

Actions for damages - election by employees under section 45 of the *Safety, Rehabilitation and Compensation Act 1988*

1. PURPOSE

The purpose of this Circular is to provide an outline of the provisions of section 45 of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

2. BACKGROUND

With the introduction of the SRC Act in 1988, an employee's right to sue the Commonwealth for damages was restricted. Section 44 of the SRC Act precludes an employee from taking common law action against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee, ('the Commonwealth etc.')., in most circumstances.

However, there is the exception contained in section 45. Under that section, an employee can elect to pursue an action for damages instead of accepting payment under sections 24, 25 or 27.

3. SECTIONS 24, 25, 27

To understand section 45 of the SRC Act it is necessary to also know about:

- sections 24 and 25: these provide for the payment, in certain situations, of a lump sum for a permanent impairment resulting from an injury;
- section 27: it provides for the payment of a lump sum for non-economic loss where compensation is payable under section 24.

4. SECTION 45

Section 45 of the Act is reproduced in full at the end of this Circular. However the main points are:

- at any time before compensation is paid to an employee under section 24, 25 or 27, he/she may elect instead to sue the Commonwealth etc. for damages for any 'non-economic loss';
- the election must be in writing;
- once an election in writing is made, compensation is not payable under sections 24, 25 or 27;
- the election is irrevocable;

- in any action that the employee institutes as a result of his/her election, the relevant court shall not award him/her damages exceeding \$110,000 for any 'non-economic loss' suffered by the employee. The amount of \$110,000 is not indexed.

5. NON-ECONOMIC LOSS

Section 27 of the SRC Act provides for the payment of additional compensation for any non-economic loss, where compensation is payable under section 24 for a permanent impairment. This amount is assessed by Comcare.

Section 45 of the SRC Act provides that instead of receiving compensation under sections 24, 25, or 27, the employee may take an action against the Commonwealth etc. for damages. Such an action is determined by a court (i.e. not the Administrative Appeals Tribunal), and the court may only award up to \$110,000.

6. LEGAL EXPENSES

In an action under section 45 of the SRC Act, payment of legal expenses would depend on the outcome of the legal action and the application of the normal court rules.

7. SUMMARY

Where an employee suffers an injury, (with a date of injury on or after 1 December 1988), for which compensation is payable for a permanent impairment, then he/she has a choice:

- accept the compensation payable under section 24,25, or 27; or
- make an irrevocable election, in writing, to institute an action or proceeding against the Commonwealth etc.

8. FURTHER INFORMATION

If you would like more information on section 45, please contact:

- Comcare's Claims Help Line 1800 150 555; or
- email: claims.help@comcare.gov.au

Safety, Rehabilitation and Compensation Act 1988

Section 45

“Actions for damages - election by employees

45. (1) Where:

- (a) compensation is payable under section 24, 25 or 27 in respect of an injury to an employee; and
- (b) the Commonwealth, a Commonwealth authority, a licensed corporation or another employee would, but for subsection 44(1), be liable for damages for any non-economic loss suffered by the employee as a result of the injury;

the employee may, at any time before an amount of compensation is paid to the employee under section 24, 25 or 27 in respect of that injury, elect in writing to institute an action or proceeding against the Commonwealth, the Commonwealth authority, the licensed corporation or other employee for damages for that non-economic loss.

(2) Where an employee makes an election:

- (a) subsection 44(1) does not apply in relation to an action or other proceeding subsequently instituted by the employee against the Commonwealth, the Commonwealth authority, the licensed corporation or the other employee for damages for the non-economic loss to which the election relates; and
- (b) compensation is not payable after the date of the election under section 24, 25 or 27 in respect of the injury.

(3) An election is irrevocable.

(4) In any action or proceeding instituted as a result of an election made by an employee, the court shall not award the employee damages of an amount exceeding \$110,000 for any non-economic loss suffered by the employee.”

Where to Find Us

Correspondence

All claims-related correspondence should be addressed to **Comcare, GPO Box 9905, CANBERRA ACT 2601**

Telephone Enquiries

Comcare has set up a General Enquiry Line to answer *all* straightforward queries on claims. The telephone number for the Comcare General Enquiry Line is **1300 366 979**.

Claims Management Centres

All claims processing is undertaken in either Canberra or Melbourne.

Australian Capital Territory

The Canberra Claims Management Centre manages all claims with a date of injury **on or after 1 July 1996**. The Canberra Office also processes all benefit payments:

Level 5, CFM Centre, 12 Moore Street, Canberra ACT 2601
Fax: (02) 6247 0176

Victoria

The Melbourne Claims Management Centre manages all claims with a date of injury **prior to 1 July 1996**:

84 Flinders Lane, Melbourne VIC 3000
Fax: (03) 9652 3513

Comcare Service Centres

The Comcare Service Centres provide customer, client and service-provider liaison, network support, training delivery and dispute management (including AAT matters):

New South Wales

Level 2, 92 Parramatta Road, Camperdown NSW 2050

Queensland

Level 13, 60 Edward Street, Brisbane QLD 4000

South Australia

Level 18, 25 Grenfell Street, Adelaide SA 5000

Western Australia

Level 18, 2 The Esplanade, Perth WA 6000

Tasmania

Level 4, 22 Elizabeth Street, Hobart TAS 7000