RICHARD DOUGLAS QC
Barrister at Law

Callinan Chambers
Level 31 East
Santos Place
32 Turbot Street
BRISBANE QLD 4000

Telephone: (07) 3218 0620
Facsimile: (07) 3218 0699
Email: douglas@callinanchambers.com
www.callinanchambers.com

17 January 2017.

Mr Neil Singleton
Insurance Commissioner
Motor Accident Insurance Commission
Queensland Treasury
GPO Box 2203
100 George Street
BRISBANE QLD 4000

REPORT ON CLAIM FARMING – QUEENSLAND CTP SCHEME

Introduction: 2
Executive summary: 6
Claim farming and its impact: 7
(a) Incidence of claim farming in Queensland: 7
(b) Impact of claim farming: 11
Is claim farming illegal?: 13
Options to address adverse impact of claim farming: 22
(a) Destroying the claim farmers' market: 22
(b) Uniform operation of the "50/50" rule as to costs: 23
(c) Practitioner exposure: 28
(d) MAI Act certification: 31
(e) Powers of investigation: 34
(f) Claim costs provisions: 35
Publication: 35
Conclusion: 35

Introduction:

1 I was briefed by the Insurance Commissioner to report on the existence of, and apt response to, what is described as "claim farming" in the Queensland compulsory third party motor accident insurance scheme ("the Queensland scheme" or "the MAI Act scheme).

2 My instructions are dated 5 August 2016. Such instructions are attached. In effect, I was asked to confer with and consider submissions from stakeholders and other contributors, and then report as to:

- first, the practice of claim farming and its impact on the Queensland scheme;
- second, whether claim farming is "illegal";
- third, the options available to address any deleterious impact of such practice.

3 Through the Commissioner, I also received submissions from stakeholders and contributors. The stakeholders comprised each CTP insurer participating in the Queensland Act scheme, the Queensland Law Society and the Australian Lawyers Alliance. The contributors were solicitors KM Splatt & Associates and Carew Lawyers.

4 To assist formulation of my report, on 23 August 2016 the Commissioner canvassed written submissions, to be afforded by 23 September 2016. Those were received by me.

5 I met with stakeholders, in open session, on 27 October 2016. I appointed a deadline of 18 November for further written submissions. Those were received by me.

6 I was not instructed to conduct, nor have I conducted, any independent formal inquiry. I have not taken nor am I empowered to take evidence. Suffice it to say I have not been appointed to conduct a Commission of Inquiry under the Commissioner of Inquiry Act 1950 (Qld).

7 The submissions from stakeholders and contributors have informed, saliently, my report conclusions. The Commissioner holds, and thereby has full access to, those submissions. Given they were canvassed expressly on a confidential basis, so as to encourage greater response and candour, herein I refrain from any express reference or attribution to any particular stakeholder or contributor.

8 The current iteration of the Queensland scheme, which has existed since 1936, is to be found in the *Motor Accident Insurance Act* 1994 (Qld) ("the MAI Act").

9 The Queensland scheme, insofar as concerns causes of action for damages for negligence occurring within the state of Queensland, is a fault based scheme.

10 Any cause of action damages for motor vehicle injury occurring in Queensland is unbridled by injury threshold, but rather is subject to constraint as to recovery contained in Chapter 3 of the *Civil Liability Act* 2003 (Qld) ("the CL Act"). CL Act s 5 provides for certain exemptions. In the case of smaller claims, constraint on recoverable costs is to be found in MAI Act s 55F.

11 Any cause of action for damages for motor vehicle injury occurring interstate is subject (ordinarily) to the law of that state.

12 The language "claim farming", plainly, is pejorative in character. The critics contend the practice of claim farming encourages unnecessary and sometimes fraudulent claims.

13 No doubt those engaged in the practice, if they were prepared to emerge from the shadows and justify their activity, would contend it entails motor accident victims being informed or reminded of the rights they enjoy to claim damages in respect of motor vehicle injury, and furnishing them an opportunity to pursue those rights.

14 Conventional claim farming consists of:

- Contact made by cold calling - invariably by telephone but occasionally online - of a person involved in a motor vehicle accident, or in the case

of a child then the parent. The caller has prior knowledge of a person's accident involvement.

- Telephone contact seems to be preferred because it involves no or little documentary proof or record of the contact and its content.
- Critically, the call is international, often originating in the United Kingdom.
- The contact is often commenced by false pretext as the identity of the caller eg calling on behalf of MAIC, some other government agency or a CTP insurer.
- The accident victim or parent is the subject of enquiry about, and encouragement of the making of a claim under the MAI Act scheme in respect of injury which might have been sustained.
- A persuaded accident victim or parent is enlisted to pursue the claim, with advice that contact by a legal practitioner will follow.
- Farmed claims are bundled and "sold", for a fee, directly, or through an intermediary, to an Australian legal practitioner.
- The "purchasing" legal practitioner contacts the prospective claimant and is retained to act in the claim.

15 How any accident victim is identified is not apparent. One could readily infer that media reports and social media would be a ready source of contacts. Media reports often identify an accident victim by name and town suburb. Social media devotees, now numerous, often seem anxious to share the fact of their adventures and misadventures, including of a motor kind. Social media is readily accessed or hacked.

16 Some submissions contended, without evidence, that police, hospital and CTP staff may be a paid source of contacts. Absent such evidence, and despite instructions requesting I consider same, me speculating as to such plainly illicit sourcing could only be tendentious. Any such conduct most likely would offend

s 67 of the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIP Act"), to which I return below.

17 The evident concern is that claim farming of an accident victim, whether or not injured:

- leads to him or her making of a claim under the MAI Act scheme;
- in circumstances where a claim would (or may) not otherwise be made on account of lack of inclination on the part of the potential claimant (even in respect of a frank injury) or the otherwise modest nature of his or her injury;
- in turn, generating an unnecessary or fraudulent claim, and claim cost under the scheme and, depending on the number of farmed claims, putting pressure on CTP premiums.

18 Statutory measures presently exist which, at least potentially, act as a deterrent or disincentive to engage in claim farming. These include ss 67 and 68 of the PIP Act and ss 345 to 347 of the *Legal Profession Act* 2007 (Qld) ("the LP Act"). Such deterrent or disincentive, however, may be apparent than real (see below).

19 The shortcomings in respect of these extant statutory measures, identified in the submissions, are:

- first, claim farmers being foreign based entities or persons engaged in cold calling, are unconcerned by local proscriptive legislation;
- second, difficulty eliciting evidence of instances in which fees have been paid for farmed claims;
- third, doubt as to extra-territorial operation of Queensland legislation in respect of solicitors who do not hold Queensland practising certificates under the LP Act, but rather under the analogous legislation in other states and territories.

20 In sum, it is submitted, the existing measures lack utility.

21 Having broadly summarised the submitted position, I now provide an executive summary of my views, and thereafter descend to my reasoning.

Executive summary:

22 Claim farming – by cold calling international entities, with subsequent "sale" of farmed claims to Australian legal practitioners – is occurring in Queensland.

23 Of its nature, the practice is surreptitious, and thereby not readily susceptible to quantification, investigation or prosecution.

24 The evidence does not permit me to form any conclusion as to whether a recent 10% spike in Queensland scheme claims is attributable, in whole or part, to claim farming.

25 Such claim farming, in some of its forms, but certainly in respect of fee exchange between claim farmer and legal practitioner, is illegal, being in contravention of PIP Act s 68, but not s 67.

26 Legal practitioner claim farming – practise of which would obviate the need for payment of a fee to a non-practitioner claim farmer – lies unregulated in Queensland. Whether such practitioner farming is occurring I cannot say, but if not it must be a serious prospect.

27 Claim farming, in whatever form it is or can be deployed, is a deleterious practice. Of its character it is likely to promote the making of unnecessary or fraudulent claims. Now, or in the medium term, legislative measures to stamp it out ought be seriously considered.

28 The legislative measures adopted, to be of utility, ought be focused on amplifying the disincentive for legal practitioners to engage in claim farming. Identification and pursuit of international claim farmers is a futile exercise.

29 I have canvassed a number of options to obviate or diminish claim farming:

- First, amendment of the LP Act to amplify the prospect that interstate legal practitioners dealing with claim farmers - in respect of Queensland

residents injured in Queensland – are bound by the "50/50" rule as to costs recovery contained in the LP Act.

- Second, amendment of the PIP Act so as to better embrace all forms and facets of claim farming.

- Third, amendment of the MAI Act so that legal practitioners are deterred, by likely exposure in want of compliance, from engaging in claim farming activity.

- Fourth, legislative augmentation of the investigative powers of the Commissioner so as to investigate claim farming in respect of claims under the Queensland scheme.

30 While a matter for the Commissioner, I have no objection to publication of this report.

Claim farming and its impact:

(a) Incidence of claim farming in Queensland:

31 I refer to the matters canvassed above under the heading "Introduction". As to the basal facts, my attached instructions make the position plain.

32 As my instructions record:

- "Claim farming or sourcing in personal injury insurance schemes is not a new concept and has been well documented in the UK for many years … the emergence of claim farming in Australia is more recent. MAIC believes [it] is an issue in the New South Wales CTP scheme, where, in response to rapidly increasing CTP premiums, the NSW government earlier this year released an options paper outlining reform options for the NSW CTP scheme … MAIC understands that this reform process is being driven in part by evidence of fraudulent and unethical behaviour in the claims process, such as exaggerating the extent of minor injuries, and may indicate some claim farming behaviours".

- "Over the past 12 months, MAIC has seen a rapid growth in the operation of NSW based law firms in the Queensland CTP scheme, particularly for accidents that occurred in Queensland. It is unclear whether this is in any way connected to claim farming activity, however MAIC has been unable to identify any reason why increasing numbers of Queensland residents would start engaging NSW-based law firms to represent them in their personal injury claim".

- "Throughout 2015, MAIC has noted an increase in the number of CTP claims. For the five years from 2010 – 2014 the total number of notified claims per year were relatively stable, ranging between 6081 and 6447. In 2015, however, this number increased to 6879. … Interestingly there was a similar increase in added year claim numbers, which is the year in which the claim was first reported in the Personal Injuries Register. …While one cause for an increase in claim numbers could be an increase in accidents, this is not borne out by information from other sources including Comprehensive Motor insurers and government Agencies who are reporting an increase in the incidence of road crashes".

- "Left unchecked, a rise in claim frequency immediately flows through to upward pressures on premiums which impacts the broader Queensland motoring community. … Additionally there is increased risk of claims fraud as members of the public are encouraged or enticed by claim farmers submitting CTP claims without proper merit as part of the claim farmers objective to maximising volumes of 'clients' to on-sell to other parties".

- 'One of the questions of interest is where/how the initial leads are being obtained. … In this regard some work has been conducted by MAIC in the past without any firm conclusions being drawn. In most cases, the chain of events and parties involved from the time of accident to receipt of the telephone call is so varied that it is not possible to pin down a consistent pattern regarding the sourcing of accident information. In essence, rarely are two instances the same in all respects".

33 The submissions of the stakeholders and contributors, broadly, support that instructed information. Therefore, I adopt that information as the factual foundation of his report.

34 Thus, recently there has been a discernible spike in Queensland scheme claims, by a measure of about 10%. That coincides with anecdotal reporting to the Commissioner of claim farming cold calls.

35 That coincidence, however, does not mean there is any correlation between such matters. Rather, the spike may be an aberration due to some other practice eg an upsurge in legal practitioner advertising. To say more about the cause of claim increase would be speculative. I doubt that the reasons for the spike (and more than one reason is likely) are readily capable of discernment.

36 No particular firm of legal practitioners has been identified, in my instructions or the submissions, as having colluded with a claim farmer to garner, for a fee, retainer by any claimant or claimants.

37 If such collusion need be further explored, a Commission of Inquiry may be required. The alternative would be detailed investigation by the appropriate investigative body (Department of Justice and Attorney General and, or alternatively the Legal Services Commission). In either case, compulsive investigative powers would be required for thorough investigation of individual cases.

38 My report on this issue is facilitated by the experience in New South Wales. It would be naïve to suggest that claim farming practices identified as occurring in New South Wales are unlikely be replicated in Queensland. In particular that is so given the fault based and largely unconstrained recovery of damages (save for the provisions under the CL Act) in this state.

39 Early in 2016, the New South Wales CTP regulator, the State Insurance Regulatory Authority ("SIRA"), conducted an inquiry and prepared a report addressing (inter alia) such matters. On 17 June 2016, the report was tabled in a hearing of the New South Wales Law & Justice Parliamentary Committee.

40 The SIRA report, at page 5, stated:

> Cold calling use of claims farming practices is growing, and there is evidence that claims farming firms in the UK are starting to operate in Australia. There is evidence that the issue is emerging in other CTP schemes around Australia though NSW appears to be the epicentre.

41 The SIRA report went on to identify that a common theme is one lawyer and doctor have more than 200 minor injury claims in common (see report page 14) and that the claims involve children, in particular small children (see report page 16).

42 Reverting to Queensland, the submissions from stakeholders and contributors as to instances of claim farming, while anecdotal in character, conduce to the view - unsurprising in light of the UK and NSW experience – that claim farming is practised in Queensland, is likely to continue and in all likelihood will amplify.

43 The premise for many of the submissions made to me is that the practice of claim farming necessarily is deleterious. It is that to which I turn shortly below. Before doing that there is a further issue which, within the remit of my instructions, I ought canvass at this point.

44 The recent spike in Queensland scheme claims may be attributable, at least in part, to legal practitioner claim farming. By this I seek to identify the following scenario:

- A legal practitioner, whether the holder of a Queensland or interstate practising certificate, cold calls an accident victim identified in media or social media as potentially injured in a Queensland motor vehicle claim.
- Alternatively, a law practice or legal practitioner has staff, or a third party contractor, so engage with an accident victim.
- In either case, the accident victim is solicited or induced to retain the legal practitioner to act in making a claim.
- Unlike the non-practitioner cold calling, there is no false pretext. Rather, the practitioner is identified.

45 There is no evidence before me that such practice is occurring, but there is no reason to exclude it as a possibility. It occurring would be wholly unsurprising given:

- increasing competition for legal work;
- local knowledge and ease of pursuit;
- dispensation with payment of a fee to a claim farmer;
- absence of any legislative proscription of such practice (see below).

(b) Impact of claim farming:

46 Is claim farming inimical to the operation of the Queensland scheme?

47 The abovementioned New South Wales SIRA report certainly presumes a wholly affirmative answer to that question. In my opinion, however, for Queensland, that response ignores a reality of the MAI Act scheme. Indeed, the same reality exists in respect of any CTP or like injury compensation scheme whether fault or non-fault in character, or independent right to common law damages.

48 That reality is that, in many instances, a claim farmed claimant:

- will have suffered an injury even if modest in character;
- absent earlier farming, may well have made a claim in due course in any event;
- even if he or she would not have made such a claim otherwise, by dint of the farming has thereby been informed of a right which was enjoyed, and is then pursued.

49 What I am attempting to identify by this trio of propositions is that, from one perspective, claim farming – although undoubtedly engaged in for profit, and practised surreptitiously and often by nefarious means (eg pretext misrepresentation) – may serve to:

- communicate to some claimants a right of action which, through ignorance, they would not otherwise have enjoyed;

- expedite the bringing of other claims which would otherwise have been made in any event, and in either case as the Queensland scheme permits.

50 Telephonic cold calling per se is a vogue and endemic reality in modern Australian society. Anecdotally, while some who are bored or naïve welcome the contact or are inquisitive in respect of the subject matter, the majority is bedevilled by it.

51 Such cold calling inexorably involves the caller, on behalf of some entity or institution, offering the prospect of some purported benefit to the contacted person, which if taken up inexorably involves a benefit to each of the caller and the institution or entity which he or she represents.

52 Advertising per se contrasts with cold calling:

- An advertisement does not entail direct contact with an individual, but rather only by way of media or billboard broadcast.

- Any citizen can ignore the advertisement, and may even be disenchanted by it vis-à-vis the advertised service or product provider.

- Advertising also can operate to inform, but its content is readily apparent and recorded, and susceptible to scrutiny by regulators for misrepresentation or harassment.

- Moreover, advertising bears none of the potential inimical features of cold calling, namely false pretexting, harassment and intimidation.

53 Where the subject matter of cold calling is conduct directed at promoting the making of a claim under a statutory insurance scheme, as exists under the MAI Act scheme, in particular in circumstances where the claim made might not otherwise be made for good reason, prima facie that calls for close regulatory scrutiny and possibly legislative intervention.

54 Logically, claim farming will tend to increase the number of claims, and thereby an increase in total cost of claims. Again, that is a legacy of the fact that the MAI Act scheme contemplates such an entitlement to an injured person, even if modestly injured. The likely measure of that increase, however, is uncertain.

55 Unequivocally, claim farming harbours deleterious attributes:

- First, it may encourage an accident victim to make a claim for physical or psychiatric injury which is fraudulent, speculative or exaggerated in character (but, to some extent, these presently exist).
- Second, a claimant suffering a modest injury may make a claim which, in some cases, can only lead to a pyrrhic outcome for the claimant because of the necessary unrecoverable solicitor and client legal costs of pursuit which need be met from the damages recovered (in particular if represented by an interstate solicitor not bound by the Queensland statutory 50/50 rule – see below).

56 Individually, or in combination, each attribute threatens to burden the Queensland scheme with unnecessary claims' cost, and puts pressure on statutory premiums.

57 In my opinion, by reason of such attributes, serious consideration ought be given to promulgation of measures to obviate or diminish the adverse impact of claim farming on the Queensland scheme.

58 That stated, practitioner claim farming, if it is taking place or in prospect, constitutes an equal threat to the Queensland scheme.

Is claim farming illegal?:

59 The second portion of my instructions concerns enquiry as to whether claim farming is "illegal". I so italicise the question due to the three critical features entailed in claim farming:

- First, the farming caller is an international caller. Such caller, and any institutional farmer on whose behalf he or she may act, are not readily identifiable.

- Second, the surreptitious character of the dealings between the farmer and the legal practitioner.

- Third, the legal practitioner to whom the farmer, directly or indirectly, "sells" a claim will not necessarily be a Queensland legal practitioner, but rather an interstate practitioner.

60 In short, it is all very well to identify – as I do below – that the conduct of the fee payment to farmer by legal practitioner constitutes an offence under extant Queensland legislation, but real difficulty exists on account of the doubtful extra-territorial operation of such legislation, coupled with the inability to readily garner evidence sufficient to found any prosecution.

61 Parts 1 and 2 of Chapter 3 of the PIP Act contain a suite of provisions which, broadly described, proscribe engagement in certain forms of advertising of personal injury services and conduct in the nature of "touting" for personal injury claims. Section 6, by subs (2) thereof, precludes the application of such Act to personal injury within the meaning of the MAI Act, but then goes on to provide that subs (2) "does not affect the general application of chapter 3, part 1 or 2".

62 Thus, these PIP Act Chapter 3 provisions apply not just to MAI Act claims, but to all personal injury claims.

63 The jurisdiction to investigate any breach of Chapter 3 of the PIP Act is vested with the Department of Justice and Attorney General, and in the case of a legal practitioner, the Legal Services Commissioner. The Insurance Commissioner, under the MAI Act, enjoys no investigative powers concerning a possible Chapter 3 contravention arising out of a Queensland scheme claim.

64 Relevantly, parts 1 and 2 of chapter 3 provides:

> **62 Application of pt 1**
> (1) This part is of general application.

(2) However, this part does not bind the State, the Commonwealth or the other States.

63 Definitions for pt 1

In this part—

advertises personal injury services see section 64.

allowable publication method see section 65.

approved includes accredited, authorised, employed, licensed, registered or otherwise permitted to carry on activities.

client, of a law practice, includes a person who makes a genuine inquiry of a law practice about a personal injury.

convicted includes being found guilty, and the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded.

employment includes self-employment.

fee includes the following—

(a) a bonus, commission, cash payment, deduction, discount, rebate, remission or other valuable consideration;

(b) employment, or an agreement to give employment, in any capacity.

hospital includes the following—

(a) any premises used for receiving, caring for or treating persons who are injured, sick or mentally ill;

(b) any premises used for providing a service for maintaining, improving or restoring a person's health and wellbeing;

(c) any land or building occupied or used in connection with premises mentioned in paragraph (a) or (b).

Examples of a hospital—

1 nursing home
2 community health facility
3 medical centre
4 physiotherapist's rooms
5 dentist's surgery
6 hostel

incorporated legal practice see the Legal Profession Act 2007, schedule 2.

law firm see the Legal Profession Act 2007, schedule 2.

law practice see the Legal Profession Act 2007, schedule 2.

legal practitioner director see the Legal Profession Act 2007, schedule 2.

legal practitioner partner see the Legal Profession Act 2007, schedule 2.

member, of a law practice, means—

(a) if the law practice is a sole practitioner—the sole practitioner; or

(b) if the law practice is a law firm—each partner, and each employee of the law firm, who is a practitioner; or

(c) if the law practice is an incorporated legal practice—each legal practitioner director and each employee who is a practitioner of the incorporated legal practice; or

(d) if the law practice is a multi-disciplinary partnership—each legal practitioner partner and each employee who is a practitioner of the multi-disciplinary partnership.

misconduct means professional misconduct or unsatisfactory professional conduct as defined under the Legal Profession Act 2007.

multi-disciplinary partnership see the Legal Profession Act 2007, schedule 2.

potential claimant means—

(a) a person who suffers, or may suffer, personal injury arising out of an incident; or

(b) another person who has or may have a claim in relation to a person mentioned in paragraph (a).

printed publication includes a newspaper, magazine, journal, periodical or directory.

prohibited person means a person who, for the purpose of the person's employment, is attending or attended the scene of an incident at or from which a person allegedly suffered personal injury or at a hospital after an incident at or from which a person allegedly suffered personal injury.

Example—

a tow truck operator, police officer, ambulance officer, emergency services officer, doctor or hospital worker

public place means a place or vehicle that the public, or a section of the public, is entitled to use or that is open to, or is being used by, the public or a section of the public, whether on payment of money, through membership of a club or other body, or otherwise.

sole practitioner see the Legal Profession Act 2007, schedule 2.

...

67 Prohibition on touting at scene of incident or at any time

(1) At the scene of an incident at which a person allegedly suffered personal injury or at a hospital after an incident at which a person allegedly suffered personal injury—

(a) a prohibited person must not solicit or induce a potential claimant involved in the incident to make a claim; or

(b) a person, other than a prohibited person, must not solicit or induce, in a way that would be unreasonable in the circumstances, a potential claimant involved in the incident to make a claim.

Example for paragraph (b)—

A person who lives near the scene of the incident helps a potential claimant immediately after the incident. If the person, without being asked to do so, telephones a law practice and insists the potential claimant speaks with a practitioner at the law practice about making a claim, the person is acting in a way that would be unreasonable in the circumstances.

Maximum penalty—300 penalty units.

(2) Subsections (3), (4) and (5) apply, as stated in the subsections, to the following persons—

(a) a prohibited person;

(b) a person who, for the purpose of the person's employment, obtains information about an incident at or from which a person allegedly suffered personal injury;
(c) a person who, for the purpose of the person's employment, has contact with a potential claimant if the contact substantially arises because of an incident at or from which a person allegedly suffered personal injury.

Example for paragraph (c)—
a hospital worker in the casualty department of a large hospital who attends to a potential claimant

(3) A person mentioned in subsection (2)(a) or (b) must not give a potential claimant involved in the incident, or someone on the potential claimant's behalf, the name, address or telephone number of—
(a) a particular law practice; or
(b) an employee or agent of a law practice.
Maximum penalty—300 penalty units.
(4) A person mentioned in subsection (2)(c) must not give the potential claimant, or someone on the potential claimant's behalf, the name, address or telephone number of—
(a) a particular law practice; or
(b) an employee or agent of a law practice.
Maximum penalty—300 penalty units.
(5) Also, a person mentioned in subsection (2) must not disclose the name or address of a person involved in the incident to anyone other than—
(a) a police officer; or
(b) a person to whom the person is required to disclose the information under a law; or
(c) a potential claimant involved in the incident or a practitioner acting for the potential claimant or the practitioner's agent; or
(d) the person's employer, if the person is attending or attended the incident for the purpose of the person's employment and the employer requires the person to disclose the information on grounds that are reasonable in the circumstances; or
(e) a person (insurer) who carries on the business of providing insurance for people or property, a practitioner acting for the insurer or someone acting as the insurer's agent.
Maximum penalty—300 penalty units.
(6) However, a person does not commit an offence against subsection (5) only because the person discloses the name or address of a person involved in the incident to a practitioner if—
(a) the person is a client of the practitioner or a law practice of which the practitioner is a member for the purpose of making a claim or exercising a legal right, whatever its nature, arising out of the incident; and
(b) in the circumstances, it is reasonable for the person to think the person may have a claim or a legal right; and
(c) the disclosure is for the purpose of making the claim or exercising the legal right.
(7) Also, a person does not commit an offence against subsection

(5) if the disclosure is not likely to result in a potential claimant involved in the incident being solicited or induced to make a claim.

67A Exemption from s 67(3) and (4)

(1) A person does not commit an offence against section 67(3)(a) or (4)(a) if—

(a) the person gives the potential claimant, or someone on the potential claimant's behalf, the name, address or telephone number of a particular practitioner or law practice (the information); and

(b) the person, in giving the information, is acting on behalf of a community legal service or industrial organisation; and

(c) the community legal service or industrial organisation approved of the giving of that information by the person.

(2) In this section—

community legal service see the Legal Profession Act 2007, schedule 2.

industrial organisation means a federal organisation, or an organisation, as defined under the Industrial Relations Act 1999, section 409.

68 Prohibition against paying, or seeking payment, for touting

(1) A person must not pay, or seek payment of, a fee for the soliciting or inducing of a potential claimant to make a claim.
Maximum penalty—300 penalty units.

(2) However, a person does not commit an offence against subsection (1) only by—

(a) if the person is not a law practice or a person acting for a law practice—advertising, in the ordinary course of the conduct of the person's business as an advertiser or publisher, legal services about claims; or

(b) if the person is a law practice or a person acting for a law practice—charging a potential claimant a fee for professional services provided to the potential claimant as part of making a claim.

69 Consequence if person approved or regulated under an Act is convicted under s 67 or 68

(1) This section applies to a person if—

(a) under an Act—

(i) the person is approved for a profession, type of employment or calling; or

(ii) the person's activities for the person's profession, employment or calling are regulated; and

(b) under the Act under which the person is approved or the person's activities are regulated, the person's approval may be suspended or cancelled for misconduct or the person may be disciplined or otherwise dealt with for misconduct.

> (2) If the person is convicted of an offence against section 67 or 68, the person's conviction may also be dealt with as misconduct under the Act under which the person is approved or the person's activities are regulated.

65 Anti-touting provisions were first introduced in Queensland in 1999, coincidentally into the MAI Act, by the *Motor Accident Insurance Amendment Act (No 2)* 1999 (Qld). In 2002, upon enactment of the PIP Act, the MAI Act provisions were repealed but re-enacted in an earlier iteration of the present form of PIP Act ss 62 to 69 enactment canvassed above.

66 PIP Act Chapter 3 was amended by the *Personal Injury Proceedings (Legal Advertising) and Other Acts Amendment Act* 2006 (Qld). Among other things, the amendments consisted of:

- broadening the anti-touting provisions;
- amending the then *Legal Profession Act* 2004 (Qld) to enable the Legal Services Commissioner to investigate alleged breaches by legal practitioners of the aforementioned anti-touting provisions of the PIP Act.

67 While such provisions probably acted to contain the advent or growth of farming of claims, no instance has been identified to me of any person (legal practitioner or other person) who has been prosecuted, let alone convicted of a contravention of ss 67 or 68.

68 That prosecutorial history, I infer, is a function, at least in part, of:

- The likely offending conduct is surreptitious character, the participants necessarily being covert in respect of their dealings. This is a function of human nature in matters of illicit collusion. An analogy is the parlous history of prosecution for the taking by secret commissions under the Criminal Code.
- The complexity of the drafting, in particular of s 67(2)-(7). Any experienced lawyer would struggle in construing the maze of provisions thereof. In consequence, prosecution, most probably, would be

protracted and unpredictable in outcome. This does not conduce to any person being charged.

69 The claim farming caller would probably fall within the language of s 67(2)(c), namely "a person who, for the purpose of the person's employment, has contact with a potential claimant if the contact substantially arises because of an incident at or from which a person allegedly suffered personal injury". The farming entity by whom the caller is so employed or retained, however, would not fall within the embrace of s 67(2). It is only that farming entity which is likely to breach s 67(5) when dealing with the "purchasing" legal practitioners, but that subsection does not constitute such entity as a potential offender.

70 Thus, s 67 is of questionable impact on "front end" claim farming, namely a claim farmer dealings with prospective claimants. Indeed, such conclusion underscores the fact of the parlous history of prosecution under s 67 generally, let alone paving the way for prosecution on account of claim farming.

71 The position in respect of s 68 is more propitious in addressing the "back end" of claim farming, namely the dealing between claim farmer and "purchaser" legal practitioner.

72 The language of s 68 is somewhat equivocal as to whether the soliciting need occur before or after the seeking or making of fee payment (see below). That stated, s 68 probably falls to be construed in a plenary manner to capture fee transactional conduct.

73 In my opinion, the claim farmer, in seeking payment of a fee from a legal practitioner or intermediary for the farmed MAI Act claimant, would fall within the language of s 68(1):

> A person must not … seek payment of … a fee for soliciting or inducing of a potential claimant to make a claim.

74 Correspondingly, the same can be said for a dealing legal practitioner – or any intermediary between farmer and practitioner - for the purpose of s 68(1):

> A person must not pay … a fee for soliciting or inducing of a potential claimant to make a claim.

75 Two problems, however, already presaged, exist:

- first, identifying the persons involved, and the details of the transaction, coupled with willing and available witnesses, such as to found a prosecution;

- second, the questionable extra-territorial operation of that provision insofar as the relevant fee transaction occurs outside the State of Queensland, particularly if involving an overseas farming entity per se, and or in the alternative an interstate legal practitioner.

76 If the facts are identified, the evidence is available to be adduced from willing and available witnesses as to those facts and the claim farmer or legal practitioner is Queensland based, then the prospects of proof of contravention ordinarily would be favourable.

77 The usual circumstance, however, concerns a Queensland resident who is farmed by an international claim farmer, the farmer selling the (willing) claimant to an interstate practitioner.

78 Suffice it to say the above hurdles to successful prosecution in such usual circumstance militate against ss 67 and 68 being of any practical utility in inhibiting claim farming.

79 Thus, in my opinion, claim farming may be illegal, but much depends on the particular circumstances, and successful prosecution is unlikely.

80 Further:

- There is nothing in ss 67 and 68 of the PIP Act, nor otherwise in any other legislation including the LP Act, which precludes a Queensland based legal practitioner engaging directly in farming clients. The same position obtains in respect of any interstate practitioner farming Queensland residents.

- That being so, what incentive is there for any legal practitioner to deal with a claim farmer, to whom a fee need be paid, when the legal

practitioner can engage directly in the farming by following through on media, or social media leads pertaining to injured persons?

- Such reality transcends MAI Act scheme claims, extending to all personal injury claims.

Options to address adverse impact of claim farming:

(a) **Destroying the claim farmers' market:**

81 I do not consider that greater information being supplied to claimants is the answer. Rather, the answer lies in legislative and regulatory intervention.

82 The reality is that, ordinarily, a claim farmer operates from some international location, is difficult to identify, engages in cold calls and thereby minimises the prospect of call recording, and participates in covert dealings with usually interstate legal practitioners. In consequence, I infer, farmers would be unconcerned about Queensland domestic legislation, even PIP Act s 68 which proscribes a farmer garnering a fee for one or a bundle of Queensland scheme claimants.

83 The only proposed amendment I venture to s 67 is to s 67(2)(b), by addition of the words "or business" after "employment". That, at least would extend to comprehend the claim farming entity. See also below the suggested amendment to s 63 and the proposed s 67B.

84 Apart from this modest amendment to the PIP Act provisions, in my opinion there are no practical legislative options open to directly curtail or diminish the "front end" conduct of claim farmers.

85 In respect of claim farming, the Gordian knot can only be cut by a legislative regime which, at the "back end", obviates or diminishes the motivation for legal

practitioners to deal with claim farmers. This can be best achieved by measures directed at:

- First, entrenching the operation of the "50/50" rule as to costs in respect of interstate practitioners, that rule being operative in respect of state practitioners under Queensland law under LP Act s 347.

- Second, an amplification of the risks practitioners face as practitioners by engaging in claim compliance, in particular by their exposure to prosecution.

86 In addition, claim farming in its present form engaged in by non-practitioner entities could end up being overshadowed by practitioner claim farming. Again there is no legislative proscription of practitioner claim farming on foot in Queensland, nor is it proscribed under ethical rules.

87 In my opinion, legal practitioners need to know that their conduct in regard to claim farming generally – of the practitioner and non-practitioner kind – is under close scrutiny, and will be the subject of resolute investigation.

88 One option is to do nothing at present, monitor the claim trends and practices in Queensland and in the larger New South Wales CTP scheme and then respond as appropriate when a clearer picture emerges. The other is to take immediate action.

89 With these matters in mind I canvass below what I consider to be apt measures for legislative intervention if they are to be deployed (now or in future).

(b) Uniform operation of the "50/50" rule as to costs:

90 Almost universally, personal injury claims – whether or not under the MAI Act scheme - are conducted by legal practitioners on a speculative basis.

91 For several decades Queensland legislation applicable to solicitors has adopted what is colloquially referred to in the profession as "the 50/50 rule". The current iteration of such rule is to be found in LP Act ss 345 to 347.

92 The statutory rule, in effect, provides for a client to enjoy a minimum level of recovery in claims of relatively lower value, so as to ensure that solicitor and own client legal costs do not mulct the damages recovered by a claimant in a speculative personal injury claim.

93 Sections 345 to 347 provide:

> **345 Main purpose of div 8**
> The main purpose of this division is to provide for the maximum payment for a law practice's conduct of a speculative personal injury claim.
>
> **346 Definitions for div 8**
> In this division—
> ***legal costs*** means amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services including interest on the amounts, but excluding disbursements and interest on disbursements.
> ***speculative personal injury claim*** means a claim for, or substantially for, damages for personal injury if the right of a law practice to charge and recover legal costs from a client for work done is dependent on the client's success in pursuing the claim.
>
> **347 Maximum payment for conduct of speculative personal injury claim**
> (1) The maximum amount of legal costs (inclusive of GST) that a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim must be worked out under the costs agreement with the client for the claim or this Act but in no case can those legal costs be more than the amount worked out using the formula—
>
> **[E – (R + D) x 0.5]**
>
> where—
> **E** means the amount to which the client is entitled under a judgment or settlement, including an amount the client is entitled to receive for costs under the judgment or settlement.
> **R** means the total amount the client must, under an Act, a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under the judgment or settlement.
> **D** means the total amount of disbursements or expenses for which the client is liable if that liability is incurred by or on behalf of the client either by the law practice or on the advice or recommendation of the law practice, in obtaining goods or services (other than legal services from that law practice) for the purpose of investigating or progressing the client's claim, regardless of how or by whom those disbursements or expenses are paid, but does not include interest on the

disbursements or expenses.

Examples for D—

1 The disbursements or expenses may be paid by the client direct or through a law practice or by a person funding the client for those disbursements or expenses.

2 If a client obtains a loan to fund the payment of disbursements and expenses on the firm's recommendation and pays for medical and expert reports direct to the provider, the expenses fall within D (but the interest payable by the client on those expenses do not).

(2) If—

(a) the amount of legal costs that a law practice may charge and recover from a client is more than the amount calculated under subsection (1); and

(b) the law practice wishes to charge and recover the amount (the ***greater amount***) from the client;

the law practice may apply under subsection (3) for approval to charge and recover the greater amount.

(3) The application must be made in writing to—

(a) if the law practice is a barrister—the bar association; or

(b) otherwise—the law society.

(4) A relevant regulatory authority may, in writing, approve an application made to it for an amount up to the greater amount.

(5) This section applies to a barrister only if the barrister has not been retained by another law practice.

(6) This section applies despite section 319 and division 5.

(7) Also, this section applies to any request for payment made on or after the day this section commences, whether or not a client agreement was entered into before that date.

94 Stakeholders and contributors were unanimous in the view that the uniform operation of the 50/50 rule was essential in addressing the advent and growth of claim farming.

95 For a Queensland legal practitioner acting for a farmed Queensland resident injured person, there is no difficulty. Inexorably, as part of the law of Queensland, being contained in the Queensland statute, the rule will regulate entitlement to recover legal costs.

96 The concern expressed by stakeholders and contributors was that while such rule would apply to a legal practitioner holding a Queensland certificate under the LP Act, it was unlikely to apply to an interstate practitioner acting for a farmed Queensland resident injured in a Queensland motor vehicle accident, and would not apply to an interstate lawyer acting for an interstate resident injured in a motor vehicle accident involving a Queensland registered vehicle outside Queensland.

97 I concur with these submissions. Where an interstate practitioner is involved, invariably that practitioner, in entering a costs agreement with a claimant, will include as a term of a costs agreement to the effect that the law of the agreement is the law of that other state. Such provision, ordinarily, would result in the right to recover costs being adjudicated in accordance with that state law, not Queensland law (including LP Act ss 345 to 347).

98 The Queensland 50/50 rule, contained in the LP Act, if applicable to a costs agreement, cannot be the subject of contracting out.

99 In New South Wales, a rule constraining costs in claims under $100,000 is prescribed by s 61, that in turn attracting Schedule 1 of the *Legal Profession Uniform Law Application Act* 2014 (NSW). Unfortunately, however, clause 4(1) of the schedule provides that the schedule constraints have no application to recovery of costs by a legal practitioner against a client in the event that those parties have entered into a costs agreement which complies with Division 4 of Part 4.3 of the *Legal Profession Uniform Law* (NSW). Thus, the New South Wales provision may be contracted out of.

100 For claim farming purposes, I reiterate, the principal focus ought be upon the scenario of an interstate practitioner acting for a Queensland resident injured in Queensland. To that end, in my opinion, the endeavour ought be to have the Queensland rule apply in such a way as to trump the likely in the non-Queensland choice of law provision contained in the costs agreement made with the interstate practitioner. That is not without difficulty.

101 If the equivalent rule, incapable of being contracted out of, were introduced in all other states and territories, in particular in New South Wales, the difficulty would be resolved. The prospect of that occurring, however, is questionable.

102 What I propose is an amendment to the LP Act by the addition of a s 347A to Division 8 of Chapter 3 thereof:

> **347A Law practice precluded from acting without agreement to the terms of this division**
>
> (1) A law practice may not act or continue to act, or recover fees for acting, for a client in a speculative personal injury claim without

> entering into a contractual retainer or agreement with the client which expressly incorporates the provisions of this division.
> Maximum penalty – 300 penalty units.
> (2) In this section ***client*** means a person who seeks that a law practice act in a personal injury claim arising from an incident or injury which occurred in Queensland;
> (3) To remove any doubt, this provision applies to a law practice which is an interstate law practice.

103 Obviously the Legal Services Commissioner, and his Minister, need be engaged in respect of this proposed amendment to the LP Act. Some surgery of language may be required.

104 Directed as such amendment is principally to the paradigm circumstance of an interstate lawyer acting for a Queensland resident in respect of a Queensland accident, in my opinion such amendment will not contravene, relevantly, s 117 of the Commonwealth Constitution. That provides:

> **117** A subject of the Queen, resident in the State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were the subject of the Queen resident in such other State.

105 The leading authorities in respect of the interpretation of s 117 are *Street v Queensland Bar Association* (1989) 168 CLR 461; *Re Pudig* [1990] 2 QdR 551, *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 and *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

106 In *Goryl* the High Court held that s 117 was infringed by Queensland legislation that denied residents of other States access to Queensland's more generous damages payouts for motor vehicle accidents. Dawson and Toohey JJ, at 486, wrote:

> Guidance is … to be found in the objective s 117 which is to foster the concept of Australian nationhood, recognising at the same time the capacity of the States to govern their own communities which is an essential feature of federation.

107 Their Honours left open the question whether financial assistance and welfare schemes, the benefits of which are limited to residents of one state, violate s 117. Mason CJ agreed with Dawson and Toohey.

108 In my opinion my proposed LP Act s 347A does not discriminate against an interstate legal practitioner acting for a Queensland resident in respect of an injury which occurs in that state, nor against an interstate resident who seeks to engage a legal practice. Each is treated in the same fashion as a Queensland resident legal practitioner or client.

109 Suffice it to say the proposed amendment, being to the LP Act, would apply to all personal injury claims, not just those under the MAI Act scheme.

(c) Practitioner exposure:

110 I turn now to amendments directed at diminishing the attraction to a legal practitioner dealing with a claim farmer, directly or indirectly, and the exposure of the same at the point of or shortly after the making of an MAI Act claim.

111 In my opinion the primary amendments required are to PIP Act ss 67 and 68, together with some modernisation of the definitions provisions in s 63. Again, each of these provisions is extracted above in this report.

112 I propose a further s 67B (to augment ss 67 and 67A) and an amended s 68 (the amendment to the latter underlined for convenience):

> **67B Prohibition on touting by a law practice or legal practitioner**
>
> (1) A prescribed legal person must not solicit or induce, or cause or permit the soliciting or inducing of, a potential claimant to make a claim.*
> Maximum penalty – 300 penalty units.
> (2) In this section ***prescribed legal person*** means—
> (a) a law practice; or,
> (b) a member of a law practice; or,
> (c) a legal practitioner director; or,
> (d) a legal practitioner partner; or,
> (e) an employee or agent of a law practice.
> (3) A person commits an offence against subsection (1), in the case of a claimant under a disability, by soliciting or inducing, or causing or permitting the soliciting or inducing of, the parent or guardian of the potential claimant.
> (4) However, a person, who is a natural person, does not commit an offence against subsection (1) where the potential claimant, or his or her parent or guardian, solicited or induced—
> (a) is a relative (including de facto spouse or stepchild) of the person; or,
> (b) is a close acquaintance of the person; or,
> (c) is an employee of the person; or,

(d) is an existing client of the person; or,
(e) makes an unsolicited request to the person to advise on the claim being made or to act for the claimant in respect of the making of the claim; or,
(f) in response to publication or advertising by such person permitted by sections 65 or 66, makes a prior request to the person to advise on the claim being made or to act for the claimant.

(5) Further, a person, which is a corporate person, does not commit an offence against subsection (1) where the potential claimant, or his or her parent or guardian, solicited or induced, is a person referred to in paragraphs (d), (e) or (f) of subsection (4).

68 Prohibition against paying, or seeking payment, for touting

(1) A person must not pay or promise to pay, or cause payment or make a promise of payment, or seek payment or a promise of payment, of a fee for-
(a) the soliciting or inducing of a potential claimant to make a claim; or
(b) providing the name or address of a potential claimant who has been solicited or induced to make a claim.
Maximum penalty—300 penalty units.

(2) However, a person does not commit an offence against subsection (1) only by—
(a) if the person is not a law practice or a person acting for a law practice—advertising, in the ordinary course of the conduct of the person's business as an advertiser or publisher, legal services about claims; or
(b) if the person is a law practice or a person acting for a law practice—charging a potential claimant a fee for professional services provided to the potential claimant as part of making a claim.*

* For the assistance of the reader, the word "claim" is defined in the Dictionary schedule to the PIP Act. Note also the definitions in s 63.

113 Section 69(2) need be amended to refer also to the enacted s 67B.

114 Section 63 requires some additional definitions:

address includes residential address, post office address, email address, social media address or other online address.

...

Australian legal practitioner see *Legal Profession Act* 2007, section 61.

...

Interstate legal practitioner see *legal Profession Act* 2007, section 6(3).

115 Proposed s 67B is self-explanatory. The intent is to proscribe legal practitioner claim farming, but in doing so providing for apt exceptions.

116 For the reasons canvassed above, in my opinion, practitioner claim farming, in reality or in prospect, ought be proscribed. My impression is that, to date, there seems to have been a view abroad in the profession that ss 67 and 68, as presently drafted, somehow proscribe such conduct. In my opinion that is not their proper construction. Specifically as to s 68, practitioner farming is unlikely to involve a fee.

117 Moreover, there is no professional conduct rule which precludes such conduct. To the contrary, rule 12 of the Australian Solicitors' Conduct Rules 2012 permits payment of a fee to a third party for a referral, as long as the client has been advised of same.

118 The language "cause or permit" in my proposed s 67B and the amended s 68, respectively, is directed at preventing legal practitioners dealing with claim farmers circumventing the provision by:

- in the case of s 67B, arranging for practitioner staff or general administrative contractors to undertake the task;
- in the case of s 68, not paying a fee directly to the claim farmer, but arranging for the fee to be paid to the claim farmer or some independent person or entity.

119 I have expanded s 68(1) because:

- the existing wording thereof is equivocal, connoting that the fee is agreed to be paid in advance of the soliciting. Dealings between claim farmers and "purchasing" legal practitioners, however, seem to ensue, ordinarily, subsequent to the farming;
- the transaction may involve a fee for provision only of a name or address of the farmed claimant.

(d) **MAI Act certification:**

120 Through the focus of the above measures, in my opinion, claim farming practices are likely to be diminished by compelling a legal practitioner acting for a Queensland scheme claimant to certify relevant compliance.

121 Undoubtedly, this may be controversial with some members of the profession:

- first, as adding "red tape" to the claim process;
- second, by a practitioner being obliged to provide evidence which might aid him or her being prosecuted;
- third, the detail of compliance might disadvantage the claimant by touching upon the substance of the advice given.

122 These, and other, criticisms can be considered when the stakeholders are canvassed as to any such proposal. I have attempted to accommodate the above possible criticisms in my drafting below.

123 In my opinion, in light of the above facts, the burden of certification is neither onerous nor unfair. It would facilitate proper maintenance of the availability of common law rights under the Queensland scheme, and maintain proper standards in the ranks of the legal profession.

124 Certification in a rolled-up fashion (eg "I have complied with LP Act Chapter 3 Division 8") lacks utility and begs the question. It is akin to saying "In my opinion I have not breached the Criminal Code". Rather, the requisite facts should be identified, accompanied by acknowledgement of the relevant provisions.

125 With the above matters in mind, I suggest that the certificate ought be as follows:

I of in the State of Queensland, solicitor, declare:

1. I am a solicitor of the Supreme Court of [Insert state or territory], in the Commonwealth of Australia.
2. I am a director/partner/ sole practitioner of [Insert practice name] ("the law practice").

3. The law practice acts for the claimant [Insert claimant's name] ("the claimant") in respect of a claim for damages for injury arising from a motor vehicle accident which occurred on [Insert date of accident] ("the claim").

4. I have full knowledge of the matters the subject of this declaration.

5. I have read and acknowledge the terms of s 36A of the *Motor Accident Insurance Act* 1994, ss 63 and 67 to 69 of the *Personal Injuries Proceedings Act* 2002 and ss 345 to 347A of the *Legal Profession Act* 2007.

6A. Neither the law practice nor any member of the law practice solicited or induced, or caused or permitted the soliciting or inducing of, the claimant, or a parent or guardian on behalf of the claimant, to make the claim.

6B. [In the alternative to 6A] The claimant [or parent or guardian acting on behalf of the claimant namely - Insert name, address and relationship with claimant] was solicited or induced, or caused to be solicited or induced, to make the claim, in the following circumstances [Insert full details by reference to a defence in s 67B(4) or (5)].

7. Neither the law practice nor any member of the law practice paid or made a promise of payment of, or caused to be paid or made a promise of payment of, a fee for:

   (a) soliciting or inducing the claimant, or claimant's parent or guardian, to make the claim; or,

   (b) providing the name or address of the claimant, or claimant's parent or guardian, as a person who had been solicited or induced to make a claim.

8A. On [Insert date] the legal practice entered into an agreement with the claimant in accordance with s 347B of the *Legal Procession Act* 2007.

8B. [In the alternative to 8A] Section 347B of the *Legal Profession Act* 2007 does not apply to the claimant's retainer with the law practice because [Insert full details].

Dated of 2017

_____

Declarant

_____

Witness (including name, address and qualification)

126 To accommodate such certificate, amendments need also be made to the MAI Act:

- So that the certificate is a requirement for s 37 claim compliance, s 37(1) would need to be augmented by a subparagraph (e):

(e) if a law practice has been retained to act in respect of the making of the claim, a law practice certificate within the meaning of s 36A.

- Proposed s 36A ought read:

36A Law practice certificate

(1) Subject to subsection (1)(e) of section 37, within 3 months after being retained to act in respect of a claim, a law practice shall complete a certificate complying with this section, and give the certificate to the insurer, and give a copy thereof to each of the Commission and the claimant (or claimant's parent or guardian). Maximum penalty – 300 penalty units.

(2) The certificate, in a form approved by the Commission, must contain information which evidences compliance, by the law practice and each member of a law practice with sections 67B and 68 of the *Personal Injuries Proceedings Act* 2002, and compliance by the law practice with section 347A of the *Legal Profession Act* 2007.

(3) To remove any doubt, subsection (2) does not require or permit the certifier to provide information of privileged communication with the claimant concerning prospects of a successful claim.

(4) The certificate shall be certified by statutory declaration by the sole practitioner, a legal practitioner partner or a legal practitioner director.

(5) In this section:
law practice see the Legal Profession Act 2007, schedule 2.
legal practitioner director see the Legal Profession Act 2007, schedule 2.
legal practitioner partner see the Legal Profession Act 2007, schedule 2.
***member* of a law practice**, means—
(a) if the law practice is a sole practitioner—the sole practitioner; or
(b) if the law practice is a law firm—each partner, and each employee of the law firm, who is a practitioner; or
(c) if the law practice is an incorporated legal practice—each legal practitioner director who is a practitioner of the incorporated legal practice; or
(d) if the law practice is a multi-disciplinary partnership—each legal practitioner partner who is a practitioner of the multi-disciplinary partnership.
multi-disciplinary partnership, see *Legal Profession Act* 2007, schedule 2.

127 The proposed s 36A(2) is to enable privilege to be circumvented in respect of the subject matter.

128 The form of certificate would need to be formally approved by the Commission.

(e) Powers of investigation:

129 The MAI Act gives the Commissioner, as the person constituting the Motor Accident Commission (see MAI Act ss 6 and 7), extensive functions, but in terms of audit review and investigation confined to CTP insurers – see s 10(1). Consistent with that, Part 5 vests the Commissioner with broad investigative powers, of a compulsive nature, in respect of CTP insurers.

130 The Commissioner, however, is not invested with investigative powers, expressly, in respect of conduct which may involve contravention of PIP Act ss 67 and 68 in the sphere of MAI Act claims. The Commission, with respect, is best placed to undertake such investigation, rather than refer the same.

131 In my opinion this investigative lacuna ought be filled by the vesting of investigative powers in the Commission.

132 Given that conduct which may constitute a contravention might be that of a legal practitioner acting for a claimant in a Queensland scheme claim, there is risk of a "competition" for jurisdiction between the Insurance Commissioner, the Legal Services Commissioner and the Department of Justice and Attorney General. With respect, the risk which materialises is that the potentially offending conduct may fall between the investigation cracks.

133 If the Commissioner is vested with appropriate powers of investigation in matters bearing upon or arising out of Queensland scheme claims, which powers ought necessarily extend to the conduct of practitioners, then there ought be no reason for there to be any such "competition". The conduct needs to be investigated. This could occur in parallel or sequentially.

134 Given the greater complexity evident in this sphere, I have refrained from drafting particular MAI Act amendment to vest such powers. I could do so if asked.

(f) Claim costs provisions:

135 MAI Act s 55F provides, in effect, for small claims threshold in respect of costs. The plain intention of s 55F was to provide a disincentive for the litigation of less serious claims.

136 The relevant "upper offer limit" and "lower offer limit" in respect of which the Minister makes a recommendation from time to time under s 100A, are $71,730 and $43,020 respectively.

137 Given the matters canvassed in this report, there is some force in the argument that these thresholds should be the subject of a not insubstantial increase, in the order of 50%. That stated, this issue is probably on the fringes of the remit of my instructions, so I take it no further.

Publication:

138 I see no good reason for the Commissioner to refrain from publication of this report. If a legislative response is to be considered, the stakeholders and contributors will be an invaluable source of comment. Other stakeholders also ought be accessed eg Bar Association of Queensland.

139 Whether such publication occurs, however, is a matter for the Commissioner.

Conclusion:

140 My conclusions are summarised under the above heading "Executive summary".

141 I am indebted to the Commissioner and his staff, together with the stakeholders and contributors, for their submissions and assistance.

142 Consultation by the Commissioner with other arms of government (including the Legal Services Commissioner) and stakeholders will be critical in the Commissioner's finalisation of a response to claim farming. In this regard, can I emphasise that practitioner and non-practitioner claim farming (as occurring or in prospect) need be considered in any such response.

143 If requested to so do, I am willing and able to provide such supplementary report that may be required by the Commissioner.

I report accordingly.

With compliments

Contrary to public interest

Richard Douglas
Chambers
Ph: (07) 32180620