

Western Australia

## **Civil Liability Act 2002**

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As at 20 Nov 2002

No. 35 of 2002

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## Civil Liability Act 2002

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**Defined Terms**

Western Australia

## **Civil Liability Act 2002**

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**No. 35 of 2002**

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**An Act relating to the recovery of damages for death or injury of a person caused by the fault of another person, to restrict advertising of legal services relating to personal injury and touting, and for related purposes.**

*[Assented to 20 November 2002]*

The Parliament of Western Australia enacts as follows:

## Part 1 — Preliminary

### 1. Short title

This Act may be cited as the *Civil Liability Act 2002*.

### 2. Commencement

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

### 3. Meaning of “personal injury damages”

In this Act, unless the contrary intention appears —

“**personal injury damages**” means damages that relate to the death of, or injury to, a person caused by the fault of another person, but does not include a sum payable under a superannuation scheme or any life or other insurance policy.

### 4. Varying amounts to reflect award rate changes

- (1) This section applies if a provision of this Act requires the amount that is relevant for a particular financial year (in this section called “**the relevant financial year**”) to be obtained by varying the corresponding amount for the preceding financial year (in this section called “**the preceding financial year**”) according to this section.
- (2) The amount for the relevant financial year is obtained —
  - (a) by varying the amount for the preceding financial year by the percentage by which the amount that the Australian Statistician published as the Wage Cost Index, ordinary time hourly rates of pay (excluding bonuses) for Western Australia (in this subsection called “**the WCI**”) varied between the last December quarter before the preceding financial year commenced and the last December quarter before the relevant financial year commenced; or

- (b) if the calculation under paragraph (a) cannot be performed for a financial year because the WCI for a relevant quarter was not published, by varying the amount for the preceding financial year in accordance with the regulations,

and, if necessary, rounding the resulting amount off under subsection (3).

- (3) If the amount resulting under subsection (2)(2)(a) or (2)(b) is not a multiple of \$500 it is to be rounded off to the nearest multiple of \$500 (with an amount that is \$250 more than a multiple of \$500 being rounded off to the next highest multiple of \$500).

**5. Act binds Crown**

This Act binds the Crown in right of the State and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

## **Part 2 — Personal injury damages**

### **Division 1 — Preliminary**

#### **6. Application of this Part**

- (1) This Part applies to the awarding of personal injury damages unless this section states otherwise.
- (2) This Part extends to an award of personal injury damages even if the damages are sought to be recovered in an action for breach of contract or any other action.
- (3) This Part does not apply to —
  - (a) an award of damages relating to the death of, or injury to, a person caused by —
    - (i) an unlawful intentional act that is done with an intention to cause the death of, or injury to, a person, whether or not a particular person; or
    - (ii) an intentional act the doing of which is a sexual offence as defined in the *Evidence Act 1906* section 36A or sexual conduct that is otherwise unlawful;
  - (b) an award of damages to which the *Motor Vehicle (Third Party Insurance) Act 1943* applies;
  - (c) an award of damages to which the *Workers' Compensation and Rehabilitation Act 1981* Part IV Division 2 applies;
  - (d) an award of damages under the *Civil Aviation (Carriers' Liability) Act 1961* (including the applied provisions as defined in that Act);
  - (e) an award of damages relating to any death or injury that is attributable to the inhalation of asbestos; or
  - (f) an award of damages of a class that the regulations exclude from the operation of this Part.

- (4) This Part applies only if the personal injury arises out of an incident happening after the commencement of this Part.
- (5) If —
- (a) it cannot be ascertained whether or not the incident out of which the personal injury arises happened after the commencement of this Part; and
  - (b) the symptoms of the injury first appeared after the commencement of this Part,

the incident is to be taken, for the purpose of subsection (4), to have happened after the commencement of this Part.

**7. Court awards constrained**

A court cannot award damages contrary to Division 2 or 3.

**8. Act does not give rise to any cause of action**

This Act does not create or confer any cause of civil action for the recovery of damages in respect of an injury or death caused by the fault of a person.

**Division 2 — Restrictions on damages for non-pecuniary loss  
(general damages)**

**9. Restrictions on damages for non-pecuniary loss (general damages)**

- (1) If the amount of non-pecuniary loss is assessed to be not more than Amount A for the year in which the amount is assessed, no damages are to be awarded for non-pecuniary loss.
- (2) If the amount of non-pecuniary loss is assessed to be more than Amount A but not more than Amount C for the year in which the amount is assessed, damages for non-pecuniary loss are not to be awarded in an amount that is more than the excess of the amount assessed over Amount A.

**Civil Liability Act 2002**

**Part 2** Personal injury damages

**Division 2** Restrictions on damages for non-pecuniary loss (general damages)

**s. 10**

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- (3) If the amount of non-pecuniary loss is assessed to be more than Amount C but less than the sum of Amount A and Amount C for the year in which the amount is assessed, damages for non-pecuniary loss are not to be awarded in an amount that is more than the excess of the amount assessed over the amount calculated as follows —

Amount A — (Amount assessed — Amount C)

- (4) In this section —
- “**Amount A**” has the meaning given by section 10;
- “**Amount C**” has the meaning given by section 10;
- “**non-pecuniary loss**” means —
- (a) pain and suffering;
  - (b) loss of amenities of life;
  - (c) loss of enjoyment of life;
  - (d) curtailment of expectation of life; and
  - (e) bodily or mental harm.

**10. Amount A and Amount C**

- (1) For the financial year ending on 30 June 2003 —
- (a) Amount A is \$12 000; and
  - (b) Amount C is \$36 500.
- (2) For any other financial year —
- (a) Amount A is obtained by varying Amount A for the preceding financial year according to section 4; and
  - (b) Amount C is obtained by varying Amount C for the preceding financial year according to section 4.
- (3) On or before each 1 July after this section commences, the Minister is to publish a notice in the *Gazette* specifying the amounts that are Amount A and Amount C for the financial year commencing on that 1 July.

- (4) Publication under subsection (3) is for public information only and a failure to publish or a delay or error in publication does not affect what is Amount A or Amount C for the year concerned.

### **Division 3 — Fixing damages for pecuniary loss**

#### **11. Damages for loss of earnings**

- (1) In assessing damages for loss of earnings, including in an action under the *Fatal Accidents Act 1959*, the court is to disregard earnings lost to the extent that they would have accrued at a rate of more than 3 times the average weekly earnings at the date of the award.
- (2) In subsection (1) —  
**“loss of earnings”** means —
- (a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or
  - (b) future economic loss due to loss of prospective earnings or the deprivation or impairment of prospective earning capacity.
- (3) For the purpose of this section, the average weekly earnings at the date of the award is —
- (a) the amount estimated by the Australian Statistician as the average weekly total earnings of full-time adult employees in Western Australia for the quarter ending most recently before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award; or

- (b) if the Australian Statistician ceases to make the estimate of the amount referred to in paragraph (a), the amount fixed by, or determined in accordance with, the regulations.

**12. Damages for provision of home care services**

- (1) This section deals with the awarding of damages for gratuitous services of a domestic nature or gratuitous services relating to nursing and attendance that have been or are to be provided to the person in whose favour the award is sought by a member of the same household or family as the person.
- (2) No damages are to be awarded for the services if the services would have been, or would be, provided to the person even if the person had not suffered the personal injury.
- (3) If the amount of damages that could, if this subsection did not apply, be awarded under subsection (5) or (7) is Amount B or less, no damages are to be awarded for the services.
- (4) In subsection (3) —  
“**Amount B**” has the meaning given by section 13.
- (5) If the services are provided or to be provided for not less than 40 hours per week, the amount of damages awarded for them is not to exceed the amount calculated on a weekly basis at the rate of —
  - (a) the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in Western Australia for the relevant quarter; or
  - (b) if the Australian Statistician ceases to make the estimate referred to in paragraph (a), the weekly amount fixed by, or determined in accordance with, the regulations.
- (6) In subsection (5)(5)(a) —  
“**the relevant quarter**” means —
  - (a) the quarter in which the services were provided; or

- (b) if at the date of the award an estimate as referred to in subsection (5)(a) is not available to the court for that quarter or the services are yet to be provided, the most recent quarter for which such an estimate is available to the court at the date of the award.
- (7) If the services are provided or to be provided for less than 40 hours per week, the amount of damages awarded for them is not to exceed the amount calculated on an hourly basis at an hourly rate that is one-fortieth of the weekly rate that would be applicable under subsection (5) if the services were provided or to be provided for not less than 40 hours per week.

**13. Amount B**

- (1) Amount B for the financial year ending on 30 June 2003 is \$5 000.
- (2) For any other financial year, Amount B is obtained by varying Amount B for the preceding financial year according to section 4.
- (3) On or before each 1 July after this section commences, the Minister is to publish a notice in the *Gazette* specifying the amount that is Amount B for the financial year commencing on that 1 July.
- (4) Publication under subsection (3) is for public information only and a failure to publish or a delay or error in publication does not affect what is Amount B for the year concerned.

**Division 4 — Structured settlements**

**14. Meaning of “structured settlement”**

In this Division —

**“structured settlement”** means an agreement that provides for all or part of the damages agreed or awarded to be paid in the form of periodic payments funded by an annuity or other agreed means.

**15. Consent order for structured settlement**

- (1) This section applies if the parties to a claim for personal injury damages make a structured settlement and apply to the court hearing, or with jurisdiction to hear, the claim for an order approving of, or in the terms of, the structured settlement.
- (2) The court may make the order even though the payment of damages is not in the form of a lump sum.

### **Part 3 — Advertising legal services relating to personal injury and touting**

#### **16. Meanings of terms used in this Part**

In this Part, unless the contrary intention appears —

**“client”**, of a legal practitioner, includes a person who makes a genuine inquiry of a legal practitioner about a personal injury;

**“hospital”** includes —

- (a) any premises used for receiving, caring for, or treating, persons who are injured, sick, or mentally ill;
- (b) any premises used for providing a service for maintaining, improving, or restoring, a person’s health and wellbeing; and
- (c) any land or building occupied or used in connection with premises described in paragraph (a) or (b);

**“legal practitioner”** has the meaning that is assigned to “practitioner” in the *Legal Practitioners Act 1893*;

**“potential claimant”** means —

- (a) a person who suffers, or may suffer, personal injury arising out of an incident; or
- (b) another person who has, or may have, a claim arising out of that personal injury;

**“printed publication”** includes a newspaper, magazine, journal, periodical, or directory;

**“public place”** means a place or vehicle that —

- (a) the public, or a section of the public, is entitled to use; or

- (b) is open to, or is being used by, the public or a section of the public,

whether on payment of money, through membership of a club or other body, or otherwise;

**“publish”** means —

- (a) to include in a printed publication;
- (b) to disseminate by the exhibition or broadcast of a photograph, slide, film, video recording, audio recording or other recording of images or sound, either as a public exhibition or broadcast or as an exhibition or broadcast to persons attending a place for the purposes of receiving professional advice, treatment, or assistance;
- (c) to broadcast by radio or for television;
- (d) to include on an internet website or otherwise publicly disseminate by means of the internet;
- (e) to publicly exhibit in, on, over, or under, any building, vehicle, or place, or in the air, in view of persons in or on any street or public place;
- (f) to include in a document gratuitously sent or delivered to any person or thrown or left on premises occupied by any person or left on a vehicle; or
- (g) to include in a document provided to a person as a receipt or record for a transaction.

**17. Restriction on advertising legal services relating to personal injury**

- (1) A legal practitioner or a person acting for a legal practitioner must not publish or cause to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person —
  - (a) to make a claim under any Act or law for compensation or damages for a personal injury; or

- (b) to use the services of the legal practitioner, or another named legal practitioner or a named firm of legal practitioners in connection with the making of a claim mentioned in paragraph (a),

except if section 18 allows publication of the statement.

Penalty: \$10 000.

- (2) A legal practitioner or a person acting for a legal practitioner does not contravene subsection (1) only because of —
  - (a) a statement made —
    - (i) to a person who is already a client of the legal practitioner or in an agreement under the *Legal Practitioners Act 1893* section 59;
    - (ii) to a person at the legal practitioner's place of business; or
    - (iii) under an order by a court;
  - or
  - (b) a statement made on the legal practitioner's internet website that is limited to statements about —
    - (i) the operation of the law of negligence and a person's legal rights under that law; and
    - (ii) the conditions under which the legal practitioner is prepared to provide personal injury services.
- (3) The liability of a legal practitioner who contravenes subsection (1) to the penalty provided under that subsection does not prevent the legal practitioner from being charged with, or found guilty of, unprofessional conduct because of the conduct involved in the contravention.
- (4) Subsection (1) does not apply to a statement made in an edition published before the commencement of this section.

**18. Allowed publication**

- (1) Except as stated in subsection (3), the publication of a statement that states only the name of a legal practitioner or a firm of legal practitioners and the contact details of the legal practitioner or firm, with or without information as to any area of practice, speciality, or accreditation, of the legal practitioner or firm, is allowed if it is —
  - (a) in a printed publication;
  - (b) by publishing on an internet website an electronic version merely reproducing a statement in a printed publication that is published independently of a legal practitioner;
  - (c) part of the publication on an internet website of the contents of a directory or database that is published or maintained independently of a legal practitioner;
  - (d) by public exhibition in, on, over, or under, any building, vehicle, or place, or in the air, in view of persons in or on any street or public place;
  - (e) in a printed document gratuitously sent or delivered to any person or thrown or left on premises occupied by any person or left on a vehicle; or
  - (f) in a printed document provided to a person as a receipt or record relating to a transaction.
- (2) For the purposes of subsection (1)(1)(b) or (1)(c), a printed publication, directory, or database is published or maintained independently of a legal practitioner only if —
  - (a) it is not published or maintained by the legal practitioner or by a partner, employee or member of the legal practitioner's practice; and
  - (b) the person who publishes or maintains it does so in the ordinary course of the conduct of the person's business or affairs.

- (3) Subsection (1) does not allow the publication of a statement —
- (a) by public exhibition in or on a hospital; or
  - (b) in a printed document gratuitously sent or delivered to a hospital or left in a hospital or on a vehicle in the vicinity of a hospital.

**19. Prohibition on touting at scene of incidents or at any time**

- (1) At the scene of an incident from which a person allegedly suffered personal injury or at a hospital after an incident from which a person allegedly suffered personal injury —
- (a) a person attending must not solicit or induce a potential claimant involved in the incident to make a claim; and
  - (b) a person, other than a person attending, must not solicit or induce, in a way that would be unreasonable in the circumstances, a potential claimant involved in the incident to make a claim.

Penalty: \$10 000.

- (2) In any circumstances after an incident from which a person allegedly suffered personal injury —
- (a) a person attending; or
  - (b) a person obtaining information,

must not give a potential claimant involved in the incident, or someone on the potential claimant's behalf, any information described in subsection (4).

Penalty: \$10 000.

- (3) In any circumstances after an incident from which a person allegedly suffered personal injury, a person having contact whose contact directly involves —
- (a) the treatment or management of the injury or its physical, psychiatric, or psychological consequences; or

- (b) the provision of administrative or other support to a person whose contact directly involves anything referred to in paragraph (a),

must not give a potential claimant (whether or not the potential claimant involved in the incident) or someone on the potential claimant's behalf, any information described in subsection (4) except if subsection (5) allows the information to be given.

Penalty: \$10 000.

- (4) The information the giving of which may be an offence under subsection (2) or (3) is the name, address, or telephone number of —
  - (a) a particular legal practitioner or firm of legal practitioners; or
  - (b) an employee or agent of the legal practitioner or firm.
- (5) Information described in subsection (4) may be given as described in subsection (3) if —
  - (a) the information is given while simultaneously giving similar information about, or about an employee or agent of, each of at least 3 competing legal practitioners or firms; or
  - (b) the information is given on behalf of an association in order to help a person to make use of an arrangement that the association has, as a service to its members, made with a particular legal practitioner or firm of legal practitioners.
- (6) When counting how many competing legal practitioners or firms there are for the purposes of subsection (5)(5)(a), 2 or more legal practitioners who are members of the same firm count as one.
- (7) In any circumstances after an incident from which a person allegedly suffered personal injury —
  - (a) a person attending;



(10) The name or address of a person involved in the incident may be disclosed if the disclosure is not likely to result in a potential claimant involved in the incident being solicited or induced to make a claim.

(11) In this section —

**“person attending”** means a person who, for the purpose of the person’s employment, is attending or attended —

(a) at the scene of the incident from which a person allegedly suffered personal injury; or

(b) at a hospital after an incident from which a person allegedly suffered personal injury;

**“person having contact”** means a person who, for the purpose of the person’s employment, has contact with a potential claimant, whether or not the potential claimant involved in the incident, that substantially arises because of the incident from which a person allegedly suffered personal injury;

**“person obtaining information”** means a person who, for the purpose of the person’s employment, obtains information about the incident from which a person allegedly suffered personal injury.

**20. Prohibition against paying, or seeking payment, for touting**

(1) A person must not provide or offer to provide, or receive or seek to receive, a fee for the soliciting or inducing of a potential claimant to make a claim.

Penalty: \$10 000.

(2) A person does not commit an offence against subsection (1) if the fee is for a person who is not a legal practitioner and is not acting for a legal practitioner, in the ordinary course of business as an advertiser or publisher, advertising legal services about claims.

- (3) A person does not commit an offence against subsection (1) if the fee is for professional services provided by a person who is a legal practitioner or is acting for a legal practitioner to the potential claimant in the process of making a claim.
- (4) In this section —  
“**fee**” includes the following —
  - (a) a bonus, commission, cash payment, deduction, discount, rebate, remission or other valuable consideration;
  - (b) employment, or an agreement to give employment, in any capacity.

**21. Consequences if person approved under an Act is convicted under section 19 or 20**

- (1) This section applies to a person if —
  - (a) under an Act (“**the relevant Act**”) —
    - (i) the person is approved for a profession or a kind of employment or calling; or
    - (ii) activities for the person’s profession, employment, or calling are regulated;
  - and
  - (b) under the relevant Act, the person’s approval may be suspended or cancelled for misconduct.
- (2) If the person is convicted of an offence against section 19 or 20, the conduct resulting in the person’s conviction is conduct because of which the person’s approval may be suspended or cancelled under the relevant Act.
- (3) In this section —  
“**approved**” includes accredited, authorised, employed, licensed, registered or otherwise permitted to carry on activities;

**“convicted”** includes being found guilty, and the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded;

**“misconduct”** includes malpractice, professional misconduct and unprofessional conduct or practice.

## **Part 4 — Other matters**

### **22. Regulations**

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

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Defined Terms

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**Defined Terms**

*[This is a list of terms defined and the provisions where they are defined.*

*The list is not part of the law.]*

| <b>Defined Term</b>                | <b>Provision(s)</b> |
|------------------------------------|---------------------|
| Amount A .....                     | 9(4)                |
| Amount B .....                     | 12(4)               |
| approved .....                     | 21(3)               |
| client .....                       | 16                  |
| convicted.....                     | 21(3)               |
| fee .....                          | 20(4)               |
| hospital.....                      | 16                  |
| insurer .....                      | 19(8)               |
| legal practitioner .....           | 16                  |
| loss of earnings .....             | 11(2)               |
| misconduct.....                    | 21(3)               |
| non-pecuniary loss .....           | 9(4)                |
| person attending.....              | 19(11)              |
| person having contact .....        | 19(11)              |
| person obtaining information ..... | 19(11)              |
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| potential claimant.....            | 16                  |
| printed publication .....          | 16                  |
| public place .....                 | 16                  |
| publish.....                       | 16                  |
| structured settlement .....        | 14                  |
| the preceding financial year ..... | 4(1)                |
| the relevant Act.....              | 21(1)               |
| the relevant financial year .....  | 4(1)                |
| the relevant quarter .....         | 12(6)               |
| the WCI.....                       | 4(2)                |