The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

27 March 2019

Dr Adam Tomison
Director-General
Department of Justice
David Malcolm Justice Centre
23 Barrack St
PERTH WA 6000

Attention: Sarah Burnside
By email: Sarah.Burnside@justice.gov.au

Dear Dr Tomison

CLAIMS HARVESTING – YOUR REFERENCE 2018/07045

1. Thank you for your letter dated 12 December 2018, received on 17 December 2018, and for the extension of time in which to respond to that letter, given the season of the year and the difficulties which that posed in assembling members of the Law Society of Western Australia (the Society) in a position to address the matter the subject of that letter.

2. Accompanying this letter is a Policy Statement by the Society, developed by the Personal Injuries Committee and Ethics Committee, jointly, in relation to the matters raised in your letter. I set out below the reasons for the Society adopting the position documented in that Policy Statement.

3. First, the Society entirely endorses the Government's concern that practitioners (whether or not members of the Society) may from time to time fall into error in their compliance with their legal and ethical obligations, and that if they do so there should be appropriate consequences for that conduct.

4. The conduct of "claims harvesting" as you identified appears to have the following critical elements:
   4.1 that a third party, "claims harvester" perhaps overseas-based, engages in a business of procuring information about persons who may have injury claims, and enters into a commercial relationship for remuneration, whether paid for by the legal practice or another entity, under which that claims harvester agrees with the legal practice to:
      (a) solicit persons to approach the legal practice with a view to making a claim for monetary compensation
      (b) sell or supply contact details in relation to those persons (and presumably something indicating that there is a potential claim) so that the legal practice may itself approach those persons; and/or
      (c) entices an existing client of a legal practice to be represented by another legal practice.

Level 4, 160 St Georges Terrace Perth WA 6000, DX 173 Perth
Telephone: (08) 9324 8600 Facsimile: (08) 9324 8699
Email: info@lawsocietywa.asn.au Website: www.lawsocietywa.asn.au
Please address all correspondence to The Law Society of Western Australia PO Box Z5345, St Georges Terrace Perth WA 6831

4.2 The legal practice then enters into a retainer agreement with the relevant person and makes a claim on their behalf for compensation.

4.3 There may be, or at least may be a risk of, some element of representation to the claimant as to the level of compensation which may be available, which may not provide an objective and realistic assessment of the quantum of the compensable claim. That representation might be made by the harvester, or by the legal practice.

If in the course of that conduct a practitioner directly or through a legal practice:

(a) pays a referral fee to the third party claims harvester;

(b) otherwise procures or knowingly benefits from a breach of relevant legislation, including applicable privacy legislation in relation to the personal information of the claimant; or

(c) makes, or is a party to the making of, a representation which does not fairly and objectively reflect a proper professional assessment of the merits of a claim;

the practitioner and legal practice *may* breach their obligation under rules 5, 6, 18 (5) and 45 of the Legal Profession Conduct Rules 2010. (It should be noted that in those States in which legal practitioners are governed by the Australian Solicitors Conduct Rules, referral fees *are* permitted to be paid by lawyers provided that the payment is disclosed to the client or prospective client and that the client or prospective client has consented to the payment, whereas such payments are currently proscribed in Western Australia.).

The Society also notes that such conduct may involve breaches of provisions of the *Privacy Act 1988* (Cth) (as amended) and multiple provisions of the Australian Consumer Law.

The Society is not aware of any instance in which the relevant regulator, equipped with investigative powers, has taken steps to address that conduct and suggests that you direct enquiries to, relevantly, the Legal Profession Complaints Committee, Australian Information Commissioner, Australian Competition and Consumer Commission, and Consumer Protection Division of the Department of Mines, Industry Regulation and Safety.

5. Secondly, the Society is concerned, as it always is, that the rights of those who have been injured as a result of the wrong of another to obtain compensation, according to law, for the injury should not be further diminished. Existing laws currently impose:

5.1 restrictions on the ability of those injured in our community to obtain information about their rights, and to identify and retain practitioners and legal practices qualified to represent them, as a result of restrictions imposed by sections 19 and 20 of the *Civil Liability Act 2002*;

5.2 limitations on amounts that may be awarded by a court in respect of damages for non-pecuniary loss, as a result of Part 2 of the *Civil Liability Act 2002* and in the case of motor vehicle accident claims,

by s3C of the *Motor Vehicle (Third Party Insurance) Act 1943* and limitations of the awarding of damages for gratuitous services by provisions such as s3D of the *Motor Vehicle (Third Party Insurance) Act 1943*; and

5.3 limitations upon the ability of such practitioners and legal practices to derive fees for the provision of services in relation to injuries, as a result of costs rules made under Part XV, Division 3 of the *Workers Compensation and Injury Management Act 1981*, section 27 and 27A of the *Motor Vehicle (Third-Party Insurance) Act 1943* and the Legal Profession (Supreme and District Courts) (Contentious Business) Report 2018, with the effect that fees recovered may not represent proper remuneration for the skill and effort required to produce an appropriate outcome.

In considering any policy response to claims harvesting it is critical, in the Society's submission, that the Government be mindful of the right of members of the public, who have a genuine claim to compensation for an injury actually sustained by them through the fault of another, to be able to maintain that claim in an appropriate, proportionate, and cost-effective manner.

6. Thirdly, as a matter of principle, where there are available legal mechanisms, including applicable prohibitions and provisions which may result in disciplinary, compensatory or penal outcomes (of which there appear to be a number, identified above) to address a matter of concern it is appropriate to consider whether the adequacy of those mechanisms has been properly examined and if found to be wanting restraint can be imposed by a combination of:

6.1 compliance education;

6.2 the resourcing and tasking of appropriate regulatory agencies; and

6.3 analysis of the application of relevant provisions to ascertain why they are not "fit for purpose";

before considering additional compliance measures, in particular where those compliance measures might result in a further constraint upon the ability of members of the public to assert their legal rights.

7. Fourthly, in regulatory design, proportionality and an assessment of the proper relationship between the problem addressed, and the proposed response to that problem, is critical. The information supplied in your letter suggests that 306 claims in 2018 were suspected to be "harvested" out of more than 3,000 new CTP compensation claims received by ICWA during the 2017 – 2018 financial year. That suggests that 71% of "harvested" claims were rejected. That is less than 100 out of 3000 claims were suspected of being harvested and yet were paid. Presumably they were paid because they were valid. Presumably the 200 claims which were rejected were rejected because they were not valid (or did not meet existing thresholds and no legal costs were paid as a result).

8. The Society also understands that ICWA may be concerned that the economic model which is necessary to support a "harvested claim" involves

the payment of a referral fee which may result in an element of inflation of legal fees to "compensate" the practitioner or legal practice for monies payable to the claims harvester. The Society condemns, unequivocally, both:

(a) the payment of referral fees, in breach of the Legal Professional Conduct Rules, the *Civil Liability Act*, and any other applicable legislation; and

(b) any element of overcharging, or improper charging, which does not reflect, only the proper costs for performing professional services for a claimant in the vindication of their claim, in any forum.

The Society has produced the attached Policy Statement for the purpose of communicating to practitioners and legal practices its views in that regard. The Society encourages the Government, and its relevant agencies, to refer any properly founded concerns about the conduct of a practitioner or legal practice to the appropriate regulatory body (which is not limited, in the circumstances, to the Legal Profession Complaints Committee) for investigation and appropriate action if a contravention is identified.

9. The Society is not presently persuaded by the information in your letter, that:

9.1 the requirement for certification by statutory declaration is necessary or a meaningful deterrent where a practitioner or legal practice which has paid a referral fee, will already have breached its professional and statutory obligations. In addition to the element of additional regulation, that requirement as framed would (if imposed upon the claimant or a practitioner approached by a claimant who was *not* the practitioner to whom the claimant was referred) impose a barrier to a proper claimant, who may not otherwise have been aware of their entitlements to pursue compensation, from being adequately represented or making a claim merely because they have been canvassed;

9.2 additional restrictions on professional costs can be justified on any basis other than that the work performed does not justify the amounts claimed, which is properly a question on taxation in any event.

10. The Society does support:

10.1 rigorous but appropriate data analysis to:

(a) identify claims harvested claims and distinguish false, contrived or inflated claims from valid claims so as to ensure that valid claims are paid in accordance with a proper and objective assessment of their merits;

(b) identify practitioners, and legal practices, which may be involved in claims harvesting in breach of their professional and other legal obligations for the purpose of referring properly founded complaints to appropriate regulatory authorities for compliance action;

10.2 a program of professional education for legal practitioners to ensure they are fully cognizant of their obligations, and members of the public to ensure that they are not ensnared in scams (noting that there are a number of compliance authorities which are actively engaged in consumer protection in this area including the ACCC, ASIC and Consumer Protection);

10.3 referral of these matters to the Australian Information Commissioner for appropriate action, given that it appears to be intrinsically unlikely that potential sources of information in relation to injuries, including health service providers, panel beaters, tow truck operators et cetera include appropriate use authorities in their terms and conditions which authorise the release of private information concerning claimants to claim harvesters;

10.4 the presumptive treatment of the payment of referral fees by a legal practitioner or legal practice to a third party claims harvester, under a commercial arrangement, as professional misconduct for the purpose of the *Legal Profession Act* and the retention of that prohibition in any rules that come to be adopted as part of the unification of the Australian legal profession.

11. The Society would be happy to work with Government in considering any proposals to enhance consumer protection in this area, and ensure compliance with the existing regulatory framework, while preserving appropriate, and proportionate, access to justice by injured members of our community.

If you would like to discuss the above further, please do not hesitate to contact Mary Woodford, General Manager Advocacy at mwoodford@lawsocietywa.asn.au or on (08) 9324 8646.

Yours sincerely

Greg McIntyre SC
President

Enc. – Policy statement

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BRIEFING PAPER

INJURY INSURANCE CLAIMS HARVESTING

THE ESSENTIAL MEMBERSHIP FOR THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia
lawsocietywa.asn.au

March 2019

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INJURY INSURANCE CLAIMS HARVESTING

Issue

Over the past two years, Western Australia has experienced an increase in an activity known as 'claims harvesting' (also referred to as 'claim farming') in relation to injury insurance claims. This is a pre-existing issue which has been present nationally and internationally for a number of years.

Background

The Insurance Commission of Western Australia (ICWA) has reported that since 2015, it has received 322 motor vehicle injury insurance claims, which it suspects have originated from claims harvesting.[1]

Claims harvesting is the practice of pursuing people involved or connected to accidents in order to encourage them to retain a legal practitioner to lodge an injury insurance claim, including claims which are below the deductible threshold for damages, exaggerated or falsified. The motivation for doing so is to obtain a reward from a law firm to which the potential claimant is directed.

Members of the public are being targeted through information obtained from health service providers, automotive repairers and other sources potentially in breach of the *Privacy Act*, 'cold-calls' and social media prompts, enquiring as to whether they or members of their family have been injured in a motor vehicle accident.[2] The callers often pretend to be from a Crash Investigation Company or ICWA, and often deceive victims by promising sums of money if they lodge a claim through a specific law firm.[3]

ICWA has reported that it suspects some law firms are involved in claims harvesting.[4] In such instances, the law firm purchases the injured person's personal details from the third party, and then contacts the injured person directly.[5]

In September 2017, ICWA announced that it is working with other Government entities on the issue, by investigating and managing the claims as they arise.[6]

Legal Framework

In Western Australia legal practitioners or persons acting for legal practitioners are not permitted to pay or receive an introduction fee or spotter's fee to any person for introducing professional business to the practitioner.[7]

Legal practitioners (or persons acting for legal practitioners) are also prohibited from publishing or causing to be published a statement likely to encourage or induce a person to make a claim for compensation for personal injury, or to use the services of a legal practitioner to make such a claim.[8]

In other States, including in Queensland, New South Wales and Victoria, the payment and receipt of referral fees is allowed under the Australian Solicitors Conduct Rules provided that there is full disclosure to and informed consent from the prospective clients.

Although practitioners are required to avoid conflicts, merely acting for a claimant referred by others to the law firm does not per se give rise to a conflict. A conflict may arise where a law practice has paid for the referral from the claims harvesters, as the practice will therefore be more likely to pursue the claims to recoup their costs already paid.

Policy Positions

Law Council of Australia

The Law Council of Australia does not appear to have a published policy position on this issue.

Interstate

Queensland Law Society

The Queensland Law Society opposes claims harvesting and any conduct by legal practitioners and third parties that breaches provisions under the *Personal Injuries Proceedings Act 2002* and the *Australian Solicitors Conduct Rules 2012* ("ASCR").[9] The Queensland Law Society made submissions to the Queensland Government including, but not limited to; calling for 'a requirement for the claimant and the solicitor to certify, at the beginning and end of the claim that the claim did not originate from a claim farmer; legislative reform; strengthening of the Qld Act relating to civil liability claims; and widening powers of the Legal Services Commission.'[10]

The Law Society of New South Wales

The Law Society of NSW is of the view that claim farming has the potential to bring the state's legal profession into disrepute.[11] The President of The Law Society of NSW recently stated, "We must question whether our professional ethics should permit financial gain where it results from the sale of private information by a third party or at the expense of potential intrusions on a client's privacy, forceful sales tactics or undue influence."[12]

Victorian Legal Services Commissioner

The Victoria Legal Services Commissioner has warned legal practitioners in a recent media release to exercise care when offering their services to consumers, stating that practices such as 'claims farming' and 'cold calling' could potentially constitute a breach of the Australian Solicitors Conduct Rules.[13]

Western Australia

The Legal Practice Board of Western Australia

The Legal Practice Board does not appear to have a published policy position on this issue. However, the Legal Profession Complaints Committee has confirmed the view that the general description 'claims harvesting' does not of itself establish that there is 'misconduct' and the facts of each individual matter would need to be considered, for example to see if there were breaches of the Conduct Rules.[14]

The Law Society of Western Australia

The Law Society of Western Australia opposes the practice of claims harvesting. The Society discourages legal practitioners and third parties, from being involved in such practice.

NOTES

1. Insurance Commission of Western Australia (28 September 2017) *Motor Injury Insurance Claims Harvesting* < https://www.icwa.wa.gov.au/news-and-publications/news/news-articles/motor-injury-insurance-claims-harvesting >
2. Motor Accident Insurance Commission (29 March 2017)*Just Hang up on Claim Farmers* <https://maic.qld.gov.au/just-hang-up-claim-farmers/ >
3. Insurance Commission of Western Australia (28 September 2017) *Motor Injury Insurance Claims Harvesting* < https://www.icwa.wa.gov.au/news-and-publications/news/news-articles/motor-injury-insurance-claims-harvesting >
4. Ibid.
5. Motor Accident Insurance Commission (29 March 2017)*Just Hang up on Claim Farmers* <https://maic.qld.gov.au/just-hang-up-claim-farmers/ >
6. Insurance Commission of Western Australia (28 September 2017) *Motor Injury Insurance Claims Harvesting* < https://www.icwa.wa.gov.au/news-and-publications/news/news-articles/motor-injury-insurance-claims-harvesting >
7. *Legal Profession Conduct Rules 2010* (WA), Reg 18(5)
8. *Civil Liability Act 2002 (WA),* s17.
9. Queensland Law Society (25 June 2018) *Reminder to avoid claim farming* <http://www.qls.com.au/About_QLS/News_media/News/Reminder_to_avoid_claim_farming >
10. Queensland Law Society (27 June 2018) *Stamping out claim farming* <http://www.qls.com.au/About_QLS/News_media/News/Stamping_out_claim_farming >
11. Lawyers Weekly (3 July 2018) *Claim farming may bring profession into disrepute* <https://www.lawyersweekly.com.au/biglaw/23554-claim-farming-may-bring-profession-into-disrepute >
12. Ibid.
13. Victorian Legal Services Commissioner (13 July 2018) *Media Release* < http://www.lsbc.vic.gov.au/documents/Media_Release-%20Commissioner-warns-lawyers-over-marketing-tactics-2018.pdf >
14. Based on correspondence between the Legal Profession Complaints Committee and the Law Society of Western Australia.

Recommendations

The Law Society:

- Reminds legal practitioners of their obligations under rule 6 and rule 45(1) of the *Legal Profession Conduct Rules* and warns legal practitioners and persons acting for them not against engaging in the practice of claims harvesting; and
- Recommends that where it is known that a client referral have arisen from either an inducement paid or a promise of reward made to a claims harvester, the legal practitioner with such knowledge report the circumstances to the Legal Practice Board, the Department of Commerce and/or the Australian Information Commissioner or other regulators as appropriate.