

2002

THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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(As presented)

(Mr Brendan Smyth)

# Adventure Activities (Liability) Bill 2002

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## **Adventure Activities (Liability) Bill 2002**

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### **A Bill for**

An Act to regulate compensation payable in relation to the death or injury  
of people taking part in certain adventure activities

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The Legislative Assembly for the Australian Capital Territory enacts as  
follows:

1 **Part 1 Preliminary**

2 **1 Name of Act**

3 This Act is the *Adventure Activities (Liability) Act 2002*.

4 **2 Commencement**

5 This Act commences on the day after its notification day.

6 **3 Dictionary**

7 The dictionary at the end of this Act is part of this Act.

8 *Note 1* The dictionary at the end of this Act defines certain words and  
9 expressions used in this Act, and includes references (*signpost*  
10 *definitions*) to other words and expressions defined elsewhere in this  
11 Act.

12 *Note 2* A definition in the dictionary (including a signpost definition) applies to  
13 the entire Act unless the definition, or another provision of the Act,  
14 provides otherwise or the contrary intention otherwise appears (see  
15 *Legislation Act 2001*, s 155 and s 156 (1)).

16 **4 Notes**

17 A note included in this Act is explanatory and is not part of this Act.

18 *Note* See *Legislation Act 2001*, s 127 (1), (4) and (5) for the legal status of  
19 notes.

20 **5 Meaning of *adventure activity***

21 In this Act:

22 *adventure activity* means an approved adventure activity conducted  
23 by, or under the control of, an approved operator in the normal  
24 course of the operator's business in the ACT.

1   **6    Meaning of *serious injury***

2       In this Act:

3       *serious injury* means—

- 4       (a) a serious long-term impairment or loss of a body function; or
- 5       (b) permanent serious disfigurement; or
- 6       (c) severe long-term mental or severe long-term behavioural
- 7           disturbance or disorder; or
- 8       (d) loss of a foetus.

1 **Part 2** **Purpose, application and**  
2 **objects**

3 **7 Purpose of Act**

4 The purpose of this Act is to regulate the compensation for people to  
5 whom this Act applies.

6 **8 Application of Act**

7 (1) This Act applies in relation to people who die or suffer injury  
8 because of voluntarily taking part in an adventure activity that  
9 involves inherent risk of injury to people taking part, particularly if  
10 the physical or environmental challenge, or the element of risk, form  
11 part of the enjoyment of the activity.

12 (2) Also, this Act applies to any adventure contract, despite anything to  
13 the contrary in any other Act or law.

14 (3) In this section:

15 *adventure contract* means a contract under which an approved  
16 operator supplies goods or services to someone in relation to the  
17 operator's approved adventure activity.

18 **9 Principal objects of Act**

19 The principal objects of this Act are—

20 (a) to improve the safety of people taking part in adventure  
21 activities by approving operators of the activities; and

22 (b) to minimise the financial burden on ACT businesses by  
23 regulating the costs of compensation for injuries to people who  
24 take part in adventure activities; and

25 (c) to reduce the social and economic costs to the ACT community  
26 of compensation for injuries to people who take part in  
27 adventure activities; and



- 1           (d) to entitle proceedings to be brought for compensation in  
2           relation to taking part in adventure activities only in relation to  
3           death or serious injury.

## **Part 3 Adventure activity operators**

### **10 Application for approval as operator**

- (1) A person may apply to the Minister for approval as an operator.
- (2) The application must—
  - (a) be in writing; and
  - (b) state the adventure activities for which the applicant wishes to be approved; and
  - (c) be accompanied by the information (if any) prescribed under the regulations.

*Note 1* A fee may be determined under s 33 (Determination of fees) for this section.

*Note 2* If a form is approved under s 34 (Approved forms) for this section, the form must be used.

### **11 Approval as operator**

- (1) This section applies if a person applies for approval as an operator under section 10.
- (2) The Minister must, within 1 month after receiving the application—
  - (a) approve the person as an operator; or
  - (b) in writing, refuse to approve the person as an operator.
- (3) The Minister may approve a person as an operator only if the adventure activity the person operates, or proposes to operate, is in schedule 1 or is prescribed under the regulations.
- (4) In deciding whether to approve a person as an operator, the Minister must consider—
  - (a) the nature of the adventure activity operated, or proposed to be operated, by the applicant; and

- 1 (b) whether the adventure activity involves an inherent risk of  
2 injury to people taking part in the activity from, but not limited  
3 to—  
4 (i) the forces of nature; or  
5 (ii) the behaviour of animals; or  
6 (iii) the terrain, location or environment where the activity is  
7 to take place; or  
8 (iv) the physical ability of the people taking part in the  
9 activity; or  
10 (v) the equipment used to take part in the activity; and  
11 (c) the experience, training and qualifications of anyone  
12 conducting or supervising the adventure activity on behalf of  
13 the applicant; and  
14 (d) the risk management procedures the applicant has, or proposes  
15 to have, for the adventure activity.  
16 (5) An approval may be subject to conditions (if any) prescribed under  
17 the regulations or as decided by the Minister.

## 18 **12 Form of approval**

19 If the Minister approves a person as an operator, the approval must  
20 state the adventure activities for which the operator is approved, and  
21 any conditions on the approval.

## 22 **13 When approval takes effect**

- 23 (1) An approval takes effect on the day the first of the following  
24 happens:  
25 (a) if the applicant has public liability insurance in relation to each  
26 adventure activity for which approval is given for an amount  
27 that is not less than the amount prescribed under the  
28 regulations for the activity—the day the operator is given  
29 notice of the approval;

1 (b) in any other case—the day the operator obtains public liability  
2 insurance for that amount.

3 (2) However, the approval of an operator may—

4 (a) take effect from a stated date in the approval that is after the  
5 date approval is given; and

6 (b) be subject to a condition precedent decided by the Minister.

7 **14 Term of approval**

8 An approval lasts for 5 years beginning on the day the approval  
9 takes effect.

10 **15 Variation of approval**

11 (1) This section applies if an operator asks the Minister to vary the  
12 operator's approval by—

13 (a) adding an adventure activity to, or omitting an activity from,  
14 the adventure activities for which the operator has approval; or

15 (b) varying a condition on the approval.

16 (2) An application to vary an approval must be in writing.

17 *Note 1* A fee may be determined under s 33 (Determination of fees) for this  
18 section.

19 *Note 2* If a form is approved under s 34 (Approved forms) for this section, the  
20 form must be used.

21 (3) The Minister may vary the approval of an operator only if the  
22 Minister considers it appropriate to do so having regard to the  
23 matters mentioned in section 11 (4) (Approval as operator).

24 (4) The Minister must, within 1 month after the day the Minister  
25 receives an application—

26 (a) vary the approval to which the application relates; or

27 (b) in writing, refuse to vary the approval.

- 1 (5) The variation of an operator's approval takes effect the day the  
2 notice of the decision is given to the operator or, if the notice states  
3 a later date of effect, that date.

## 4 **16 Cancellation of approval**

- 5 (1) The Minister may cancel an operator's approval if—
- 6 (a) the Minister becomes aware of circumstances that, if the  
7 Minister had been aware of them at the time of the application  
8 for the approval, would have resulted in the application being  
9 refused; or
- 10 (b) the operator contravenes this Act or a condition of the  
11 approval; or
- 12 (c) the operator is convicted, or found guilty, of an offence against  
13 this Act, or a law of a State corresponding to this Act; or

14 *Note* A reference to an Act includes a reference to the statutory instruments  
15 made or in force under the Act, including regulations (see *Legislation*  
16 *Act 2001*, s 104).

- 17 (d) the approval was obtained by fraud or misrepresentation; or
- 18 (e) the Minister is asked to do so, in writing, by the operator.
- 19 (2) Before cancelling the approval of an operator, the Minister must  
20 give the operator written notice—
- 21 (a) stating the grounds on which the Minister proposes to cancel  
22 the approval; and
- 23 (b) stating the facts that, in the Minister's opinion, establish the  
24 grounds; and
- 25 (c) telling the operator that the operator may, within 7 days  
26 beginning the day after receiving the notice, give a written  
27 response to the Minister.
- 28 (3) In deciding whether to cancel the approval, the Minister must  
29 consider any response given to the Minister in accordance with  
30 subsection (2) (c).

**Part 3** Adventure activity operators

Section 16

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- 1 (4) The Minister must give the operator written notice of the Minister's  
2 decision.
- 3 (5) Cancellation of an approval takes effect on the day the notice of  
4 cancellation is given to the operator, or if the notice states a later  
5 date of effect, that date.

1 **Part 4** **Damages in relation to death**  
2 **or serious injury**

3 **Division 4.1** **Key concepts**

4 **17** **Definitions for pt 4**

5 In this part:

6 *damages* include pecuniary and non-pecuniary damages.

7 *insurer*, in relation to an injury to a person that happened during an  
8 adventure activity, means the operator's public liability insurer  
9 when the injury happened.

10 *medical report*, in relation to a person who died or suffered serious  
11 injury while taking part in an adventure activity, means—

12 (a) a written statement by a doctor about medical matters  
13 concerning the person; and

14 (b) includes any document the doctor intends should be read with  
15 the statement, whether the document was in existence at the  
16 time the statement was made or was a document the doctor  
17 obtained or caused to be brought into existence afterwards.

18 **18** **Assessment of degree of impairment for pt 4**

19 (1) An assessment of degree of impairment must be made—

20 (a) in accordance with—

21 (i) the AMA guides as modified by this Act or the  
22 regulations; and

23 (ii) if the Minister has approved guidelines for the use of the  
24 AMA guides—those guidelines; or

- 1           (b) in accordance with—
- 2                   (i) the methods prescribed under the regulations; and
- 3                   (ii) if the Minister has approved guidelines for the use of the
- 4                       methods—those guidelines.
- 5       (2) The AMA guides as modified and the guidelines for the use of the
- 6           AMA guides are notifiable instruments.
- 7           *Note*     A notifiable instrument must be notified under the *Legislation Act 2001*.
- 8       (3) A doctor assessing the degree of impairment of an injury suffered by
- 9           a person taking part in an adventure activity must disregard any
- 10          psychiatric or psychological injury, impairment or symptoms arising
- 11          as a consequence of, or secondary to, a physical injury.
- 12       (4) For assessing the degree of psychiatric impairment, the AMA guides
- 13           apply, subject to any regulations made for this section, as if for
- 14           chapter 14 there were substituted the Clinical Guidelines to the
- 15           Rating of Psychiatric Impairment prepared by the Medical Panel
- 16           (Psychiatry) Melbourne, Victoria October 1997 and published in the
- 17           Victorian Government Gazette.
- 18       (5) The Clinical Guidelines to the Rating of Psychiatric Impairment
- 19           prepared by the Medical Panel (Psychiatry) Melbourne, Victoria are
- 20           a notifiable instrument.
- 21           *Note*     A notifiable instrument must be notified under the *Legislation Act 2001*.
- 22       (6) In this section:
- 23           **AMA guides** means the American Medical Association's Guides to
- 24           the Evaluation of Permanent Impairment (4th edition) (other than
- 25           chapter 15).



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## **Division 4.2                      Actions for damages**

### **19        Entitlement to damages**

- (1) This section applies to a person who—
- (a) takes part in an adventure activity other than in accordance with this part; and
  - (b) dies or is injured taking part in the activity.
- (2) The person is not entitled to recover damages in a proceeding in relation to the death or injury.
- (3) If a person is entitled to compensation in relation to the death or injury under the *Road Transport (General) Act 1999* or a corresponding law of another State, that Act applies to the extent of any inconsistency with this Act.
- (4) This section does not apply to death or injury suffered before the commencement of this section.
- (5) Subsection (4) and this subsection expire 1 month after this section commences.

## **Division 4.3                      Assessment of degree of injuries**

### **20        Entitlement to bring proceedings**

- (1) This section applies to a person (the *injured person*) who—
- (a) takes part, or agrees to take part, in an approved adventure activity conducted by an approved operator, whether or not the person gives the operator consideration in exchange for taking part in the activity; and
  - (b) suffers a serious injury because of taking part in the activity.
- (2) The injured person may bring a proceeding under this part only if the insurer has assessed the degree of impairment of the person as a result of the injury.

- 1 (3) This section is subject to section 28 (Entitlement to bring  
2 proceedings for damages).

3 **21 Request for assessment**

- 4 (1) If an injured person asks the insurer to assess the person's degree of  
5 impairment, the insurer must, within 1 month after the day the  
6 insurer receives the application, assess the person's injury in  
7 accordance with section 18 (Assessment of degree of impairment for  
8 pt 4).

9 *Note* If a form is approved under s 34 (Approved forms) for a application, the  
10 form must be used.

- 11 (2) However, an injured person may not make a further request for an  
12 assessment unless it is the first request made after the insurer has  
13 refused to make an assessment under section 22 (Refusal to assess if  
14 injury not stabilised).

- 15 (3) The request for assessment must be in writing.

- 16 (4) The request must be accompanied by—

17 (a) a copy of any medical report about the injury held by the  
18 injured person; and

19 (b) any other document on which the injured person intends to  
20 rely—

21 (i) that will allow the insurer to decide the degree of the  
22 injured person's impairment; or

23 (ii) in a proceeding relating to the injury.

24 **22 Refusal to assess if injury not stabilised**

25 If the insurer receives a request for assessment by an injured person  
26 in the first 2 years after the injury, the insurer may refuse to assess  
27 the injury unless satisfied that the injury has stabilised.

**23 Consequence of unreasonable refusal to submit to medical examination**

(1) This section applies if—

- (a) an injured person makes a request under section 21 (Request for assessment); and
- (b) the insurer asks the injured person to submit to a medical examination to be paid for by the insurer; and
- (c) the injured person—
  - (i) unreasonably refuses to comply with the insurer's request; or
  - (ii) hinders the examination in any way.

(2) In working out the 1 month mentioned in section 21 (Request for assessment), the time between the day the injured person refused to comply with the insurer's request, or hindered the examination, and the day of the examination, is to be disregarded.

**24 What is serious injury?**

If the degree of impairment of the injured person because of the injury assessed by the insurer under section 18 (Assessment of degree of impairment for pt 4) is 30% or more, the injury is taken to be a serious injury.

**25 Time for making assessment**

- (1) The insurer must, within 4 months after the day the insurer receives a request for assessment, give the injured person written notice of—
- (a) the assessment; or
  - (b) a refusal by the insurer to assess the injury under section 22 (Refusal to assess if injury not stabilised ).

- 1 (2) The notice must be accompanied by—
- 2 (a) a copy of any medical report about the injury held by the
- 3 insurer; and
- 4 (b) any other document on which the insurer intends to rely—
- 5 (i) about the degree of the injured person's impairment; or
- 6 (ii) in a proceeding relating to the injury.

7 **26 Consequences of failing to give notice of assessment**

- 8 (1) The injured person may, within 1 month after receiving the notice
- 9 under section 25 (Time for making assessment), give the insurer
- 10 notice about any other document on which the injured person
- 11 intends to rely to rebut the insurer's notice.
- 12 (2) However, subsection (1) does not apply in relation to the medical
- 13 reports of the insurer about the person's injuries on which the
- 14 insurer intends to rely.
- 15 (3) If the insurer fails to give the injured person notice under section 25
- 16 (Time for making assessment), the injury is taken to be a serious
- 17 injury.

18 **27 Admissibility of medical reports or other documents**

- 19 (1) In a proceeding under this part, a medical report or other document
- 20 is inadmissible in evidence on behalf of the insurer if—
- 21 (a) it was in existence, and the operator or insurer, or the legal
- 22 representative or either of them, was aware of it, before the day
- 23 the notice by the insurer is required to be given under
- 24 section 25 (Time for making assessment); and
- 25 (b) a copy was not given to the injured person under that section.

- 1 (2) In a proceeding under this part, a medical report or other document  
2 is inadmissible in evidence on behalf of the injured person if—
- 3 (a) it was in existence, and the injured person or the injured  
4 person's legal representative was aware of it, before the end of  
5 1 month after receiving the notice under section 25 (Time for  
6 making assessment); and
- 7 (b) a copy was not given to the other party under section 21  
8 (Request for assessment) or section 26 (Consequences of  
9 failing to give notice of assessment).

10 **28 Entitlement to bring proceedings for damages**

- 11 (1) If an injury suffered by a person is taken to be a serious injury under  
12 section 24 (What is serious injury?) or section 26 (Consequences of  
13 failing to give notice of assessment), the injured person may bring a  
14 proceeding to recover damages in relation to the injury.
- 15 (2) However, the injured person may not bring a proceeding under this  
16 part if the insurer has notified the injured person that—
- 17 (a) the degree of impairment of the injured person is less than  
18 30%; or
- 19 (b) the insurer has refused to make an assessment under section 22  
20 (Refusal to assess if injury not stabilised);
- 21 (3) Subsection (2) does not apply if—
- 22 (a) the insurer—
- 23 (i) is satisfied that the injury is a serious injury; and
- 24 (ii) gives the injured person written consent to bring a  
25 proceeding; or
- 26 (b) on application by the injured person, a court gives leave to  
27 bring a proceeding.

1 (4) If the injured person applies to a court for leave to bring  
2 proceedings, the person must give a copy of the application to the  
3 insurer and each person against whom the injured person claims to  
4 have a cause of action.

5 (5) A court must not give leave unless satisfied the injury is a serious  
6 injury.

7 **29 Awards of damages**

8 (1) This section applies if an award of damages under this section  
9 includes an amount, assessed as a lump sum, in respect of damages  
10 for future loss in relation to—

11 (a) deprivation or impairment of earning capacity; or

12 (b) loss of the expectation of financial support; or

13 (c) a liability to incur expenditure in the future; or

14 (d) a loss suffered by a dependant.

15 (2) The present value of the future loss must be discounted by 6% to  
16 allow for inflation, income from investment of the sum awarded and  
17 the effect of taxation of the income.

18 (3) Subsection (2) does not affect any other law relating to the  
19 discounting of sums awarded as damages.

20 (4) A court must not order the payment of interest in relation to an  
21 award of damages under this section.

22 (5) Interest is not payable on any amount of damages, other than  
23 damages referable to loss actually suffered before the date of the  
24 award, for the period beginning on the date of the death or injury to  
25 the person in relation to whom the award is made and ending on the  
26 date of the award.

27 (6) Subsections (4) and (5) do not affect any other law relating to the  
28 payment of interest on an amount of damages, other than special  
29 damages.

1   **30   No insurer**

2       If there is no insurer, this part applies, with any necessary  
3       modification, as if the operator were the insurer.

## Part 5 Miscellaneous

### 31 Review of decisions

Application may be made to the administrative appeals tribunal for review of a decision of the Minister—

- (a) under section 11 (2), refusing to give an approval; or
- (b) under section 11 (5), imposing conditions on an approval; or
- (c) under section 15 (5), refusing to add an adventure activity for which the operator has approval, or varying or refusing to vary a condition of an approval.

### 32 Notification of decisions

- (1) If the Minister makes a decision mentioned in section 11 or 15, the Minister must give written notice of the decision to the person affected by the decision.
- (2) A notice under subsection (1) must be in accordance with the code of practice in force under the *Administrative Appeals Tribunal Act 1989*, section 25B (1).

### 33 Determination of fees

- (1) The Minister may, in writing, determine fees for this Act.

*Note* The *Legislation Act 2001* contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

- (2) A determination is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.



1   **34   Approved forms**

- 2       (1) The Minister may, in writing, approve forms for this Act.
- 3       (2) If the Minister approves a form for a particular purpose, the
- 4           approved form must be used for that purpose.
- 5       (3) An approved form is a notifiable instrument.

6           *Note*       A notifiable instrument must be notified under the *Legislation Act 2001*.

7   **35   Regulation-making power**

- 8       (1) The Executive may make regulations for this Act.

9           *Note*       Regulations must be notified, and presented to the Legislative

10           Assembly, under the *Legislation Act 2001*.

- 11       (2) The regulations may deal with the following:

- 12           (a) the adventure activities in relation to which an operator may be
- 13           approved;
- 14           (b) the terms and conditions that apply to approvals.

- 15       (3) The regulations may apply, adopt or incorporate any matter
- 16           contained in a law or instrument, or a provision of a law or
- 17           instrument, as in force from time to time or at a particular time.

18           *Note 1*    The text of an applied, adopted or incorporated law or instrument,

19                       whether applied as in force from time to time or at a particular time, is

20                       taken to be a notifiable instrument if the operation of the *Legislation Act*

21                       2001, s 47 (5) or (6) is not disapplied (see s 47 (7)).

22           *Note 2*    A notifiable instrument must be notified under the *Legislation Act 2001*.

- 23       (4) The regulations may prescribe offences for contraventions of the
- 24           regulations and prescribe maximum penalties of not more than
- 25           10 penalty units for offences against the regulations.

## **Schedule 1      Approved adventure activities**

(see s 11)

Approved adventure activities include the following:

- (a) abseiling;
- (b) canoeing and kayaking;
- (c) cattle drives and musters;
- (d) fishing;
- (e) four wheel drive tours;
- (f) hang gliding;
- (g) hiking or bush walking;
- (h) horse riding and horse trail riding;
- (i) hot air balloon flights;
- (j) light aeroplane and ultra light plane flights;
- (k) mountain bike riding;
- (l) rafting, including white water rafting;
- (m) rock climbing, whether indoors or outdoors and whether on a natural or man-made surface;
- (n) snow skiing, snowboarding, cross-country skiing and snowplay with toboggans, ski-bobs or inflatable devices;
- (o) trail bike riding;
- (p) any activity designed to simulate any of the activities mentioned in paragraphs (a) to (o) or the natural environment in which the activity is usually conducted, for teaching the skills necessary to undertake the activity.

## Dictionary

(see s 3)

*adventure activity*—see section 5.

*approved operator* means a person approved under section 11 (Approval as operator).

*damages*, for part 4—see section 17.

*injured person*—see section 20 (1) (Entitlement to bring proceedings).

*injury* means physical or mental injury.

*insurer*, for part 4—see section 17.

*medical report*, for part 4—see section 17.

*operator* means a person who conducts an adventure activity.