

# BRIEFING PAPER

# INJURY INSURANCE CLAIMS HARVESTING

THE **ESSENTIAL** MEMBERSHIP FOR  
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

[lawsocietywa.asn.au](http://lawsocietywa.asn.au)

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# INJURY INSURANCE CLAIMS HARVESTING

## Issue

In 2015, a practice known as ‘claims harvesting’ (also referred to as ‘claim farming’) was identified as occurring in Western Australia, in relation to personal injury insurance claims. This is a pre-existing issue which has been present nationally and internationally for a number of years.

## Background

In September 2017, the Insurance Commission of Western Australia (**ICWA**) reported that since 2015, it had received 322 motor vehicle injury insurance claims, which it suspects have originated from claims harvesting.<sup>1</sup> The Law Society does not possess updated figures for claims suspected of originating from claims harvesting.

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 financial 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 1988* (Cth), ‘cold-calls’ and social media prompts, enquiring as to whether they or members of their family have been injured in a motor vehicle accident.<sup>2</sup> 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.<sup>3</sup> Many cold calls originate from interstate or overseas and callers are referred to large interstate firms.<sup>3</sup> In such instances, the law firm purchases the injured person’s personal details from the third party, and then contacts the injured person directly.<sup>4</sup>

## Legal Framework

### Western Australia

In Western Australia, rule 18(5) of the *Legal Profession Conduct Rules 2010* (WA) (**the Conduct Rules**) expressly prohibits legal practitioners from paying an introduction fee or spotter’s fee to any person for introducing professional business to the practitioner, or receiving a similar allowance from any person recommending clients.<sup>5</sup>

Under section 17 of the *Civil Liability Act 2002* (WA) (**CLA**), it is an offence for legal practitioners (or a person acting for a legal practitioner) to publish or cause to be published a statement that

may reasonably be thought to be intended or 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.

Section 19 of the CLA makes it an offence to solicit potential clients at the scene of an accident or at a hospital, and expressly prohibits any person involved in the treatment or management of a potential claimant's injuries from referring the potential claimant to a lawyer. Furthermore, it is an offence for persons who obtain information regarding a person who has allegedly suffered a personal injury to give the contact details of the potential claimant to a legal practitioner or an agent of a law practice.<sup>6</sup>

Section 20 of the CLA makes it an offence for a person to provide or offer to provide, or to receive or to seek to receive a fee for soliciting or inducing a potential claimant to make a claim. The section defines 'fee' to include a bonus, commission, cash payment, deduction, discount, rebate, remission or other valuable consideration.

## Commonwealth

There is no Commonwealth legislation to specifically prohibit claim farming, although there are arrangements to regulate aspects of claim farming to some degree. The *Do Not Call Register Act 2006* (Cth) prohibits unsolicited telemarketing calls and faxes to a number registered on the Do Not Call Register. The *Spam Act 2003* (Cth) regulates commercial emails and electronic messages and prohibits unsolicited electronic messages. The *Telecommunications Act 1997* (Cth) also provides for telemarketing calls, marketing faxes and commercial electronic

messages. Claim farming conduct may also be captured by the *Privacy Act 1988* (Cth) and the *Competition and Consumer Act 2010* (Cth).

## Policy Positions

### Western Australia

#### *The Law Society of Western Australia*

The Law Society of Western Australia opposes the practice of claims harvesting and strongly discourages legal practitioners and third parties from being involved in such practices. The Society's position is reflected in section 13.13 of the Society's *Ethical and Practice Guidelines*, which cautions legal practitioners in Western Australia against breaching rule 18(5) of the Conduct Rules or assisting or becoming involved in a breach of sections 19 or 20 of the CLA.<sup>7</sup>

Western Australia is due to adopt the Australian Solicitors' Conduct Rules (**ACSR**) in 2021. Under the ACSR, receipt of a referral fee is not unlawful if the solicitor has "first disclosed the payment or financial benefit to the client".<sup>8</sup> However, the adoption of the ACSR in Western Australia will not alter the need for compliance with the CLA.

#### *The Legal Practice Board of Western Australia*

The Legal Practice Board does not 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.<sup>9</sup>

## Interstate

### *Queensland*

In December 2019, the Queensland government enacted the *Motor Accident Insurance and Other Legislation Amendment Act 2019* (Qld) with the purpose of stopping claim farming.<sup>10</sup> The Act creates two new offences of ‘claim farming’ and requires a law practice principal to certify that a claim did not originate from a claim farmer. The amendments are based on a similar mechanism introduced in the United Kingdom<sup>11</sup> and the Queensland Law Society strongly advocated for the law reform.

### *Australian Capital Territory*

In May 2019, the Australian Capital Territory enacted the *Motor Accident Injuries Act 2019* (ACT), which also aims to deter claim farming practices by prohibiting payments by a lawyer (or a related entity) for referrals of defined benefit applications or damages claims for legal representation.<sup>12</sup>

### *New South Wales*

The Law Society of New South Wales is of the view that claim farming, although not expressly prohibited under the *Australian Solicitors’ Conduct Rules*, has the potential to bring the state’s legal profession into disrepute.<sup>13</sup> Furthermore section 24 of the *Motor Accidents Compensation Regulation 2015* (NSW) provides that a breach of the duty not to give or receive consideration for the referral of a claimant for the purposes of services being provided in respect of a claim may be considered unsatisfactory professional conduct or professional misconduct.

## Endnotes

1. Insurance Commission of Western Australia (28 September 2017) *Motor Injury Insurance Claims Harvesting* <<https://www.icwa.wa.gov.au/news-and-publications/news/newsarticles/motor-injury-insurance-claims-harvesting>>
2. Motor Accident Insurance Commission (29 March 2017) *Just Hang up on Claim Farmers* <<https://maic.qld.gov.au/justhang-up-claim-farmers/>>
3. Evidence of Rod Whithear, CEO of the Insurance Commission of Western Australia, to the Legislative Council Estimates and Financial Operations Committee Hearing, 15 February 2018: [https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/789717D6043428B54825822D001E1DCA/\\$file/ef.aar16.180215.tro.003.sd.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/789717D6043428B54825822D001E1DCA/$file/ef.aar16.180215.tro.003.sd.pdf)
4. See note 4.
5. *Legal Profession Conduct Rules 2010* (WA) r 18 (5).
6. *Civil Liability Act 2002* (WA) s 19(7).
7. Law Society of Western Australia Ethical and Practice Guidelines <https://www.lawsocietywa.asn.au/wp-content/uploads/1970/01/ethical-practice-guidelines-25-august-2015.pdf>
8. *Australian Solicitors’ Conduct Rules*, r 12.4.4.
9. Based on correspondence between the Legal Profession Complaints Committee and the Law Society of Western Australia.
10. *Motor Accident Insurance and Other Legislation Amendment Act 2019* (Qld) <https://www.legislation.qld.gov.au/view/html/asmade/act-2019-036>
11. *Criminal Justice and Courts Act 2015* (UK) s 58 <https://www.legislation.gov.uk/ukpga/2015/2/contents/enacted>
12. *Motor Accident Injuries Act 2019* (ACT) <https://www.legislation.act.gov.au/a/2019-12/>
13. Lawyers Weekly (3 July 2018) *Claim farming may bring profession into disrepute* <<https://www.lawyersweekly.com.au/biglaw/23554-claim-farming-may-bring-profession-intodisrepute>>

## Recommendations

The Law Society:

- Reminds legal practitioners of:
  - their fundamental ethical obligations under rule 6 of the Conduct Rules;
  - the prohibition on spotter's fees in rule 18 of the Conduct Rules;
  - restrictions on advertising under rule 45(1) of the Conduct Rules;
  - and cautions legal practitioners and persons acting for them against engaging in the practice of claims harvesting; and
- Recommends that where it is known that a client referral has 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 Mines, Industry Regulation and Safety (responsible for consumer protection) and/or the Australian Competition and Consumer Commission (ACCC) or other regulators as appropriate.



**The Law Society of Western Australia**

Level 4, 160 St Georges Tce, Perth Western Australia 6000

**Postal address:** PO Box Z5345, Perth WA 6831 or DX 173 Perth

**Phone:** (08) 9324 8600 **Fax:** (08) 9324 8699

**Email:** [info@lawsocietywa.asn.au](mailto:info@lawsocietywa.asn.au) **Website:** [lawsocietywa.asn.au](http://lawsocietywa.asn.au)



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