division 1: Operation of this Determination

1. Citation
2. Commencement
3. Repeal, saving and transitional
3A. Application and transitional – amendments commencing 1 December 2014

Division 2: Definitions

4. Definitions

Division 3: Decisions under this Determination

5. Decision-makers
5A. Decision-making
6. Information to support a claim
7. Overpayments and recovery

Part 2: How to identify employment

Division 1: Persons who are not employers or employees

8. Hobbies and volunteers
9. Persons who fail to meet a test under this Part

Division 2: Members who are self-employed

10. Controlling interest in a company
11. Controlling interest that does not satisfy the self-employment test
12. Conditions for self-employment
12A. Payment to self-employed member

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13. Examples of employment
14. Work that is not employment for this Determination
15. Examples of employers

Division 4: Hours of employment

16. Working hours each week in employment
17. Full-time or part-time work
18. Change in working hours
Division 5: Principal source of income

19. What income includes
20. When income is received
21. Evidence of principal source of income

Division 6: Principal source of employment

21A. Evidence of principal source of employment

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Division 1: Overview

22. Overview

Division 2: Rules about time

23. Qualifying period
24. Qualifying period – new employer or ownership
25. Qualifying period – continuous Defence service across financial years
26. Qualifying period if illness or injury results from Defence service
27. Calculating absence on Defence service

Division 3: Rules about the member's employment

27A. Australian Business Number
28. Minimum wage or benefits
29. Minimum period of employment
30. Continuous full-time service and employment
31. Trading or operation of claimant – before or during Defence service
32. Trading or operation of self-employed member – after continuous full-time service

Division 4: Rules about Defence service

33. Eligible service
34. Eligible service during Unit stand-down

Division 5: Eligibility for payment

35. Eligibility – basic conditions
36. Cost-effectiveness
37. Absence not due to Defence service
38. Member with 2 or more employment relationships
39. Limit on claims relating to self-employment
40. Change in circumstances
41. Extended eligibility if illness or injury results from Defence service
42. Extended eligibility – member dies on Defence service
Part 4: Making a claim

Division 1: Time and evidence

43. Making a claim
44. Time for claiming
45. Evidence that must be provided
46. Approval of cost effectiveness for classes of claims
47. Reasons for refusing a claim

Division 2: Calculating the amount that is payable

48. Amount of employer support payment – full-time work
49. Amount of employer support payment – part-time work with one employment relationship
50. Amount of employer support payment – part-time work with two or more employment relationships
51. Maximum amount payable for a single period of absence on Defence service
52. Additional employers support payments
53. Capability and employer support payments
53A. Payment relating to medical practitioner's service to be reduced
54. Change or revocation of capability support payment
55. When the amounts are paid

Part 5: Review

56. General
56A. Review initiated by senior review officer
57. Review by Administrative Appeals Tribunal
58. Investigation by Ombudsman
EXPLANATORY STATEMENT

Defence Determination 2014/55

This Determination amends Defence Determination 2012/68, Reserve employer support payments (the Principal Determination), made under paragraph 58B(1)(ga) of the Defence Act 1903 (the Act) and in accordance with subsection 33(3) of the Acts Interpretation Act 1901 (AIA Act). Determinations made under section 58B of the Defence Act are disallowable non-legislative instruments and are subject to the interpretation principles in the AIA Act, as modified by section 58B of the Defence Act.

This Determination provides a scheme of payments for employers of Reservist members of the Australian Defence Force (ADF) and for self-employed Reservists.

The purpose of this Determination is to amend the decision-making provisions and review arrangements for the scheme, to remedy some problems in the Principal Determination. This Determination will also simplify some of the language, so as to make it easier to read and use.

Section 1 of this Determination sets out the manner in which this Determination may be cited.

Section 2 of this Determination provides that the Determination commences on 1 December 2014.

Section 3 specifies that the Principal Determination, as amended, is amended by this Determination.

Section 4 inserts a table of contents to assist readers to navigate the detailed provisions of the Reserve employer support payment scheme.

Sections 5, 6 and 7 simplify the wording of the old transitional provisions that applied to claims relating to service before the commencement of Determination 2012/68 on 1 January 2013. In the longer term it is anticipated that this section will be repealed however it has been left in place in the event that any pre-commencement matters still require review.

Section 8 provides transitional arrangements in relation to the amendments. These are inserted as a new section 3A in the Principal Determination so that they may be viewed by readers in the consolidated version of that Determination. The section modifies the manner in which the amendments made by this Determination apply in relation to a claim for a payment made before 1 December 2014 or in relation to a claim for payment for a period of defence service that commenced before 1 December 2014. The transitional provision ensures that these earlier claims and service are dealt with according to the rules that existed at the time they occurred or commenced. However, subsection 3 establishes a limited exception that permits access to the new decision-making and review options provided under this Determination. Subsection 4 makes clear that the changes made by this Determination apply without modification to those who have not provided service under this scheme prior to commencement.

Section 9 inserts additional definitions for business and claimant into section 4 of the Principal Determination. These definitions assist the reader to understand these terms used in the Principal Determination. Locating these concepts in the definitions avoids repetition of elements of those definitions elsewhere in the Determination.

Section 10 corrects a typographical error in the Principal Determination.

Section 11 amends section 5 of the Principal Determination. It allows a Service Chief to delegate their review powers to a senior review officer, an ADF member at or above the rank of Brigadier (or equivalent rank) or an Australian Public Service employee at Senior Executive Service Band 1 or above. This will provide greater flexibility to the Service Chiefs for the allocation of claim review responsibilities.

Section 11 also amends section 5 of the Principal Determination to insert a new section 5A that expressly provides for a decision-maker to refer a claim to the Director of the scheme for advice. This is not intended to limit the ability of the decision-maker to seek any relevant advice for their decision but seeks to ensure they are aware that they may seek advice from the relevant subject area when dealing with more complex claims.
Section 12 inserts a note at the end of subsection 8.1 of the Principal Determination. The note explains that an assessment of whether a person is conducting a hobby or volunteering may be made by looking at a continuous period of 26 weeks that occurred immediately before the period of absence on Defence service to which the claim relates. In certain circumstances, as explained in section 16, a different period may be used. This amendment will provide clearer guidance to claimants as to how the existing provision on hobbies and volunteers may be observed to apply to them.

Section 13 amends subsection 12.2 of the Principal Determination and inserts a new subsection 12.3. Subsection 12.2 is amended to make express that a member who has any of the specified roles or interests detailed in subsection 12.1 may only receive employer support payments as a self-employed Reservist. The new subsection 12.3 specifies that for a self-employed Reservist to be eligible for an employer support payment, the member’s business must provide the member’s principal source of income or the member’s principal source of employment and must have done so for at least the previous 12 months.

Section 14 inserts a new section 12A into the Principal Determination, which provides that an employer support payment to a self-employed Reservist is made to the member in their capacity as an employer, for and on behalf of their business.

Section 15 amends paragraph 14.2.b of the Principal Determination to renumber it as paragraph 14.2.a and to define casual work as being employment on an irregular and unreliable basis, to give an explanation of the concept in the Determination. Employers are not eligible for employer support payments in respect of casual work.

Section 16 renumbers paragraph 14.2.c consequential on the amendment in section 15 of this Determination.

Section 17 amends item 3 of the table in subsection 16.2 of the Principal Determination. The amendment simplifies and expands the scope of the rule that provides when absence on Defence leave may be excluded from the calculations of a member’s normal working hours.

Section 18 inserts a note at the end of subsection 16.2 of the Principal Determination. The note explains that it is up to a decision-maker to test and evaluate evidence relating to a member’s working hours and that the decision-maker may accept or reject this evidence. This is intended to help ensure the expectations of claimants are reasonable and to encourage provision of relevant documentation.

Section 19 is a technical amendment. It substitutes subparagraph a.i in item 5 of the table at subsection 16.3 of the Principal Determination to correct a typographical error.

Section 20 omits subsection 16.4 of the Principal Determination, which related to determining a member’s working hours when the employment had been for less than 3 months. Employers are not eligible for employer support payments when a member has been employed for less than 3 months (this time limit is part of the existing section 29 of the Principal Determination).

Sections 21 and 22 amend subsections 16.5 and 16.6 of the Principal Determination to amend references from ‘employer’ to ‘claimant’ so as to make clear that self-employed members are not excluded from this activity.

Section 23 substitutes the table in subsection 17.2 of the Principal Determination that sets out the application of rules relating to full-time work and part-time work. The revised table provides a simplified way to work out what type of employment an employee is deemed to have for the purposes of this Determination. It also covers some employment situations not addressed in the previous version of the table.

Part 2 Division 5 of the Principal Determination sets out information to assist Reservists to calculate the income that can be taken into account to establish whether the member meets the principal source of income requirements to be classified as a self-employed Reservist, for the purposes of establishing eligibility for an employer support payment. Sections 25 to 34 amend Division 5 and specifically sections 19 and 20 of the Principal Determination, to specify that income must be received by the member from their business for their own use or benefit in order to be counted towards providing the member’s principal source of income from their business.
Sections 35 to 37 amend subsection 21.1 of the Principal Determination, which deal with the evidence that must be provided to show principal source of income. In particular, the amendment made by section 37 aligns the period to be shown in evidence with the longer period detailed at section 12 of the Principal Determination, over which a member must establish that their business provided their principal source of income.

Section 38 amends subsection 21.2 of the Principal Determination relating to the exclusion of any amount of employer support payments in determining a member’s income from their business. It allows inclusion of payments when the decision-maker is satisfied that there is documentary evidence that the amount was used to address a loss or shortcoming directly caused by the absence of the member on Defence service. It also allows inclusion of the payment if the decision-maker is satisfied that ownership or control of the business or company is shared by the member with another person or persons. In this situation, the provision requires documentary evidence that the share of the employer support payment was received by that person or persons and not, either directly or indirectly, by the member (in this case, the member’s income from the business would not need to be reduced by the amount of any employer support payment that was not received by the member). The provision also allows inclusion of payments when the decision-maker is satisfied that it would be reasonable to count the income, having regard to the outcome under the Determination.

Section 39 substitutes subsection 21.3 of the Principal Determination, which relates to use of documents in relation to a part-year. These must be used on a proportional basis by reference to a financial statement or income tax return, or by using the same methods and principles as will be used in preparing the member’s tax return. A decision-maker may also approve a submission from a member to use a statement that was not calculated on a proportional basis. This amendment also inserts several new subsections into section 21 that provide additional detail in relation to claims from self-employed Reservists seeking to be eligible for an employer support payment under the principal source of income provisions. Updated evidence of principal source of income must be provided every 2 years and, if the member provides certain evidence, this must be substantiated by provision of the member’s tax return and notice of assessment.

Section 40 inserts a new section 21A into the Principal Determination. The new section provides for eligibility under principal source of employment. It enhances the evidence requirements. A self-employed Reservist may only be approved as eligible for an employer support payment under the principal source of employment provision for a total period of 2 years, unless exceptional circumstances apply. If a decision-maker determines that exceptional circumstances apply, updated evidence of principal source of employment must be provided every 2 years.

Section 41 substitutes section 22 of the Principal Determination, which is a brief overview of the main steps that a claimant might need to go through to work out employer support payment eligibility details. This may assist the user to work through the detailed definitions and concepts that must be satisfied as pre-conditions to eligibility for a payment.

Sections 42 and 43 amend section 23 of the Principal Determination to update rules that relate to time, specifically qualifying periods and counting of days of employee absence due to Defence service.

Section 44 amends subsection 23.2 of the Principal Determination to add a new paragraph c. The change makes clear that service can only be used to meet the qualifying period if it meets the cost effectiveness requirements detailed in section 36.

Sections 45 and 46 amend subsection 25 of the Principal Determination, which details the qualifying period requirement if a period of Defence service commences prior to the end of one financial year and finishes in the next. The amendments insert a new subsection 25.3 to make clear that when a period of service commences in one financial year and a qualifying period has been completed in that year, there is no requirement to serve a new qualifying period in the new financial year until after the completion of this period of service. That is, another qualifying period would only need to be completed in the second financial year if a further period of service is undertaken.

Section 47 amends section 26 of the Principal Determination to use language that is more closely aligned to that in the Military Compensation and Rehabilitation Act 2004.

Sections 48 to 51 amend section 27 of the Principal Determination to provide that public holidays, stand-down days and sick days are included in a period of continuous Defence service but are not necessarily eligible for an employer support payment or to be counted towards the qualifying period requirement.
Section 51 amends section 27 of the Principal Determination which relates to days on which a member performed work for their employer during a period of absence on Defence service. It provides that these days may be counted towards eligibility for employer support payments if a written permission to perform work from the member’s Commanding Officer or Branch Head specifies the work the member is authorised to perform and that the days may be counted towards eligibility for employer support payments.

Section 52 inserts a new section 27A into the Principal Determination which requires that a claimant have an active Australian Business Number at the time that the Defence service being claimed was undertaken. The introduction of the ESPS and the protections for reservists in the Defence Reserve Service (Protection) Act 2001 were part of a number of initiatives to enhance ADF Reserves capability – employers would be required to release reservists for Defence service but they would also be entitled to financial support. As the Defence Reserve Service (Protection) Act 2001 does not apply beyond Australia’s boundaries, the provision of financial support is limited to businesses with an active Australian Business Number.

Section 53 amends section 29 of the Principal Determination to update the requirement for a minimum period of employment of 3 months before an employer can claim an employer support payment. The amendment specifies that the qualifying period requirement cannot be served within this 3 month period.

Section 54 amends section 30 of the Principal Determination, which relates to a member who has performed a very substantial amount of continuous full-time Defence service, for a total period of at least 2 years. For a claimant to be eligible for an employer support payment for any further service, the member must have spent a period of 26 weeks in their employment without undertaking continuous full-time service, in order for a claim to rest on their absence from employment in Defence service. The amendment makes clear that the 26 week period in employment must have been undertaken since the start of the periods of continuous full-time Defence service that total the 2 year period.

Sections 55 to 58 amend sections 31 and 32 of the Principal Determination, which place limits on eligibility for a payment when the employing entity has ceased to trade. The amendments limit eligibility when the employing entity has ceased to trade for a continuous period of 26 weeks or longer (in place of a period of one year or longer) or when a self-employed Reservist does not operate their business for a period of 3 months or longer following a period of continuous full-time Defence service.

Section 59 amends subsection 33.2 of the Principal Determination, which related to service on Anzac Day and Remembrance Day. Eligibility of a claimant for service by a member on Anzac Day is now covered by the provisions relating to public holidays. In relation to Remembrance Day, the amendment removes the previous prohibition that service on this day is never eligible service for an employer support payment. Remembrance Day is not a public holiday and members undertaking Defence service on this day would, if not on Defence service, generally be engaged in normal employment activities.

The new subsection 33.2 specifies that service by participants in the Australian Defence Force (ADF) Gap Year program is not eligible for employer support payments. The Gap Year program aims to provide a meaningful experience, for up to 12 months, and a better understanding of the opportunities available in the ADF. It is targeted at young men and women who have completed Year 12. Participants have no obligation to serve after the initial Gap Year period. Given this, they do not provide any capability to the ADF unless they continue serving after the Gap Year.

Section 60 amends section 36 of the Principal Determination, which relates to whether the employer support payment is a cost-effective way of delivering the capability that is required by the Chief’s Service. The amendment extends the coverage of this provision to include both employer and self-employed Reservist claims. It also makes clear that cost effectiveness is a permissible factor that a decision-maker may take into account, as long as the cost effectiveness decision is made before the Defence service has been rendered.

Sections 61 and 62 amend section 37 of the Principal Determination, relating to public holidays, to specify that a public holiday is only eligible for an employer support payment or to count towards the qualifying period requirement if the member undertook a whole day of Defence service on the day.

Section 63 corrects a typographical error in paragraph 37.d of the Principal Determination.
Sections 64, 65 and 66 amend section 38 of the Principal Determination, which sets out a hierarchy of which claimant can claim a benefit when a member has more than one employment relationship. The amendment makes the coverage of the rule clearer for readers, particularly when the member is self-employed.

Section 67 omits subsection 39.1 of the Principal Determination which is incompatible with other provisions (such as section 38) that allow multiple claims in respect of a single period of Defence service, including in some circumstances when a member makes a claim based on self-employment.

Sections 68 to 71 amend subsection 40.1 of the Principal Determination to clarify the classes of claimant that each part of the table refers to.

Sections 72 to 75 amend section 41 of the Principal Determination, which provides for an extended period of eligibility when a member is unable to perform the full duties of their employment due to an injury or illness that arises out of Defence service.

Section 72 amends paragraph 41.1.b of the Principal Determination. It specifies that an injury or illness, to be eligible for an employer support payment under this section, must reasonably be expected to be accepted as a service injury or service disease in accordance with the provisions of the Military Rehabilitation and Compensation Act 2004.

Section 73 amends section 41 of the Principal Determination and inserts new subsections to permit a decision-maker to approve eligibility for an employer support payment for an employer claimant until the member is reasonably able to return to full duties or the member ceases to receive treatment from Joint Health Command and to receive compensation payments from the Department of Veterans’ Affairs (whichever is sooner). For a self-employed member claimant (except in two circumstances), it specifies that a decision-maker may approve eligibility for an employer support payment until the member is reasonably able to return to full duties or the member commences to receive compensation payments from the Department of Veterans’ Affairs (whichever is sooner). This different entitlement reflects the fact that incapacity payments made by the Department of Veterans’ Affairs in accordance with the provisions of the Military Rehabilitation and Compensation Act 2004 are made to the member as compensation payments due to the member’s inability (or reduced ability) to work because of a service injury or service disease. In the case of a self-employed member, compensation is provided through the Military Rehabilitation and Compensation Act 2004.

Section 74 amends subsection 41.4 of the Principal Determination so as to reduce the 78 week cap on employer support payments under this section to a 52 week cap (this is aligned with a similar change to the cap for payments for a single period of absence on continuous Defence service).

Section 75 inserts a new subsection 41.5 into the Principal Determination. It allows a decision-maker to set a weekly payment rate that is lower than the standard AWOTE (average weekly ordinary time earnings) payment rate, if a member cannot perform the full duties of their work (but is able to resume limited duties).

Sections 76 to 80 amend section 43 of the Principal Determination which sets out procedural requirements for making a claim. The amendments make clear that the provisions apply to all claimants, both employers and self-employed Reservists.

Sections 81, 82 and 83 amend section 44 of the Principal Determination which places a time limit on the claim. This time limit can affect on eligibility for payment under the scheme. The amendment made by section 83 inserts a new subsection 44.4 into the Principal Determination, which permits a claim to be accepted by a decision-maker more that 12 months after the service claimed began. However, it makes clear that no payment can be made for any day in a period of Defence service that forms part of the claim if the day occurred more than 12 months before the claim was made.

Section 84 amends section 46 of the Principal Determination which provides a power for a Service Chief to determine that a class of claims meets the cost effectiveness requirement. The amendment makes clear that the approval only relates to the cost effectiveness of the claim.

Sections 85 to 95 update sections 48 to 51 of the Principal Determination which set out the method for calculating an amount of employer support payment in relation to a period of absence from full-time or part-time employment. The amendment provides simplified, step by step examples to show how to calculate payments. This may assist claimants to understand how the amount of payments is calculated.
The amendments also reduce the 78 week cap on employer support payments for a single period of absence on continuous Defence service to a 52 week cap.

Section 99 amends subsection 52.5 of the Principal Determination, which provides a discretion to make additional payments of employer support payment. The amendment makes clear that the decision-maker may only approve additional payments under this section if satisfied that a claimant has suffered, or will suffer, substantial financial hardship or substantial financial loss caused by the absence of the claimant’s employee on Defence service (or caused by absence due to injury or illness resulting from the member’s Defence service).

Sections 100 to 103 amend sections 53 and 54 of the Principal Determination, respectively, which provide the Chief of the Defence Force with discretion to make capability payments additional to the base amount of employer support payment on a recommendation from a Service Chief. The amendments authorise the Head of Cadet, Reserve and Employer Support Division to also make recommendations to the Chief of the Defence Force, when the required capability relates to more than one Service. Before making such a recommendation, the Head of Cadet, Reserve and Employer Support Division must obtain agreement from the Service Chiefs involved with the provision of the required capability.

Sections 104 to 107 amend section 55 of the Principal Determination to make the section less dense and easier to work through, reflecting the changes made to definitions by section 9 of this Determination.

Sections 109 to 111 amend section 56 of the Principal Determination, which sets out information about review of decisions made under this Determination. The amendment introduces provision of a review, at the request of a claimant, by a senior review officer.

Section 112 inserts a new section 56A into the Principal Determination to provide for review of decisions within the 12 month period after the decision is made if a senior review officer is concerned as to whether the decision was made in accordance with the Determination.

Section 113 substitutes section 57 of the Principal Determination. The amendment reinstates provision for review of decisions by senior review officers in the Administrative Appeals Tribunal as the standard review body for administrative decisions. This replaces a spent transitional provision. In the event that transitional coverage is needed, the transition and application provision at the start of this Determination preserves the applicant’s ability to have any claim for pre-commencement service examined and assessed on the rules in force prior to the amendments made by this Determination. However, the new transitional provision permits access to the new investigation and review provisions for any claim that was not finalised at 1 December 2014.

Section 114 substitutes section 58 of the Principal Determination. The amendment retains claimant rights to also request the Commonwealth Ombudsman or Defence Force Ombudsman to investigate a decision or process. This replaces a spent transitional provision. In the event that transitional coverage is needed, the transition and application provision at the start of this Determination preserves the applicants ability to have any claim for pre-commencement service examined and assessed on the rules in force prior to the amendments made by this Determination. However, the new transitional provision permits access to the new investigation and review provisions for any claim that was not finalised at 1 December 2014.

Consultation

The Commonwealth Ombudsman has been consulted on the changes relating to investigation of complaints under the Ombudsman Act 1976. The Attorney-General's Department has also been consulted on the provision of merit review by the Administrative Appeals Tribunal.

The Office of Best Practice Regulation was consulted and advised on 22 September 2014 that a formal regulation impact statement was not required (advice reference number 17643).

Authority: Section 58B of the Defence Act 1903
Statement of Compatibility with Human Rights


Defence Determination 2014/55, Reserve employer support payments - amendment

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Determination

The purpose of this Determination is to amend an instrument that provides assistance to employers in situations where their employee is absent from the workplace to provide service as a Defence Force Reservist. The payment also provides an incentive to Reservists who are self-employed to undertake Defence service and provide capability to Defence.

Human rights implications

This Determination engages the following human rights.

Right to work

The protection of a person's right to remuneration engages Article 6 of the International Covenant on Economic, Social and Cultural Rights. Article 6 recognises the right of everyone to the opportunity to gain their living by work which they freely choose or accept.

(a) Legitimate objective:

This Determination does not limit the right to work. It provides a benefit that may facilitate the achievement of the objectives of Article 6 by assisting employers who are unable to rely on an employee during a period when the employee is absent on Defence Reserve service.

The employer support payment assists a business to maintain continuity when an employee is absent on Defence service. The payment provided may be used by an employer to procure a locum or contract service during an employee's absence or to make other arrangements that assist in keeping the business running. An additional benefit may also be paid if there is a cost due to the absence that cannot be prevented or mitigated.

The amendment of this Determination will provide a range of simplification and streamlining and merit review in the Administrative Appeals Tribunal for claimants. This will provide a benefit to employers and assist businesses.

(b) Reasonable, necessary and proportionate: The employer support payment assists an employer to meet the cost of getting another person to fill in for the employee during their absence. This assistance may be seen as especially important to assist smaller businesses who may need to bring in another person to cover the absence of an employee during their absence on Defence service.

Conclusion

This Determination is compatible with human rights because it advances the protection of human rights.

Stuart Robert, Assistant Minister for Defence