

Serial 138

Legal Practitioners Amendment (Costs and Advertising) Bill 2003

Dr Toyne

**A BILL
for
AN ACT**

to amend the *Legal Practitioners Act*

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NORTHERN TERRITORY OF AUSTRALIA
LEGAL PRACTITIONERS AMENDMENT (COSTS AND ADVERTISING)
ACT 2003

No. of 2003

TABLE OF PROVISIONS

Section

1. Short title
2. Commencement
3. Principal Act
4. New section
 - 6A. Act binds Crown
5. Meaning of professional misconduct
6. Professional conduct rules
7. Repeal and substitution
 - Division 1 – Definitions*
 - 118A. Definitions
 - Division 2 – Disclosure of costs*
 - 118B. Costs to be disclosed
 - Division 3 – Recovery of costs*
8. Taxation of costs and disbursements on application to Master
9. New Division heading
 - Division 4 – Agreements as to costs*
10. Repeal and substitution
 - 129A. Conditional costs agreements
 - 129B. Payment of premium under conditional costs agreement
 - 129C. Costs not to be calculated on amount recovered in proceedings
 - 129D. Legal practitioner must provide estimate of costs before agreement made
 - 129E. Form of conditional costs agreement
 - 129F. General provisions apply to conditional costs agreements
 - 129G. Provision of agreement that is inconsistent with Division is void
 - 129H. Review of agreements
 - 129I. Appeal
 130. Failure to comply with certain provisions not an offence
11. New Part
 - PART XA – ADVERTISING SERVICES FOR PERSONAL INJURY CLAIMS
 - 130AA. Application
 - 130AB. Definitions

- 130AC. Restriction on advertising of legal services in connection with personal injury claims
- 130AD. Permitted methods of advertising
- 130AE. Prohibition against touting for potential claimants
- 130AF. Prohibition against paying for touting for potential claimants



NORTHERN TERRITORY OF AUSTRALIA

No. of 2003

AN ACT

to amend the *Legal Practitioners Act*

[Assented to 2003]

[Second reading 2003]

The Legislative Assembly of the Northern Territory enacts as follows:

1. Short title

This Act may be cited as the *Legal Practitioners Amendment (Costs and Advertising) Act 2003*.

2. Commencement

The provisions of this Act come into operation on the date, or respective dates, fixed by the Administrator by notice in the *Gazette*.

3. Principal Act

The *Legal Practitioners Act* is in this Act referred to as the Principal Act.

4. New section

The Principal Act is amended by inserting after section 6 the following:

"6A. Act binds Crown

"This Act binds the Crown in right of the Territory and, so far as the legislative power of the Legislative Assembly permits, the Crown in all its other capacities."

5. Meaning of professional misconduct

Section 45 of the Principal Act is amended by inserting after subsection (2)(a) the following:

"(aa) a legal practitioner's contravention of, or failure to comply with, section 118B, 129A(3), 129B(2)(a), 129C, 129D, 129E, 130AC, 130AE(1) or 130AF whether or not the contravention or failure was wilful or reckless;"

6. Professional conduct rules

Section 45A of the Principal Act is amended by inserting after subsection (1) the following:

"(1A) The Law Society may make rules relating to the professional conduct of legal practitioners for the purpose of section 130AC(1).

"(1B) The Law Society may make rules relating to the professional conduct of legal practitioners that regulate or prohibit advertising by legal practitioners and, in particular, that regulate or prohibit advertising that it considers –

- (a) is false, misleading or deceptive;
- (b) may bring the administration of justice into disrepute; or
- (c) may encourage persons to engage in legal proceedings that lack merit."

7. Repeal and substitution

Section 118A of the Principal Act is repealed and the following substituted:

"Division 1 – Definitions

"118A. Definitions

"In this Part, unless the contrary intention appears –

'conditional costs agreement' means an agreement made under section 129A;

'costs agreement' means an agreement made under section 129;

'legal practitioner' means –

- (a) a local legal practitioner who holds an unrestricted practising certificate, other than a Counsel;

- (b) an interstate legal practitioner, who has established a practice in the Territory and who holds a current interstate practising certificate that corresponds to an unrestricted practising certificate, other than an interstate legal practitioner who is entitled to practise only as a barrister and independently of another legal practitioner;
- (c) a locally registered foreign lawyer; or
- (d) an organisation referred to in section 22(5);

'premium' means a premium on costs within the meaning of section 129B.

"Division 2 – Disclosure of costs

"118B. Costs to be disclosed

"(1) As soon as practicable after a legal practitioner accepts instructions to undertake work of a professional nature for a person, the legal practitioner must provide the person with a written statement of the costs of the work to be undertaken.

"(2) The written statement must contain the following:

- (a) the basis on which the costs, including disbursements, will be calculated and whether the costs will be calculated in accordance with a fee scale prescribed under a law in force in the Territory;
- (b) details of proposed billing intervals;
- (c) a statement informing the person of his or her rights under section 120 and of any other rights to dispute a statement of costs and disbursement (including those rights agreed between the legal practitioner and the person) and any other processes that are available to the person to have a statement of costs and disbursements reviewed;
- (d) if the work to be undertaken could involve litigation – details of the variables in and costs of the litigation (based on a successful and unsuccessful outcome) and details of party-party costs that may be payable in addition to the costs otherwise payable by the person.

"(3) A legal practitioner must, while he or she is undertaking work of a professional nature for a person, ensure that the person is regularly informed of the costs and disbursements payable by the person for the work.

"(4) A legal practitioner who undertakes work of professional nature for a person must, if money or a benefit may be paid to the person as a result of an

offer of settlement, inform the person of the minimum amount or benefit that the person will receive if the matter is settled in accordance with the offer.

- "(5) This section does not apply if –
- (a) the costs are less than the prescribed amount;
 - (b) the person for whom the work is undertaken is –
 - (i) the Territory or the Commonwealth of Australia or an authority of the Territory or the Commonwealth; or
 - (ii) a prescribed person;
 - (c) the person for whom the work is undertaken is a client of the legal practitioner or the legal practitioner's firm and the person has received a written statement of costs under this section within the previous 12 months;
 - (d) it is not practical, in the circumstances of the matter, for the legal practitioner to comply with this section; or
 - (e) the legal practitioner can not reasonably comply with this section due to the urgency of the matter.

"Division 3 – Recovery of costs".

8. Taxation of costs and disbursements on application to Master

Section 120 of the Principal Act is amended by inserting after subsection (2) the following:

"(2A) A person is not entitled to give notice under subsection (1) to have the amount of costs payable by him or her under a conditional costs agreement determined by taxation unless the conditional costs agreement provides for the payment of a premium on the costs payable under the agreement."

9. New Division heading

The Principal Act is amended by inserting after section 128 the following:

"Division 4 – Agreements as to costs".

10. Repeal and substitution

Section 130 of the Principal Act is repealed and the following substituted:

"129A. Conditional costs agreements

"(1) A legal practitioner may make an agreement with a person that the amount of costs (excluding disbursements) payable, or to be payable, by the person to the legal practitioner for work of a professional nature already undertaken, or to be undertaken, for the person by the legal practitioner –

- (a) is to be the amount specified in, or ascertainable in accordance with, the agreement; and
- (b) is contingent on the successful outcome of the matter to which the work relates.

"(2) Subject to subsection (3), a conditional costs agreement may relate to any proceedings in a court or tribunal.

"(3) A conditional costs agreement cannot relate to –

- (a) criminal proceedings;
- (b) proceedings under the *Family Law Act 1975* of the Commonwealth; or
- (c) prescribed proceedings.

"129B. Payment of premium under conditional costs agreement

"(1) A conditional costs agreement may provide for the payment of a premium on the costs payable under the agreement in addition to the amount payable as costs.

"(2) The premium –

- (a) is to be a specified percentage of the costs, not exceeding the prescribed percentage of the costs (if any); and
- (b) is to be identified in the agreement separately from the amount of costs payable.

"(3) If a conditional costs agreement provides for the payment of a premium referred to in subsection (1) and the costs payable under the agreement are taxed under Division 2, the premium is the relevant percentage of the amount of costs determined by taxation.

"(4) For the purposes of subsection (2), the Regulations may prescribe different percentages for different circumstances.

"129C. Costs not to be calculated on amount recovered in proceedings

"A legal practitioner must not enter into a conditional costs agreement that provides for the amount of costs payable under the agreement to be determined as a proportion of, or to vary according to, the amount recovered in the proceedings to which the agreement relates.

Penalty: 100 penalty units.

"129D. Legal practitioner must provide estimate of costs before agreement made

"Before a legal practitioner and a person enter into a conditional costs agreement, the legal practitioner must give to the person a written estimate of the amount of costs that will be payable by the person to the legal practitioner on the successful outcome of the matter to which the agreement relates.

"129E. Form of conditional costs agreement

"A conditional costs agreement must –

- (a) be in writing;
- (b) specify the circumstances constituting the successful outcome of the matter;
- (c) disclose the legal practitioner's usual fees for the work to which the agreement relates;
- (d) if the agreement provides for the payment of a premium in accordance with section 129B – specify the percentage and the reasons why the premium is warranted;
- (e) if the work to which the agreement relates involves legal proceedings –
 - (i) inform the person of his or her exposure to party-party costs if the proceedings are unsuccessful; and
 - (ii) include an explanation of the risks involved in the proceedings;
- (f) inform the person that he or she may obtain independent legal advice before entering into the agreement;
- (g) inform the person of his or her rights under the Act to have the agreement reviewed and set aside if it is not fair or reasonable; and
- (h) be signed by the person.

"129F. General provisions apply to conditional costs agreements

"(1) A conditional costs agreement is not enforceable unless it complies with section 129E.

"(2) A conditional costs agreement that complies with section 129E is evidence of the terms of the agreement.

"(3) A legal practitioner who is a party to a conditional costs agreement is not entitled in respect of work to which the agreement relates to receive an amount for his or her costs (including disbursements) greater than the amount specified in, or ascertainable in accordance with, the agreement.

"129G. Provision of agreement that is inconsistent with Division is void

"If a provision of a costs agreement or conditional costs agreement is inconsistent with a provision of this Division, the provision of the agreement is void to the extent of the inconsistency.

"129H. Review of agreements

"(1) A party to a costs agreement or conditional costs agreement may apply to –

- (a) the Law Society; or
- (b) the Court,

for it to review the agreement under this section.

"(2) An application under subsection (1) must be in the prescribed form and must comply with any requirements specified in the Regulations.

"(3) If the Law Society or the Court is satisfied that the agreement is not fair and reasonable, it may –

- (a) order that the amount payable under the agreement be reduced to an amount specified in the order; or
- (b) declare that the agreement is not binding on the parties to the agreement.

"(4) If the Law Society or the Court orders that the amount payable under an agreement be reduced, the agreement is enforceable as if the amount specified in the order were specified in the agreement as the amount payable under the agreement.

"(5) If the Law Society or the Court declares that an agreement is not binding on the parties to the agreement –

- (a) it may make any other orders as it thinks necessary to restore the parties to the position in which they would have been if the agreement had not been made; and
- (b) the provisions of this Part (other than sections 129 and 129A) apply as if the agreement had not been made.

"(6) Except by leave, a person is not entitled to make an application under this section in respect of an agreement after the institution of proceedings for the recovery from that person of the amount payable under the agreement.

"129I. Appeal

"(1) If a person who is a party to a costs agreement or conditional costs agreement is aggrieved by a decision of the Law Society under section 129H in respect of the agreement, he or she may appeal to the Court under this section.

"(2) A person must, as soon as practicable after lodging an appeal under this section, give notice of the appeal to the other party to the agreement and to the Law Society.

"(3) The Law Society must, as soon as practicable after being given notice under subsection (2), lodge with the Court all documents it has in respect of the review conducted by it under section 129H.

"(4) The Law Society is not a party to an appeal under this section but it may apply to the Court to be joined as a party to the proceedings.

"(5) An appeal under this section is to be by way of a re-hearing.

"(6) If the Court is satisfied that the agreement is not fair and reasonable, it may –

- (a) order that the amount payable under the agreement be reduced to an amount specified in the order; or
- (b) declare that the agreement is not binding on the parties to the agreement.

"(7) If the Court orders that the amount payable under an agreement be reduced, the agreement is enforceable as if the amount specified in the order were specified in the agreement as the amount payable under the agreement.

"(8) If the Court declares that an agreement is not binding on the parties to the agreement –

- (a) it may make any other orders as it thinks necessary to restore the parties to the position in which they would have been if the agreement had not been made; and

- (b) the provisions of this Part (other than sections 129 and 129A) apply as if the agreement had not been made.

"(9) Except by leave, a person is not entitled to make an application under this section in respect of an agreement after the institution of proceedings for the recovery from that person of the amount payable under the agreement.

"130. Failure to comply with certain provisions not an offence

"Despite section 69A of the *Summary Offences Act*, a legal practitioner who contravenes or fails to comply with section 118B, 129A(3), 129B(2)(a), 129D or 129E is not guilty of an offence."

11. New Part

The Principal Act is amended by inserting after Part X the following:

"PART XA – ADVERTISING SERVICES FOR PERSONAL INJURY CLAIMS

"130AA. Application

"This Part does not apply in relation to the following advertisements and publications:

- (a) an advertisement or publication by a legal practitioner relating to –
 - (i) making a claim for compensation or damages under an Act or other law for a personal injury; or
 - (ii) using the services of a legal practitioner in connection with making such a claim,

that was published before the commencement of section 11 of the *Legal Practitioners Amendment (Costs and Advertising) Act 2003*;

- (b) an advertisement or publication made for the purpose of educating persons about the content of the law or their rights, liabilities and duties under the law;
- (c) an advertisement or publication made for the purpose of identifying persons who are entitled to become parties to a class action specified in the advertisement or publication;
- (d) an advertisement or publication made under a statutory duty, function or power;

- (e) an advertisement or publication made by the Northern Territory Legal Aid Commission in relation to the Legal Aid Contingency Fund established by section 44 of the *Legal Aid Act*;
- (f) an advertisement or publication made for the purpose of confirming the existence of a contractual relationship between a legal practitioner and another person or an organisation whereby the legal practitioner is to provide legal services for personal injury claims;
- (g) an advertisement or publication exempted from the application of this Part by the Regulations.

"130AB. Definitions

"In this Part, unless the contrary intention appears –

'employment' includes self-employment;

'hospital' includes a nursing home, community health facility, medical centre, physiotherapist's rooms, dentist's surgery, hostel and any other premises occupied or used for or in connection with –

- (a) receiving, examining, caring for or treating a person who is injured, sick or mentally ill; or
- (b) providing a service for maintaining, improving or restoring a person's health and wellbeing;

'incident' includes an accident, circumstance, act or omission;

'personal injury' has the same meaning as in the *Personal Injuries (Liabilities and Damages) Act*;

'potential claimant' means –

- (a) a person who suffers or may suffer a personal injury arising out of an incident; or
- (b) another person who has or may have a claim in relation to a person referred to in paragraph (a);

'publish' means –

- (a) to publish in an edition of a newspaper, magazine, journal, periodical or directory;
- (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 purpose of receiving professional advice, treatment or assistance;

- (c) to broadcast by radio or for television;
- (d) to display on an internet website or otherwise publicly disseminate by means of the internet;
- (e) to publicly exhibit in, on, over or under a building, vehicle or place or in the air in view of a person in or on any street or public place;
- (f) to display on a document gratuitously sent or delivered to a person or thrown or left on a vehicle or on premises occupied by a person; or
- (g) to display on a document provided to a person as a receipt or record for a transaction;

'reward' includes –

- (a) a bonus, commission, cash payment, deduction, discount, rebate, remission or other valuable consideration; and
- (b) employment, or an agreement to employ, in any capacity;

'statement' includes a statement that includes matters specified in section 130AC(1)(a) and (b) as well as other matters.

"130AC. Restriction on advertising of legal services in connection with personal injury claims

"(1) A legal practitioner must not (whether himself or herself or by a person acting for him or her) publish a statement that may reasonably be thought to be intended or likely to encourage or induce a person –

- (a) to make a claim for compensation or damages under an Act or other law for a personal injury; and
- (b) to use the services of a legal practitioner or a legal practice named in the statement in connection with making such a claim.

Penalty: 50 penalty units.

"(2) Subsection (1) does not apply if a legal practitioner or person acting for a legal practitioner advertises legal services relating to making claims for

personal injuries by a statement published in accordance with section 130AD that states only –

- (a) the name and contact details of the legal practitioner, of the legal practitioner's practice or of another legal practitioner or another legal practitioner's practice by whom the legal practitioner or person is employed or engaged; and
- (b) details as to any area of speciality of a legal practitioner or legal practice referred to in paragraph (a).

"(3) Subsection (1) does not apply if the statement is published in accordance with the professional conduct rules.

"130AD. Permitted methods of advertising

"(1) A statement referred to in section 130AC(2) may be published in any of the following ways:

- (a) publication in an edition of a newspaper, magazine, journal, periodical or directory;
- (b) publication on an internet website by publication of an electronic version of an edition of a newspaper, magazine, journal, periodical or directory in which the statement is published on the website, but only if the statement is reproduced as published in the edition of the newspaper, magazine, journal, periodical or directory and the newspaper, magazine, journal, periodical or directory is published independently of the legal practitioner;
- (c) publication on an internet website as part of the contents of a directory or database that is published or maintained independently of the legal practitioner;
- (d) public exhibition of the statement in, on, over or under a building, vehicle or place or in the air in view of a person on a street or other public place, other than exhibition of the statement in or on a hospital;
- (e) display of the statement on a printed document gratuitously sent or delivered to any person or thrown or left on a vehicle or on premises occupied by a person, other than display on a printed document gratuitously sent or delivered to a hospital, left in a hospital or left on a vehicle in the vicinity of a hospital;
- (f) display of the statement on a printed document provided to a person as a receipt or record in relation to a transaction.

"(2) An edition of a newspaper, magazine, journal, periodical or directory, or a directory or database published on an internet website, is published— or maintained independently of a legal practitioner only if –

- (a) it is not published or maintained by the legal practitioner, another legal practitioner in the same practice as the legal practitioner or an employee employed or engaged by the legal practitioner or that legal practice; and
- (b) it is published or maintained by a person in the ordinary course of conducting the person's business or affairs.

"130AE. Prohibition against touting for potential claimants

"(1) A person who is at the scene of an incident, or at a hospital after an incident, at which another person allegedly suffers or suffered a personal injury must not solicit or induce a potential claimant involved in the incident to make a claim.

Penalty: 50 penalty units.

"(2) The following are examples of persons referred to in subsection (1) who might solicit or induce a potential claimant to make a claim:

- (a) a person who, for the purposes of the person's employment or business, attends or attended the scene of an incident, or at a hospital after an incident, at or from which a person allegedly suffered a personal injury, including –
 - (i) a member of the Police Force;
 - (ii) a medical practitioner;
 - (iii) a nurse;
 - (iv) a hospital worker;
 - (v) an ambulance officer;
 - (vi) a member of the Northern Territory Fire and Rescue Service; and
 - (vii) a tow truck operator;
- (b) any other person at or near the scene of an incident at or from which a person allegedly suffers a personal injury.

Legal Practitioners Amendment (Costs and Advertising) Act 2003

- "(3) A person who, for the purposes of the person's employment –
- (a) obtains information about an incident at or from which a person allegedly suffered a personal injury; or
 - (b) has contact with a potential claimant that substantially arises because of an incident at or from which a person allegedly suffered a personal injury,

must not solicit or induce a potential claimant involved in the incident to make a claim.

Penalty: 50 penalty units.

"(4) The following are examples of the way in which a person might solicit or induce a potential claimant involved in an incident at which a person allegedly suffered a personal injury to make a claim:

- (a) by giving the potential claimant or another person on the potential claimant's behalf the name, address or telephone number of a legal practitioner, a legal practice or an employee or agent of a legal practitioner or a legal practice;
- (b) whether asked to do so or not, by telephoning a legal practitioner or an employee or agent of a legal practitioner in connection with the potential claimant making a claim and insisting the potential claimant speaks with or makes an appointment to see the legal practitioner, employee or agent;
- (c) by disclosing the name or address of a person involved in the incident to another person other than to –
 - (i) a member of the Police Force;
 - (ii) a person to whom he or she is required to disclose that information under the law in force in the Territory;
 - (iii) a potential claimant involved in the incident or the potential claimant's legal practitioner or agent;
 - (iv) where the person attends or attended the incident for the purpose of his or her employment and the person's employer requires him or her to disclose that information on grounds that are reasonable in the circumstances – the person's employer; or
 - (v) a person who carries on the business of providing insurance for people or property or such a person's legal practitioner or agent.

"(5) A person does not solicit or induce a potential claimant involved in an incident at which a person allegedly suffered a personal injury to make a claim if –

- (a) the person discloses the name or address of a person involved in an incident where –
 - (i) the person is a client of a legal practitioner for the purpose of making a claim or exercising a legal right arising out of the incident;
 - (ii) it is reasonable for the person to think that he or she may have a claim or legal right referred to in subparagraph (i); and
 - (iii) the disclosure is for the purpose of making the claim or exercising the legal right; and
- (b) the disclosure is not likely to result in a potential claimant involved in the incident being solicited or induced to make a claim.

"130AF. Prohibition against paying for touting for potential claimants

- "(1) A person must not –
- (a) reward another person for soliciting or inducing a potential claimant to make a claim; or
 - (b) seek a reward for soliciting or inducing a potential claimant to make a claim.

Penalty: 50 penalty units.

"(2) A person does not commit an offence against subsection (1) only because the person –

- (a) if the person is not a legal practitioner or a person acting for a legal practitioner – advertises or advertised, in the ordinary course of conducting the person's business as an advertiser or publisher, legal services about claims; or
 - (b) if the person is a legal practitioner or a person acting for a legal practitioner – charges or charged a potential claimant a fee for legal services provided to the potential claimant as part of making a claim."
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ALTERATION TO SECTION HEADING

On the day on which the *Legal Practitioners Act* is amended by this Act, in addition to any alteration to section headings indicated in the text of this Act, the heading to section 129 of the *Legal Practitioners Act* is altered by omitting the whole heading and substituting "**Costs agreements**".