

South Australia



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ELIZABETHAE II REGINAE
A.D. 2002

**LAW REFORM (DELAY IN RESOLUTION OF PERSONAL INJURY
CLAIMS) ACT 2002**

No. 38 of 2002

[Assented to 28 November 2002]

An Act to provide for the award of damages for the benefit of the dependants or the estate of a deceased person where a person against whom a claim for personal injury lies unreasonably delays resolution of the claim; to amend the Wrongs Act 1936 and the Survival of Causes of Action Act 1940 for that and other purposes.

SUMMARY OF PROVISIONS

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RESOLUTION OF CLAIM**
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The Parliament of South Australia enacts as follows:

Short title

1. This Act may be cited as the *Law Reform (Delay in Resolution of Personal Injury Claims) Act 2002*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Amendment of Survival of Causes of Action Act 1940

3. The *Survival of Causes of Action Act 1940* is amended—

(a) by striking out section 2 and substituting the following section:

Survival of causes of action

2. (1) Subject to this Act—

(a) a cause of action vested in a person at the time of his or her death survives for the benefit or his or her estate; and

(b) a cause of action existing against a person at the time of his or her death survives against his or her estate.

(2) This section does not apply to a cause of action in defamation.;

(b) by striking out paragraph (c) of section 3(1).

Amendment of Wrongs Act 1936

4. The *Wrongs Act 1936* is amended by inserting after section 35A the following new Division:

DIVISION 10A—UNREASONABLE DELAY IN RESOLUTION OF CLAIM

Definitions

35B. In this Division—

"**dependant**" of a deceased person means any person on whose behalf an action could (assuming that he or she had been financially dependent on the deceased person) be brought under Part 2;

"**personal injury**" includes—

(a) a disease;

(b) any impairment of a physical or mental condition.

Damages for unreasonable delay in resolution of a claim

35C. (1) Damages in the nature of exemplary damages may be awarded, on a claim by the personal representative of a deceased person, against another person (the person in default) if the conditions prescribed by subsection (2) are satisfied.

- (2) The conditions for an award of damages under this section are as follows:
- (a) the deceased person suffered personal injury giving rise to a right to compensation or damages; and
 - (b) the deceased person made a claim in writing (giving a reasonable indication of the grounds of the claim) for compensation or damages for the personal injury; and
 - (c) a person (the **person in default**) unreasonably delayed the resolution of the claim knowing, or in circumstances in which he or she ought to have known, that the deceased person was, because of advanced age, illness or injury, at risk of dying before the resolution of the claim; and
 - (d) the person in default is—
 - (i) the person against whom the deceased person's claim lay; or
 - (ii) some other person who controlled or had an interest in the defence of the claim; and
 - (e) the deceased person died before compensation or damages for non-economic loss were finally determined by agreement between the parties or by judgment or decision of a court or tribunal; and
 - (f) damages have not been recovered and are not recoverable under section 3(2) of the *Survival of Causes of Action Act 1940*.
- (3) For the purposes of subsection (2)—
- (a) the question whether a person has unreasonably delayed resolution of a claim is to be determined in the context the proceedings as a whole (including negotiations and other non-curial proceedings) and the conduct of the deceased person and any other parties to the proceedings;
 - (b) a lawful fee agreement between a legal practitioner and client does not give the legal practitioner an interest in the defence of the claim;
 - (c) if a judgment or decision of a court or tribunal is liable to appeal, then—
 - (i) if there is no appeal—the judgment or decision finally determines compensation or damages on the date it is given; but
 - (ii) if there is an appeal—there is no final determination of compensation or damages until the appeal is determined.

(4) A court or tribunal that has, or would have had, jurisdiction in an action for damages, workers compensation or other monetary compensation for the personal injury has jurisdiction to award damages on a claim under this section but such a claim must be brought before the court or tribunal within 3 years after the deceased person's death (either as a separate proceeding or by introducing it as an additional claim in existing proceedings for damages or compensation for the personal injury).

(5) In determining the amount of the damages to be awarded under this section, the court or tribunal is to have regard to—

- (a) the need to ensure that the person in default does not benefit from the unreasonable delay in the resolution of the deceased person's claim; and
- (b) the need to punish the person in default for the unreasonable delay; and
- (c) any other relevant factor.

(6) Damages may be awarded under this section despite any statutory restriction on the award of exemplary or punitive damages but, if the deceased person's claim was for worker's compensation, the damages cannot exceed the total amount of the compensation for non-economic loss to which the deceased person would have been entitled if the claim had been resolved immediately before his or her death.

(7) Damages awarded under this section are to be paid, at the direction of the court or tribunal—

- (a) to the dependants of the deceased person in proportions determined by the court or tribunal; or
- (b) to the estate of the deceased person.

(8) In exercising its discretion under subsection (7), the court or tribunal—

- (a) is to make an award to dependants rather than to the estate unless there are no dependants or there is some other good reason to the contrary; and
- (b) in apportioning between dependants is to have regard to other relevant statutory entitlements (if any) that arise on the death of the deceased person.

(9) This section applies if the deceased person died on or after the commencement of this section (whether the circumstances out of which the personal injury claim arose occurred before or after that date).

Regulations

35D. (1) The Governor may make regulations for the purposes of this Division.

(2) The regulations may (for example) deal with any aspect of the procedure to be followed in proceedings under this Division.