

Electing to sue the Commonwealth

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Introduction

Under section 45 of the SRC Act, eligible employees may elect to sue the Commonwealth for damages **instead of** receiving compensation for permanent impairment (PI). *Eligible employees* means employees who are entitled to receive lump sum payments under sections 24, 25 or 27 of the SRC Act.

An employee can elect to sue the Commonwealth (section 45 of the SRC Act) at any time **before compensation has been paid** under sections 24, 25 or 27 of the SRC Act. To pursue an election to sue the Commonwealth, the employee needs to show:

- that there is at least 10% whole person impairment (WPI) and
- that Comcare would be liable for the claim.

Note: Comcare does not have to make a permanent impairment determination for an employee to elect to sue the Commonwealth. In most circumstances, the employee will rely on Comcare's PI determination before considering whether to make an election to sue the Commonwealth.

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Section 45 election form

Once liability for permanent impairment (PI) compensation has been determined and accepted, the Claims Manager sends the employee a letter advising of the determination accepting liability under sections 24 and 27. See the [Procedure to accept liability for permanent impairment](#) for more information.

A [Section 45 Election Form](#) is sent to the employee with this letter.

If the employee elects to sue under section 45 of the SRC Act, Comcare asks for the form to be returned within 14 days of the PI determination being made. As the PI payment is processed at the end of 30 days, this allows time for the employee to return their form before the payment is made, if they elect to do so. If the Section 45 election form is not returned to Comcare before the payment is made, the employee's election to sue under section 45 of the SRC Act can no longer be exercised.

An election to sue the Commonwealth under section 45 of the SRC Act is irrevocable (section 45(3)) and can only be made before the employee receives a PI payment (section 45(1)). Therefore, all rights to compensation under sections 24, 25 and 27 are waived if the employee makes a valid election under section 45 of the SRC Act.

In order for an election to sue to be valid under section 45 of the SRC Act, the following actions need to be undertaken:

- an election needs to be made
 - in writing
 - before instituting proceedings in a Court
 - before any payment being made under sections 24, 25 or 27 of the SRC Act, and
- the Commonwealth (or Comcare) must be advised.

Invalid elections to sue

Elections can be invalid for a number of reasons. Some examples include:

- PI has been paid previously
- the employee's intentions are not clear (where an acceptance for PI and a signed election to sue are both received by Comcare)
- the form isn't signed or dated
- the form doesn't clearly identify the claim number.

If it's clear there is no liability on behalf of the Commonwealth, then any section 45 election is invalid.

Any completed section 45 election form should be referred to **Claims and Litigation Services** for review before any action is taken by a Claims Manager.

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