Parliamentary Committees



Motor Accident Insurance and Other Legislation Amendment Bill 2019

Report No. 29, 56th Parliament
Economics and Governance Committee
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Economics and Governance Committee

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Acknowledgements

The committee acknowledges the assistance provided by Queensland Treasury and the Motor Accident Insurance Commission.

Contents

Abbreviations

Act	*Motor Accident Insurance Act 1994*
ALA	Australian Lawyers Alliance Queensland
Bill	Motor Accident Insurance and Other Legislation Amendment Bill 2019
Commission	Motor Accident Insurance Commission
committee	Economics and Governance Committee
Criminal Code	*Criminal Code Act 1899*
CTP	Compulsory third-party
Deputy Premier	Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships
FLP	Fundamental legislative principle
Health Practitioner Regulation National Law	*Health Practitioner Regulation National Law Act 2009*
ICA	Insurance Council of Australia
Legal Profession Act	*Legal Profession Act 2007*
LSA	*Legislative Standards Act 1992*
MAIC	Motor Accident Insurance Commission
National Injury Act	*National Injury Insurance Scheme (Queensland) Act 2016*
PIPA	*Personal Injuries Proceedings Act 2002*
POQA	*Parliament of Queensland Act 2001*
QLS	Queensland Law Society
Regulation	Motor Accident Insurance Regulation 2018
scheme	Compulsory third-party statutory insurance scheme
Slater and Gordon	Slater and Gordon Lawyers
Treasury	Queensland Treasury

All Acts are Queensland Acts, unless otherwise specified.

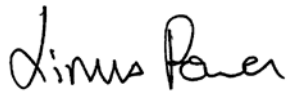
Chair's foreword

This report presents a summary of the Economics and Governance Committee's examination of the Motor Accident Insurance and Other Legislation Amendment Bill 2019.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and Queensland Treasury.

I commend this report to the House.



Linus Power MP

Chair

Recommendations

The committee recommends the Motor Accident Insurance and Other Legislation Amendment Bill 2019 be passed.

1 Introduction

1.1 Role of the committee

The Economics and Governance Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Premier and Cabinet, and Trade
- Treasury
- Aboriginal and Torres Strait Islander Partnerships, and
- Local Government, Racing and Multicultural Affairs.

Section 93(1) of the POQA provides that a portfolio committee is responsible for examining each bill in its portfolio areas to consider:

- the policy to be given effect by the legislation, and
- the application of fundamental legislative principles (FLPs).

The Motor Accident Insurance and Other Legislation Amendment Bill 2019 (Bill) was introduced into the Legislative Assembly and referred to the committee on 14 June 2019, with a reporting date of 9 August 2019.

1.2 Inquiry process

On 17 June 2019, the committee invited stakeholders and subscribers to make written submissions on the Bill. From this engagement process 11 submissions were received, see Appendix A for a list of submitters.

The committee received a public briefing about the Bill from Queensland Treasury (Treasury) on 1 July 2019. A transcript is published on the committee's inquiry webpage,[2] see Appendix B for a list of officials.

The committee received written advice from Treasury in response to matters raised in submissions and matters relating to FLPs.

The committee held a public hearing on 22 July 2019, see Appendix B for a list of witnesses.

The submissions, correspondence from Treasury and transcripts of the briefing and hearing are available on the committee's inquiry webpage.

1.3 Policy objective of the Bill

The objective of the Bill is to stop 'claim farming' – defined in the explanatory notes as the practice of anonymous persons contacting members of the public, from local or overseas call centres or via email or social media, to ask whether they or a family member have been involved in a motor vehicle accident.[3]

Claim farmers rely on different tactics to create an impression of credibility, such as suggesting they are acting on behalf of the Motor Accident Insurance Commission (Commission), other government agencies or insurers. Claim farmers induce and may harass individuals to make a claim under the

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1 *Parliament of Queensland Act 2001* (POQA), s 88 and Standing Order 194.

2 https://www.parliament.qld.gov.au/work-of-committees/committees/EGC/inquiries/current-inquiries/MotorAccInsOLA2019.

3 Explanatory notes, p 1.

compulsory third-party statutory insurance scheme (scheme) established by the *Motor Accident Insurance Act 1994* (Act), often with the promise of quick and easy compensation, and may even offer to coordinate medical treatment. Claim farmers sell individuals' personal information obtained through the contact for a fee (either directly or through an intermediary) to a legal practitioner or other claims management service provider who then handles the claim under the scheme.[4]

To cease the practice of claim farming, the Bill proposes to amend the Act to:

- create two new offences to prohibit claim farming
- require a supervising principal of a law practice acting for a claimant to complete a law practice certificate confirming compliance with new s 79 or s 347 of the *Legal Profession Act 2007* (Legal Profession Act) in relation to the '50/50 rule'
- strengthen the Commission's enforcement and special investigations powers
- expand the Commission's functions to investigate and prosecute claim farming, and
- expand the objectives of the Act to encourage licensed insurers to act in a way that supports the integrity of, and promotes public confidence in, the scheme.[5]

To support the amendments, the Bill proposes to also amend the Motor Accident Insurance Regulation 2018 (Regulation) to prescribe:

- extra information for the notice of claim and insurers' returns
- a new claimant certificate as a document to accompany the notice of claim
- that a doctor physically examines the claimant in certain circumstances, and
- compliance with claim management standards as a new condition on a licence.[6]

1.4 Consultation on the Bill

The explanatory notes advise that an exposure draft of the Bill was released for targeted stakeholder consultation on 20 February 2019, with stakeholders invited to provide written submissions over a four week period. The Commission briefed key stakeholders to receive verbal feedback and to facilitate more informed written submissions. The Commission also undertook separate consultation on elements of the reform covered by the Regulation. The explanatory notes advise that feedback was considered and incorporated into the Bill where appropriate.

From 4 February to 31 March 2019, a public awareness campaign was run alongside the targeted consultation process, with the objective of alerting Queenslanders to claim farming tactics and how to detect and avoid claim farmers.[7]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

4 Explanatory notes, p 1.

5 Explanatory notes, p 1.

6 Explanatory notes, p 2.

7 Explanatory notes, pp 22–23.

Recommendation 1

The committee recommends the Motor Accident Insurance and Other Legislation Amendment Bill 2019 be passed.

2 Background

2.1 Current legislative framework and insurance arrangements

2.1.1 Compulsory third party insurance scheme

The Act establishes Queensland's compulsory third-party (CTP) insurance scheme to protect motor vehicle owners and drivers from being held financially responsible if they cause injury to someone else in a motor vehicle accident. It also enables an injured person to claim fair and timely compensation for their injuries and access prompt medical and rehabilitation treatment.[8]

The Regulation provides for a number of scheme arrangements including the classification of motor vehicles for fixing insurance premiums, conditions for licenced insurers and the sharing of particular information from claims records by insurers.[9]

2.1.2 Motor Accident Insurance Commission

The Commission was established in 1994 under the Act to regulate Queensland's scheme. This includes licensing and supervising the four private insurers who may cover the risk of Queensland motor vehicle owners through the scheme. Motor vehicle owners pay their CTP insurance premium when they pay their vehicle registration.[10]

The Commission's Chief Executive has the role of Insurance Commissioner as well as Nominal Defendant.[11] The Nominal Defendant acts as a licensed insurer in the CTP insurance scheme for claims that involve motor vehicles that are unidentified or not covered by CTP insurance. It also meets the claims costs associated with licensed insurers that become insolvent.[12]

2.1.3 Established regulation of aspects of claim farming

In Queensland there are statutes that capture the practice of claim farming to a certain degree. The *Personal Injuries Proceedings Act 2002* (PIPA) prohibits touting at the scene of an accident (s 67), and payment and seeking of payment of a fee for soliciting or inducing a potential claim (s 68). The *Australian Solicitors Conduct Rules*[13] require a solicitor to disclose to a client if the solicitor has paid a financial benefit to a third party for referring the client (rule 12.4.4).

The Legal Profession Act imposes the '50/50 rule' for speculative personal injury claims. Under the provisions of this Act, the '50/50 rule' applies only to personal injury claims and sets a cap on the legal fees eligible to be charged by legal professionals.[14] A calculation is made after obtaining the settlement or judgement, minus costs, refunds and all disbursements, to arrive at a balance. The legal fees are calculated in accordance with the client cost agreement, but must not exceed half the balance.[15]

Queensland's *Criminal Code Act 1899* (Criminal Code) may also capture claim farming conduct if a person has committed fraud, fraudulently falsified records or illicitly obtained or dealt with identification information.[16]

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8 Motor Accident Insurance Commission (Commission), *Annual Report 2017-18*, p 2.

9 Motor Accident Insurance Regulation 2018 (Regulation), ss 4, 5, 19, 23.

10 Commission, *Annual Report 2017-18*, p 2.

11 Commission, https://maic.qld.gov.au/about-maic/.

12 Commission, *Annual Report 2017-18*, p 2.

13 Queensland Law Society (QLS), *Australian Solicitors Conduct Rules,* commenced 1 June 2012.

14 *Legal Profession Act 2007* (Legal Profession Act), ss 345-347.

15 Legal Profession Act, s 319.

16 Explanatory notes, p 23.

2.2 Identified issues with claim farming

On 24 June 2018, the Honourable Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships (Deputy Premier) announced that the Queensland Government would introduce legislation to 'crack down' on claim farming within the motor accident insurance industry.[17]

According to the explanatory notes, claim farming has led to many people, including those who could be considered vulnerable in some way, receiving unsolicited telephone calls.[18] When presenting the Bill to the Legislative Assembly, the Deputy Premier cited research that estimated, 'over 1.5 million Queenslanders have already been targeted by claim farmers'.[19]

Market research commissioned by the Commission in September 2018 indicated that 37 per cent of Queenslanders had been contacted by a claim farmer in the past 12 months, and of those reporting contact, 50 per cent were on the Do Not Call Register[20] and 75 per cent believed their personal information had been leaked without their approval.[21]

Treasury provided a number of examples of unsatisfactory claim farming practices reported by Queenslanders to Treasury, including:

> *A Queensland woman who lives alone was startled to find a lawyer at her door. The lawyer advised that they had 'purchased her name' and were going to act on her behalf in a personal injuries claim. The woman asked the lawyer where they had purchased her name from but the lawyer refused to divulge this information. The woman was highly distressed by the fact that a lawyer (who this woman had no prior contact with) had her home address and information about a motor vehicle accident she had been involved in. This made her feel unsafe in her own home and very anxious. After the lawyer left, the woman was continually called to pressure her into signing documentation to progress a CTP claim.*[22]

In another example Treasury reported:

> *A policyholder complained to his comprehensive motor vehicle insurer that after submitting a property damage claim for his vehicle, a claim farmer was contacting him on his private mobile phone number (known only to his wife and insurer) about making a CTP claim. The claim farmer spoke about a circumstance that was incorrect but recorded in the property damage claim. The insurer could not find evidence of a privacy breach. It is unknown how the claim farmer obtained the initial information.*[23]

The market research commissioned by the Commission reported that 90 per cent of Queenslanders surveyed believed claim farming was 'a serious problem'.[24] The report found that 93 per cent of those surveyed believed it was 'important' that the Queensland Government take action on claim farming,

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17 Hon Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships, 'Palaszczuk Government to crack down on claim farming', media statement, 24 July 2018.

18 Queensland Parliament, Record of Proceedings, 14 June 2019, p 2119.

19 Queensland Parliament, Record of Proceedings, 14 June 2019, p 2119.

20 The *Do Not Call Register* is a secure database where individuals and organisations can register, check or remove their Australian telephone, mobile and fax numbers to opt out of receiving most unsolicited telemarketing calls and faxes. Source: Australian Communications and Media Authority, https://www.donotcall.gov.au/about/about-the-do-not-call-register/, page last updated 30 August 2018.

21 Queensland Treasury (Treasury), correspondence dated 8 July 2019, p 4.

22 Treasury, correspondence dated 8 July 2019, p 3.

23 Treasury, correspondence dated 8 July 2019, p 3.

24 Treasury, correspondence dated 8 July 2019, p 9.

with results higher among those who had been contacted by claim farmers in the previous 12 months, at 97 per cent.[25]

Treasury advised that since 2015, there has been a 20 per cent increase in the number of legally-represented minor injury CTP claims, despite fewer road casualties and a reduction in reported motor vehicle accidents. Available CTP claims data collected by the Commission suggests claim farming is a contributing factor.[26]

The explanatory notes also stated that without legislative reform, claim farming activities would likely increase, leading to more harassing calls received by Queenslanders, additional and exaggerated claims generated by the practice, pressure on CTP premiums and a loss of confidence in the insurance sector.[27]

In explaining the purpose of the Bill, to stop the practice of claim farming in Queensland, Motor Accident Insurance Commissioner Mr Neil Singleton noted the evidence provided by Insurance Council of Australia (ICA) spokesperson, Mr Tony Moss, who stated:

> *Claims-farming business models ultimately undermine the scheme's objectives and work against the best interests of the public. Left to fester, claims farming will cause instability in an otherwise stable scheme and put unnecessary upward pressure on premiums.*[28]

In acknowledging that Queensland had not reached the stage described by Mr Moss, Mr Singleton consequently stated that the Commission was 'sufficiently concerned that if left unchecked that would be a situation that could arise'.[29]

2.3 Arrangements in other jurisdictions

The explanatory notes advise that if the Bill is passed, Queensland will be among the first states to introduce offence provisions into primary statute to stop the practice of claim farming, by prohibiting the giving and receiving of consideration for claim referrals and approaching or contacting individuals to induce them to make a claim.[30]

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.[31] This Act makes it an offence for a lawyer (or related entity) to give or receive consideration[32] for a referral for legal representation, with a maximum penalty of 200 penalty units.[33]

In New South Wales, s 24 of the Motor Accidents Compensation Regulation 2015 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, but not an offence.[34]

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25 Treasury, correspondence dated 8 July 2019, p 9.

26 Treasury, correspondence dated 26 June 2019, p 4.

27 Explanatory notes, p 2.

28 Public briefing transcript, Brisbane, 22 July 2019, p 2.

29 Public briefing transcript, Brisbane, 22 July 2019, p 28.

30 Explanatory notes, p 23.

31 As at August 2019, the *Motor Accident Injuries Act 2019* (ACT) is awaiting commencement and will automatically commence on 31 May 2020 if not enacted by that date, s 2(2).

32 Explanatory notes, p 23, consideration is defined as including a fee or other financial benefit but does not include hospitality that is reasonable in the circumstances.

33 Explanatory notes, p 23.

34 Explanatory notes, p 23.

Western Australia provides under regulation 18(5) of the Legal Profession Conduct Rules (2010) that a practitioner must not:

- give or agree to give an allowance in the nature of an introduction fee or spotter's fee to any person for introducing professional business to the practitioner, or
- receive or agree to receive a similar allowance from any person for introducing or recommending clients to that person.[35]

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).[36]

[35] Explanatory notes, p 23.

[36] Explanatory notes, p 24.

3 Examination of the Bill

3.1 Stakeholders' general views on the Bill

As outlined above, the Bill proposes to stop the practice of claim farming. While submitters made detailed comments on specific aspects of the Bill, which are discussed in the rest of this chapter, they also made comments on the Bill as a whole. A summary of these comments is below.

Submitters broadly supported the move to stop claim farming, with the Queensland Law Society (QLS) and ICA welcoming the Bill.[37] Many submitters, such as the Australian Lawyers Alliance Queensland (ALA),[38] Shine Lawyers,[39] and Slater and Gordon Lawyers (Slater and Gordon)[40] and others[41] agreed with the broad intent of the Bill. The Bar Association of Queensland advised that it was content with 'the form of the Bill as drafted'.[42]

However, some submitters raised a number of concerns with the Bill's drafting, particularly in relation to how the Bill's attempts to prohibit claim farming may have the unintended consequence of preventing law firms from engaging in sponsorship and other forms of financial payments with charities and community groups.

Shine Lawyers considered that the Bill 'extends its reach far beyond'[43] its stated objective, while the ALA stated that Bill's drafting, 'goes far beyond the intended purpose and may have unintended consequences.'[44]

Slater and Gordon considered that the core aspects of claim farming are prevented by the PIPA.[45] It also submitted that the Bill was more focussed on limiting the growth of minor injury claims, even though there was little evidence that the growing number of minor injury claims was due to claim farming.[46] It stated that if the Bill passes unchanged, Queenslanders' access to their entitlements and learning of their rights in the event of road accidents will be hindered.[47]

3.2 Creating offences for engaging in claim farming

The key ways the Bill proposes to eliminate claim farming is by creating the two offences. The first offence under new s 74 removes the financial incentive for persons to engage in claim farming, while the second offence under new s 75 bans claim farmers from approaching or contacting members of the public to solicit or induce them to make a claim under the scheme.[48]

3.2.1 Prohibition on giving or receiving payment for referring a claimant

Proposed new s 74 of the Bill would prohibit a person giving or receiving (or agreeing, allowing or causing another person to give or receive) consideration for a claim referral or potential claim referral.[49] 'Consideration' is defined as a fee or other benefit but does not include a gift or hospitality

37 Submission 11, p 1, submission 6, p 1.

38 Submission 4, p 4.

39 Submission 9, p 1.

40 Submission 3, cover letter to submission.

41 See, for example, submissions 1, 8, 10.

42 Correspondence dated 15 July 2019, p 1.

43 Submission 9, p 1.

44 Submission 4, p 5.

45 Submission 3, p 2.

46 Submission 3, p 2.

47 Submission 3, p 3.

48 Bill, cl 15.

49 Bill, cl 15.

if either has a value of $200 or less. The definition excludes money to prevent cash payments of up to $200 for a claim referral.[50]

The proposed maximum penalty for breaching this provision is 300 penalty units.[51]

3.2.1.1 When the proposed changes do not apply

The proposed offence at new s 74 will not apply if a law practice sells all or part of its practice to another practice and the new practice pays an amount for the referral of a claimant or potential claimant. That payment amount cannot be more than the current fees and costs, including disbursements, a law practice is entitled to charge and recover from the claimant in relation to the claimant's claim. The new practice must also disclose the payment of the amount to the claimant in a costs agreement.[52]

New s 74 proposed by the Bill would not prohibit advertising or promoting a service or person to the public or a group of people that influences a person to use the services advertised.[53]

Stakeholder views

Prohibiting giving or receiving payment for referring a claimant

Slater and Gordon considered that the proposed ban on giving or receiving payment for referring a claimant overlapped with the existing prohibition on paying, or seeking payment of, a fee for the soliciting or inducing of a potential claimant to make a claim contained in s 68(1) of the PIPA. It considered that the existing regulatory prohibitions on touting and the payment of referral fees were adequate to address the issue of lawyers paying claim farmers for potential claimants and that the issue was one of enforcement.[54]

Slater and Gordon provided a number of hypothetical examples that it considered could breach the proposed prohibition on giving or receiving payment for referring a claimant.[55]

Slater and Gordon noted that that a breach of the existing prohibition may constitute professional misconduct for the purposes of the Legal Profession Act, with the consequence that a lawyer may have their practising certificate suspended or cancelled or their right to practice made subject to conditions. It submitted that this is a powerful disincentive to any legal practitioner who may otherwise be tempted to pay a claim farmer for potential claimants.[56]

Giving or receiving consideration

The ICA highlighted instances where a claim farmer could be paid for a number of claim referrals or claim service engagements where a law practice pays a claim farmer an annual sum for obtaining referrals. It noted that the Bill retains the reference to a claim referral but has the addition of a 'potential claim referral', which could potentially capture situations where there is an advanced payment or annual sum for obtaining referrals.[57]

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50 Explanatory notes, p 2.

51 Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2019, s 4; from 1 July 2019, a penalty unit is $133.45; 300 penalty units is equivalent to a penalty of $40,035.

52 Explanatory notes, p 3.

53 Explanatory notes, p 29, examples of such advertising or promotion include advertising on a website or distributing items that display a law firm's logo to members of an industrial organisation.

54 Submission 3, p 4.

55 Submission 3, pp 5-7.

56 Submission 3, p 5.

57 Submission 6, p 1.

The ICA submitted this can be more clearly addressed by a general explicit prohibition on receiving consideration for 'claim referral services'.[58]

On the wording of the prohibition on giving or receiving consideration, the ICA submitted that the terms 'allow' and 'cause' are potentially wide enough to mean the section is breached if a person does not prevent such a payment from being made even if they did not authorise the payment, nor were a party/privy to the transaction.[59] The ICA proposed that 'allow' and 'cause' be replaced with 'authorised'.[60]

Regarding the proposal that the prohibition does not apply if a law practice is being sold, the QLS considered the proposed section should also require the practice that is selling all or part of its business to the new practice to advise the claimant of their right to request an itemised invoice and to apply to the court for a costs assessment of the current practice's invoice. This would cover circumstances where the legal costs are more than what would be anticipated at the point of sale purchase (and potentially including an amount for the 'referral').[61]

Proposal that gifts or hospitality cannot exceed $200 in value

Suncorp considered that the proposed limit on the value of gifts or hospitality of $200 was too high and considered $50 to be more appropriate.[62] The ICA submitted that no gift of any value should be permitted to be received for the referral of a claim. Alternatively, it suggested 'consideration' could be defined as 'a fee or other benefit, but does not include a gift, other than a gift of money or credit.'.[63]

Definition of claim farming

Slater and Gordon suggested that it is 'bad law' to create two slightly different offences that cover similar territory and instead it would be better to create a provision that defines and more specifically targets the problem that is sought to be addressed by the Bill.[64] To assist with this, it suggested the following definition of claim farming:

> *Any commercial arrangement as between a law firm (Party A) and one or more third parties (Party B), the sole or dominant purpose of which is to provide Party B with pre-agreed financial incentives to actively solicit potential claims without the informed consent of potential claimants, in exchange for the referral of potential claimants to Party A for the purposes of Party A providing a service to the potential claimants in connection with the claim*.[65]

The Asbestos Disease Support Society noted that the Bill did not define claim farming.[66]

Proposed penalties

Suncorp considered that 300 penalty units would not be sufficient to deter law practices from engaging in consideration for claim referral activities. It recommended 'increasing the penalty units and

58 Submission 6, p 1.

59 Submission 6, p 1. The Insurance Council of Australia (ICA) stated that 'the prohibition could apply to banks facilitating the payments of such consideration or insurers paying claims where the claim payment may be used by a law practice or claimant to pay such consideration'.

60 Submission 6, p 1.

61 Submission 11, p 5.

62 Submission 7, p 1.

63 Submission 6, p 1.

64 Submission 3, p 5.

65 Submission 3, p 5.

66 Submission 5, p 1.

establishing professional misconduct as a consequence for those found to be engaging in claim farming activity'.[67]

Queensland Treasury response

Prohibiting giving or receiving payment for referring a claimant

Treasury considered that the Bill would not capture the hypothetical examples of breaches of the proposed prohibition on giving or receiving payment for referring a claimant provided by Slater and Gordon.[68] It added:

> *The Bill does not affect a law practice's benevolent endeavours in relation to charities or community organisations. Paragraph (b) of the definition of 'claim referral' in section 74(4) makes clear that claim referral does not include advertising or promoting a service or person to the public or a group of persons that results in a claimant using the service or person*.[69]

Regarding provisions that exist in the PIPA, Treasury stated:

> *… the Bill is consistent with, and complementary to, the provisions and intent of Personal Injuries Proceedings Act 2002. As claim farmers appear to be targeting CTP claims, there is a need to include specific claim farming offences within the Act.*[70]

Proposal that gifts or hospitality cannot exceed $200 in value

In response to comments about the proposed $200 cap on the value of a gift or hospitality, Treasury considered:

> *… the $200 cap on the value of any gift or hospitality is a reasonable amount in enabling social recognition of a legitimate business relationship but explicitly not a cash payment that may be used to incentivise or reward claim farming. The $200 cap on the value of any gift or hospitality also reflects the majority of stakeholder feedback provided during consultation on the exposure draft of the Bill on what is considered a reasonable amount.*[71]

Giving or receiving consideration

In response to the ICA's suggestion that the words 'allow' and 'cause' should be replaced with 'authorised', Treasury advised that 'Given the evolving nature of claim farming practices, Treasury considers the words essential to capture consideration given or received via third parties.'[72]

Definition of claim farming

Regarding the definition of claim farming, Treasury stated that the Bill does not refer to the term 'claim farming' and advised that this is the term used in the insurance industry.[73]

Proposed penalties

Treasury stated that the proposed maximum penalty of 300 penalty units was considered proportionate to the seriousness of the offence and was consistent with existing comparable offences.[74]

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67 Submission 7, p 5.

68 Treasury, correspondence received 16 July 2019, p 3.

69 Treasury, correspondence received 16 July 2019, p 4.

70 Treasury, correspondence received 16 July 2019, p 3.

71 Treasury, correspondence received 16 July 2019, p 8.

72 Treasury, correspondence received 16 July 2019, p 8.

73 Treasury, correspondence received 16 July 2019, p 7.

74 Treasury, correspondence received 16 July 2019, p 10.

3.2.2 Prohibition on claim farmers approaching or contacting members of the public to solicit or induce them to make a claim

Proposed new s 75 of the Bill would prohibit a person (the first person) personally approaching or contacting another person (the second person) to solicit or induce that person to make a claim under the scheme.[75] Personal approach or contact captures contact in person, by mail, telephone, email or other form of electronic communication.[76]

The prohibition applies regardless of whether the second person is entitled to make a claim, or whether they had already decided to make, or had made, a claim.[77]

The proposed maximum penalty for breaching this provision is 300 penalty units.[78]

3.2.2.1 When the proposed changes do not apply

The first person does not breach the above provisions if they:

- do not expect or intend to receive, and do not receive, consideration because of the approach or contact, and do not ask for someone else to receive, or agree to someone else receiving, consideration because of the approach or contact
- are a law practice or lawyer that is supplying, or has previously supplied, the second person, or a relative of the second person, with legal services, and reasonably believes the second person will not object to the approach or contact, or
- are a law practice or lawyer that has been asked by a person on behalf of a community legal service[79] or industrial organisation[80] (a representative) to approach or contact the second person, and has been advised by the representative that the representative reasonably believes the second person will not object to the approach or contact.[81]

Stakeholder views

Concerns Bill may hinder relationships between community groups and law firms

A key concern from submitters was that many relationships between law firms[82] and community groups[83] may be jeopardised because the Bill, as drafted, could prevent such relationships from occurring. Triathlon Queensland highlighted that accidents occur to its members while they are cycling or running and to help its members understand their rights, it had commenced a relationship with a law firm to educate its members and provide assistance when these events occur.[84]

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75 Bill, cl 15.

76 Explanatory notes, p 2.

77 Bill, cl 15.

78 Bill, cl 15.

79 'Community legal service' is defined as in Schedule 2 of the Legal Profession Act as an organisation that holds itself out as: a community legal service, a community legal centre, an Aboriginal and Torres Strait Islander legal service, or a family violence prevention legal service. It must be established and operated on a not-for-profit basis, and provide legal services that are directed generally to people who are disadvantaged in accessing the legal system or in protecting their legal rights, or are conducted in the public interest. They must also satisfy any other criteria prescribed under a regulation.

A community legal service can also be an organisation prescribed as such under a regulation.

80 *Industrial Relations Act 2016,* Chapter 12 and Schedule 5.

81 Bill, cl 15.

82 See, for example, submissions 4, 9.

83 See, for example, submissions 1, 2, 5.

84 Submission 2, p 1.

Shine Lawyers submitted that the proposed prohibition on giving or receiving payment for referring a claimant strayed too far from the Bill's stated primary objective. It considered that personal injury litigation is a complex area and practitioners should be able to refer claimants for a fee, provided the claimant is informed of this and it is in accordance with the *Australian Solicitors Conduct Rules*.[85] Shine Lawyers considered this proposed reform will diminish people's access to justice.[86]

Slater and Gordon considered that the Bill could inadvertently hinder relationship-building activities that law firms have undertaken with community groups over many years. It provided a number of hypothetical examples that the Bill would prevent.[87] It also submitted that it could prevent doctors referring patients to lawyers they know to be leaders in the field of compensation law, because as part of that process the doctor would need to prepare a medical report for the lawyer for a fee, and this fee may be classed as 'consideration' under the Bill. It noted that such a scenario does not contravene the similar prohibition in the PIPA and suggested that a similar exemption should be included in the Bill.[88]

The ALA considered that the proposed reform, 'goes far beyond the intended purpose' of the Bill.[89] It highlighted that law firms often have relationships with not-for-profit organisations that may involve a law firm offering free initial consultations and/or discounted legal fees and that the Bill would prevent such arrangements because they would be classified as 'consideration'.[90]

At the committee's public hearing, the ALA stated it had sought input from Special Counsel to help inform its views on the Bill. The ALA's submission listed examples of how the Bill may jeopardise relationships between law firms and not-for-profit groups. At the public hearing, the ALA added this view was:

> *… borne out by the views expressed by senior counsel who has provided advice to the Australian Lawyers Alliance as well. Those examples cover a gamut of situations through sporting, community groups, industrial organisations and so on…*[91]

The ALA also considered that there was an inconsistency between the prohibition on giving or receiving payment for referring a claimant and the prohibition on claim farmers approaching or contacting members of the public to solicit or induce them to make a claim. It stated that the latter prohibition allowed an exemption for community legal services and industrial organisations, but does not exempt charities, or community organisations. It considered that charitable, community, educational and sporting organisations should be exempt from the prohibition.[92]

The ALA also considered that the Bill may be breached if a lawyer discusses an accident with a person in a social setting and wants to enquire whether they intend to pursue a claim and/or provide a business card to discuss further.[93]

The QLS submitted that the Bill should be amended to exclude circumstances where the a person is requested to approach or contact another person by the spouse, relative or friend of the second person and the first person reasonably believes the second person will not object to the approach or contact.[94]

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85 QLS, *Australian Solicitors Conduct Rules*, commenced 1 June 2012.

86 Submission 9, p 3.

87 Submission 3, pp 5–7.

88 Submission 3, p 5.

89 Submission 4, p 5.

90 Submission 4, pp 11–12.

91 Public hearing transcript, Brisbane, 22 July 2019, p 10.

92 Submission 4, p 15.

93 Submission 4, p 15.

94 Submission 11, p 5.

Definition of 'consideration' in context of relationship between law firms and community groups

When asked at the committee's public hearing whether the Bill could prevent law firms from sponsoring community groups, the QLS responded, 'We fundamentally do not believe that would be caught by the Bill in its present form'.[95] However, it acknowledged some stakeholders' concerns that such relationships could be impacted. In its submission, the QLS suggested amending the definition of 'consideration' to allay these concerns:

Consideration means a fee or other benefit but does not include:

- a *gift, other than money, or hospitality if the gift or hospitality has a value of $200 or less*
- *the provision of pro bono legal services by a supervising principal or an associate of a law practice to a 'community legal service'*
- *legal costs a law practice is entitled to charge and recover in relation to the claimant's claim, or*
- *a fee or other benefit paid for the public good, but not paid for a specific claim referral, by a law practice to:*
  - *a community legal service*
  - *an entity registered under the Australian Charities and Non-For-Profits Commission Act 2012 (Cth), or*
  - *an industrial organisation.*[96]

The QLS suggested that where there is a conviction for contravention of the claim farming offences, either knowingly or recklessly, the conduct should be categorised as 'Conduct capable of constituting unsatisfactory professional conduct or professional misconduct,' pursuant to s 420(1)(a) of the Legal Profession Act.[97]

Slater and Gordon stated that it is a normal part of any professional service business for relationships to be built and maintained using hospitality. It submitted that the provision of general hospitality, that is not clearly and directly in exchange for a referral, and educational benefits should not be regarded as consideration for a referral. It noted that the equivalent referral restrictions contained within s 24 of the New South Wales Motor Accidents Compensation Regulation 2015 expressly exclude hospitality that is 'reasonable in the circumstances'.[98]

Slater and Gordon considered the following should be excluded from the definition of 'consideration':

- fees paid in exchange for provision of a professional service rendered in respect of the claim, thereby ensuring that treating doctors and other medical professionals can continue to be engaged to provide medico-legal reports in respect of their patients' claims
- donations, bursaries, education, fee discounts and other benefits provided to charitable organisations, community organisations, unions and sporting associations, and
- remuneration paid to employees of a law practice that is contingent upon achieving business targets. Business development is a normal part of any employee's role in a professional services business and it is usual for a component of an employee's salary to be 'at risk' and contingent upon achieving designated key performance indicators.[99]

95 Public hearing transcript, Brisbane, 22 July 2019, p 22.

96 Submission 11, p 2.

97 Submission 11, p 6.

98 Submission 3, p 7.

99 Submission 3, p 7.

Slater and Gordon noted that there is an existing restriction on touting (s 67 of the PIPA) that precludes employees from directly soliciting potential claimants. The further stifling of relationship referral marketing and associated educational initiatives will further impact the ability of legitimately-injured Queensland motorists to be made aware of their rights.[100]

Considering that the Bill hinders law firms' ability to have relationships with community groups, the ALA suggested defining 'consideration' as:

> *Consideration means a fee or other benefit but does not include:*
>
> *(a) A gift or hospitality if the gift or hospitality has a value of $200 or less; or*
>
> *(b) Fees and costs, including disbursements, a law practice is entitled to charge and recover in relation to a claimant's claim; or*
>
> *(c) Any fee or other benefit to:*
>
> *(i) An unincorporated association that is a registered entity under the Australian Charities and Not-For-Profits Commission Act 2012 (Cth);*
>
> *(ii) An incorporated association that is a registered entity under the Australian Charities and Not-For-Profits Commission Act 2012 (Cth);*
>
> *(iii) A community legal service as defined by the Legal Profession Act 2007;*
>
> *(iv) A school, university or other educational institution;*
>
> *(v) An overarching body, subsidiary or affiliate of a National Sporting Organisation (NSO) or National Sporting Organisation for People with Disability (NSOD) as recognised by Sport Australia;*
>
> *(vi) An industrial organisation as defined under the Industrial Relations Act 2016; or*
>
> *(vii) Any other person prescribed by regulation*.[101]

Queensland Treasury response

Treasury noted the substantial concerns of many submitters that the proposed prohibition on giving or receiving consideration may prevent law firms from entering into sponsorship or partnership arrangements with community groups. It stated the Bill would not prohibit such relationships.[102]

This point was reiterated by Treasury at the committee's public hearing, when it stated:

> *We have sought to make it clear that advertising and sponsorship—those sorts of support payments—are legitimate and are not captured by the bill. It is purely where a referral fee is paid for the referral of a client*.[103]

Treasury gave the example that if a law firm sponsors a football club jersey which results in the law firm getting referrals, that would not breach the Bill.[104]

<u>*Definition of 'consideration' in context of relationship between law firms and community groups*</u>

Treasury rejected the QLS' suggestion that a conviction of breaching the claim farming practices, knowingly or recklessly, should be conduct capable of constituting unsatisfactory professional conduct or professional misconduct, under s 420(1)(a) of the Legal Profession Act. Treasury stated:

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100 Submission 3, p 8.

101 Submission 4, p 13.

102 Treasury, correspondence received 16 July 2019, p 1.

103 Public hearing transcript, Brisbane, 22 July 2019, p 29.

104 Public hearing transcript, Brisbane, 22 July 2019, p 29.

Such a provision could create a risk that the Queensland Parliament could be seen as attempting to define concepts under the legislation of another State or Territory Parliament.[105]

In response to Slater and Gordon's concerns, Treasury reiterated that the Bill would not:

…prevent a person from advising another person of his or her legal rights if the person giving the advice (that is, making the approach or contact):

- *does not expect or intend to receive, and does not receive, consideration because of the approach or contact; and*
- *does not ask someone else to receive, or agree to someone else receiving, consideration because of the approach or contact.*[106]

In response to the ALA's concerns that the Bill could prevent people in a social setting discussing injuries, Treasury stated:

The Bill does not intend to prevent lawyers or anyone else in the community discussing injuries with family members, friends, acquaintances or people they meet in social setting.[107]

Treasury considered that the Bill would not capture the examples outlined in the ALA submission[108] which the ALA suggested could breach the Bill.

Committee comment

The committee notes the substantial concerns from many in the legal community that the Bill may prevent law firms from maintaining relationships with various not-for-profit groups and some submitters still hold concerns. The committee notes that this was not the intention of the Bill.

The committee notes the suggested amendments from the QLS could be worthy of consideration.

The committee further notes the ALA's submission to expand the types of organisations that have some limited exemption from the Bill and that any fees to community organisations be not paid for by a specific claim referral.

3.2.3 Responsibility of a law practice or a partner for acts of their staff

New s 76 of the Bill proposes to make a person – such as a law practice or a partner in a law practice – responsible for things done, or neglected to be done, by a representative (employee) in the context of a proceeding for an offence against the claim farming activities outlined above.[109]

The Bill proposes to obviate the prosecution's obligation to prove the 'fault element' and 'physical element' of the claim farming offences above by:

- for the fault element, at new s 76 – specifying it is enough to show the representative did, or omitted to do, an act within the scope of their actual or apparent authority and had the 'state of mind' to do so (state of mind includes the person's knowledge, intention, opinion belief or purpose and the person's reasons for the intention, opinion, belief or purpose), and
- for the physical element, at new ss 74(1) and (2), and new s 75 – deeming that the person did, or omitted to do, an act of the representative (within the scope of the representative's actual or apparent authority).[110]

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105 Treasury, correspondence received 16 July 2019, p 19.

106 Treasury, correspondence received 16 July 2019, p 4.

107 Treasury, correspondence received 16 July 2019, p 5.

108 Treasury, correspondence received 16 July 2019, p 5.

109 Bill, cl 15.

110 Explanatory notes, pp 8–9.

However, the provision creates a defence if the person proves the person could not have prevented the act or omission by exercising reasonable precautions and proper diligence.[111]

See section 4.1.2 of this report for consideration of reverse onus of proof provisions in the Bill in respect to the application of FLPs.

Stakeholder views

Reversal of onus of proof

The QLS noted the potential reversal of the onus of proof proposed by the Bill and commented that the commitment not to reverse the onus of proof is a fundamental legal principle which should not be breached without appropriate justification. The QLS emphasised its general opposition to any laws which undermine established legal processes, which it considered are the cornerstone principles that support a fair and balanced system.[112]

The QLS noted that the explanatory notes advised that the policy intent of this reversal is to hold persons responsible for the serious conduct of their representatives if the conduct is within the representative's actual or apparent authority. It also noted the defence provided where a person would be able to prove they 'could not, by the exercise of reasonable precautions and proper diligence, have prevented the act or omission'. The QLS considered that in these limited and narrow circumstances, the government may consider that the reversal is necessary to meet the objective of eliminating these practices.[113]

The Bill's impact on small law firms

O'Donnell Legal and Splatt Lawyers highlighted that many small legal firms cannot afford to advertise and so rely on referrals for much of their work.[114] Both firms expressed concern that the Bill may impact their ability to receive referrals. Splatt Lawyers stated that at present, referrals must comply with the PIPA and the relevant solicitors' guidelines, with the latter having 'addressed all the ethical considerations with regards to referral arrangements.'.[115]

Splatt Lawyers and O'Donnell Legal considered that the Bill may negatively impact competition in the motor accident claims market, with Splatt Lawyers stating it could lead to the major law firms receiving most of the available work.[116]

Queensland Treasury response

Reversal of onus of proof

In response to the QLS' concerns regarding the reversal of the onus of proof, Treasury considers the Bill strikes a balance between protecting the right of individuals and the public interest in minimising the potential for fraudulent behaviour, stopping harassing calls to Queenslanders and protecting the integrity, affordability and stability of the scheme.[117]

See section 4.1.2 of this report in relation to the application of FLPs to the Bill.

111 Explanatory notes, pp 8–9.

112 Submission 11, p 5.

113 Submission 11, p 5.

114 Submission 8, p 1; submission 10, p 1.

115 Submission 10, p 2.

116 Submission 10, p 1.

117 Treasury, correspondence received 16 July 2019, p 17.

The Bill's impact on small law firms

Treasury advised that referrals to small law firms would remain lawful if the Bill passed, provided any consideration given was consistent with that outlined in the Bill.[118]

3.3 Allowing the Commission to apply for an injunction to prevent claim farming

The Bill proposes a new s 87 to allow the Commission to apply for an injunction against a person if it reasonably believes they have engaged, are engaging or are proposing to engage in conduct, in Queensland or elsewhere in Australia, contravening the prohibitions on:

- giving or receiving consideration for claim referrals, or
- personally approaching or contacting another person to solicit or induce them to make a claim.[119]

The Commission would be able to apply to a court of competent jurisdiction for an injunction restraining the offending party from engaging in claim farming.[120]

The court may grant an interim injunction restraining the offending party from engaging, or continuing to engage, in the conduct pending a decision about the application. After considering the application, the court may:

- grant the injunction, if it is satisfied on the balance of probabilities that the offending party has engaged, or is likely to engage or continue to engage, in the conduct, or
- refuse to grant the injunction.[121]

The court may grant the injunction:

- if it is satisfied the offending party has engaged in the conduct – whether or not it considers the offending party intends to engage again, or continue to engage, in the conduct, or
- if it is satisfied the offending party will likely engage in the conduct if the injunction is not granted – whether or not the offending party has previously engaged in the conduct.

If the court is satisfied there is a sufficient reason for granting an injunction, it is not required to give notice to the offending party that it has done so.[122]

An injunction would apply to conduct anywhere in Australia. A court of competent jurisdiction includes a court of another state or territory vested with jurisdiction under the *Jurisdiction of Courts (Cross-vesting) Act 1987* and the corresponding laws of the other states and territories.[123]

3.4 Law practice certificate

The Bill proposes to require legal practitioners retained to act for a claimant in relation to a claim to complete a law practice certificate when a claim is made (new s 36A) or settled (new s 41A) or when a new law practice is retained after a claim has been made (new s 37AB). The obligation to complete a law practice certificate is unaffected by an insurer's ability to waive compliance or the presumption of compliance under s 39 (see new s 39A).[124]

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118 Treasury, correspondence received 16 July 2019, p 12.

119 Bill, cl 15.

120 Bill, cl 15.

121 Bill, cl 15.

122 Bill, cl 15.

123 Bill, cl 15.

124 Bill, cls 6, 9, 12.

The supervising principal of the law practice must:

- complete a certificate for the claim, and
- give the certificate to the claimant before the claimant gives notice of the claim.[125]

A breach of the obligation to complete a law practice certificate attracts a proposed maximum penalty of 300 penalty units.[126]

3.4.1 Waiving compliance or the presumption of compliance

The Bill proposes a new s 39A to provide that the obligation to complete a law practice certificate is unaffected by an insurer's ability to waive compliance or the presumption of compliance.[127] If an insurer notifies the claimant of a waiver, or the presumption of compliance takes effect, the supervising principal must:

- give the insurer a copy of the law practice certificate as soon as practicable, if the supervising principal (or the person nominated to do so) gave the claimant a law practice certificate but the claimant did not give it to the insurer, or
- within one month after the claimant is notified or the presumption takes effect, complete a law practice certificate, if the supervising principal (or the person nominated to do so) did not give the claimant a law practice certificate.[128]

The proposed maximum penalty for breaching this requirement is 300 penalty units.[129]

3.4.2 Information to be provided on a law practice certificate

Under proposed new s 36B a law practice certificate must state that the supervising principal and each associate of the law practice have not:

- given, agreed to give or allowed or caused someone else to give consideration to another person for a claim referral or potential claim referral
- received, agreed to receive or allowed or caused someone else to receive consideration from another person for a claim referral or potential claim referral, or
- if the requirements not to give or receive consideration do not apply to the supervising principal or an associate of the law practice – why they do not apply.[130]

The law practice certificate must also state:

- the supervising principal and each associate of the law practice have not personally approached or contacted the claimant and solicited or induced the claimant to make the claim, or

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125 Bill, cl 11.

126 Bill, cl 11.

127 Bill, cl 11.

128 Treasury, correspondence received 16 July 2019, p 3.

129 Bill, cl 11.

130 Bill, cls 6, 11: the requirements not to give or receive consideration for a claim referral do not apply if the:
- payee is a law practice that is selling all or part of its business to another law practice
- new practice gives, agrees to give or allows or causes someone else to give the current practice an amount for the referral of a claimant to the new practice
- amount is not more than the current legal costs for the claimant, and
- new practice discloses payment of the amount to the claimant in a costs agreement.

- if the requirement not to approach or contact another person to solicit or induce them to make a claim does not apply to the supervising principal or an associate of the law practice, why it does not apply.[131]

Proposed new s 36B provides that if the claim is a speculative personal injury claim, the law practice certificate must state that the costs agreement relating to the claim complies with the '50/50 rule'.[132] The certificate must be signed by the supervising principal and verified by statutory declaration. In addition, the section does not require or permit the supervising principal of a law practice to give information about communication with a claimant that is subject to legal professional privilege.[133]

A new offence, a new s 36D, is proposed to be created if a supervising principal signs, and gives a claimant or insurer, a law practice certificate the principal knows is false or misleading. The proposed maximum penalty for such an offence is 300 penalty points.[134]

If a law practice is retained by a claimant before the Act's commencement, should the Bill be passed, and immediately before commencement the claim has not been concluded, the law practice certificate only needs to relate to conduct on and after the Act commences.[135]

Stakeholder views

The need for the law practice certificate

The ALA, Suncorp and the QLS supported the requirement for a law practice certificate.[136] The QLS considered that the proposed requirement was 'not an onerous, time-consuming responsibility'.[137]

However, Slater and Gordon considered the requirement 'onerous and unnecessary'. It stated that the certificate effectively certifies that the law practice has complied with the law, which it submitted is a redundant requirement, given lawyers' pre-existing and extensive professional duties. It also submitted that the prohibition against paying/receiving a referral fee is not of such importance, relative to other laws and requirements where certificates are not required, that it warrants such a process.[138]

Slater and Gordon submitted that the provisions regarding the timing of the certificate are confusing or contradictory, presenting a risk of technical or unintended non-compliance because the Bill requires:

- a certificate be provided to the insurer if it was given to the claimant but not given to the insurer 'one month after the claimant is notified of the waiver of compliance'
- the law practice to give a certificate within one month of being retained if the notice of claim was already issued by the claimant directly, and
- a certificate be given by a supervising principal on settlement or judgement.

Slater and Gordon suggested this means the Act can be read as requiring that the certificate be given prior to the notice of claim being issued, one month after the claimant is notified of the waiver of compliance, and/or one month of being retained and/or at settlement or judgement.[139]

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131 Bill, cl 6.

132 Bill, cl 6; explanatory notes, p 25.

133 Bill, cl 6.

134 Bill, cl 6.

135 Bill, cl 26.

136 Submission 4, p 20; submission 7, p 3; submission 11, p 1.

137 Public hearing transcript, Brisbane, 22 July 2019, p 24.

138 Submission 3, p 3.

139 Submission 3, p 4.

Slater and Gordon highlighted that proposed certification requirement is also in addition to the existing requirement that a 'certificate of readiness' be provided by the solicitor for the claimant to the insurer/solicitor for the insurer seven days prior to the compulsory conference taking place. The certificate is designed to ensure that the claimant has disclosed all the material they intend to rely upon and will make a genuine attempt to settle the claim when appraised by the costs consequences. It considered that it is not appropriate to include the additional certification requirements.[140]

Slater and Gordon suggested that if the provisions are maintained, responsibility for completing the certificate should rest with the practitioner with carriage of the claim. It noted that while the Bill proposes to allow for a lawyer nominated by the supervising principal to provide the certificate, that section only applies if the supervising principal is the only principal of the law practice. As there may be more than one legal practitioner director on the board of an incorporated legal practice, this requirement would not apply. It suggested the Bill be amended to allow delegation of the certification requirement by any legal practitioner director.[141]

Queensland Treasury response

The need for the law practice certificate

Regarding comments that the proposed certificate requirement is unnecessary, Treasury advised the requirement is:

> *… essential in deterring legal practitioners from engaging in claim farming. The provisions are unambiguous and drafted to work together to ensure legal practitioners certify at various stages of the claim process that they are complying with the '50/50 rule' and the Motor Accident Insurance Act 1994 (Act) and are not bringing a claim because of engaging in claim farming.*[142]

3.4.3 Who can sign the law practice certificate in the absence of a supervising principal

New s 36C of the Bill allows that, if the supervising principal cannot sign a certificate, another principal of the practice to complete the certificate. If no other supervising principal is employed by the law practice, another lawyer nominated by the supervising principal can sign it.[143]

Stakeholder views

Impact of particular organisational structures on firms' ability to comply with the requirement

At the committee's public hearing on the Bill, Shine Lawyers and Slater and Gordon expressed concern that their organisational structure may impact their ability to comply with the proposed requirement.

Shine Lawyers stated that the requirement to sign the certificate would be challenging, given that it has over 700 employees and one legal practitioner who is entitled to hold a principal practising certificate. It stated that its governance, marketing and legal functions are separate, making it challenging for any lawyer in its business to certify what is happening across each function.[144]

Slater and Gordon highlighted potential logistical issues with the proposed requirement, given its legal practice director is based in Melbourne. It also noted that for large firms, with a centralised client intake system, the lawyer with responsibility for the case will not necessarily know how the client chose a law firm, which creates uncertainty for a lawyer to be able to sign the certificate.[145]

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140 Submission 3, p 4.

141 Submission 3, p 4.

142 Treasury, correspondence received 16 July 2019, p 3.

143 Bill, cl 6.

144 Public hearing transcript, Brisbane, 22 July 2019, p 9.

145 Public hearing transcript, Brisbane, 22 July 2019, p 12.

Shine Lawyers suggested that a principal should be allowed to nominate other lawyers who can sign the certificate, even when there is more than one principal lawyer, or to allow supervising lawyers to sign it.[146]

Queensland Treasury response

Impact of particular organisational structures on firms' ability to comply with the requirement

Treasury advised that a supervising principal of a law practice who cannot sign a law practice certificate can nominate another principal of the practice or, if the supervising principal is the only principal in the practice, a lawyer nominated by the supervising principal.[147] It reiterated the presence of this provision during the committee's public hearing.[148]

3.4.4 Recovery and refund of fees and disbursements

The Bill sets out instances when a law practice may need to refund, or may not be entitled to recover, fees and disbursements paid in connection with a claim, at new s 37AA.[149] If a law practice fails to give a claimant a certificate, and that failure means the claimant cannot satisfy the requirements of their accident claim[150] and then terminates in writing the engagement of the law practice, the principal must refund all fees and costs, including disbursements, the claimant paid in relation to the claim within 14 days of the termination.[151]

3.4.5 What practitioners can charge claimants

The Bill, at new s 79, caps the amount a law practice can charge a claimant of a speculative motor accident claim and s 347 of the Legal Profession Act does not apply to the practice.[152] Legal practitioners will be able to charge their clients up to half the amount the client is entitled to under a judgement or settlement after deducting any refunds the client must pay and all disbursements and expenses, also known as the '50/50 rule'.[153] This rule is set out in s 347 of the Legal Profession Act and overrides anything to the contrary in the costs agreement relating to the claim.[154]

However, the law practice may apply for approval to charge and recover a greater amount if:

- the amount of legal costs it may charge and recover from a client are more than the amount calculated under the '50/50 rule', and
- it wishes to charge and recover the greater amount from the client.[155]

The law practice must apply in writing to the:

- Bar Association of Queensland, if the law practice is a barrister, or
- law society.[156]

146 Public hearing transcript, Brisbane, 22 July 2019, p 9.

147 Treasury, correspondence received 16 July 2019, p 13.

148 Public hearing transcript, Brisbane, 22 July 2019, p 26.

149 Bill, cl 9; explanatory notes, p 4.

150 *Motor Accident Insurance Act 1994* (Act), s 37.

151 Bill, cl 9.

152 Bill, cl 15.

153 Explanatory notes, p 4.

154 Explanatory notes, p 40. Bill, cl 1, Schedule 1, inserts a note in s 347 of the Legal Profession Act, emphasising s 79 of the Act, to ensure readers are aware that s 347 also applies to the claim.

155 Bill, cl 15.

156 Bill, cl 15.

The relevant authority may, in writing, approve an application made to it for the law practice to recover the greater amount.[157]

As a transitional arrangement at new s 116, the above does not apply to the legal costs for a claim if the client retained the law practice before the Act commences, should the Bill be passed, and the law practice continues to have the conduct of the claim on or after commencement.[158]

3.4.6 Inability of law practice to recover fees and costs

Under new s 77 of the Bill, if an associate of a law practice is convicted of an offence against the requirement to complete a law practice certificate on settlement or judgement of a claim, or either claim farming offence, the law practice is not entitled to recover any fees or costs, including disbursements, that relate to the provision of services for the claim.[159] The law practice must also repay any amount received that relate to the services.[160]

Stakeholder views

The ICA submitted that this section should not only apply where there is a court conviction, but where there is any contravention of the requirement for a law practice certificate or a breach of the claim farming offences. It suggested that consequences should also flow from any contraventions, not just those that result in a conviction. It proposed the section be drafted so that it applies where there is a court conviction, where there is a contravention enforced by the Commission or where there is an admission of claim farming practice.[161]

Queensland Treasury response

Treasury considered the Bill provides a sufficient and serious deterrent for practitioners to engage in claim farming and that it requires a higher threshold of conviction (rather than a contravention) given the significant effect it could have on a law practice.[162]

3.4.7 If the law practice is sold

As proposed by new s 36A of the Bill, if a law practice sells all or part of its business to another law practice and, as part of the sale, a claimant is referred to the new practice and the claimant has not given notice of the claim before the claimant is referred to the new practice, the supervising principal of the current practice must, before the referral occurs:

- complete a certificate for the claim, and
- give the certificate to the new practice and a copy of the certificate to the claimant.[163]

The proposed maximum penalty for breaching this provision is 300 penalty units.[164]

A law practice certificate must be signed by the supervising principal. If the supervising principal cannot sign a certificate, another principal of the practice can sign it. If no other supervising principal is employed by the law practice, another lawyer nominated by the supervising principal can sign it.[165]

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157 Legal Profession Act, s 347(2) to (4).

158 Bill, cl 26.

159 Bill, cl 15.

160 Explanatory notes, p 29.

161 Submission 6, p 2.

162 Treasury, correspondence received 16 July 2019, p 8.

163 Bill, cl 6.

164 Bill, cl 6.

165 Bill, cl 6.

3.4.8 If the new law practice does not receive the law practice certificate

The Bill proposes at new s 36E that if the new law practice does not receive the certificate its supervising principal must, as soon as practicable, complete a notice that states this and give that notice to the Commission.[166]

Stakeholder views

When a law practice is sold

The QLS suggested the Bill be amended to prevent the principal and each associate of the law firm from giving and/or receiving consideration in the future.[167] It also suggested additional wording to confirm that the claimant has been advised to seek independent legal advice, or advice from the Commission, regarding the certificate.[168]

Where a supervising principal cannot complete the certificate, the Bill proposes that a lawyer[169] nominated by the supervising principal, can sign it. The QLS submitted that 'lawyer' should be amended to 'associate'.[170] The QLS also suggested the following subsection be added to the proposed section:

> *(3) Where another principal or associate signs a section 36AA certificate under this section, they are taken to have done so with the knowledge, authority and approval of the supervising principal.*[171]

The QLS submitted that the provision should clearly state that where the 'new practice' makes subsequent enquiries that reveal activities of the 'current practice' that may amount to claim farming offences, the new practice will not be guilty of any offence, nor precluded from recovering professional fees or outlays from the claimant. The QLS suggested the new practice should be required to report such findings to the Commission.[172]

The QLS suggested that to ensure compliance with the requirement for the new practice to complete a notice that states it has not received a law practice certificate and to give this notice to the Commission, the Bill should include a maximum penalty of 300 penalty units.[173]

The QLS stressed that a claimant should also be required to complete a certificate on settlement or judgement of a matter, as it considered that this will be when the claimant or plaintiff will feel most comfortable in revealing the source of the claim referral.[174]

Request for clarification

Regarding the proposed law practice certificate, the ICA queried:[175]

- whether the intention of the Bill was that insurers can waive non-compliance if a law practice does not provide a certificate, as the Bill does not address this. It requested certainty around the progress of a claim and how the requirement to provide a certificate can be enforced and balanced with progressing the claim, and

166 Bill, cl 6.

167 Submission 11, p 3.

168 Submission 11, p 3.

169 Bill, cl 6.

170 Submission 11, p 4.

171 Submission 11, p 4.

172 Submission 11, p 4.

173 Submission 11, p 4.

174 Submission 11, p 4.

175 Submission 6, p 3.

- what occurs if there is a breach due to non-compliance with the provision of a certificate. It sought clarity as to whether the claim should proceed or not proceed, as there needs to be certainty for claimants, and where a breach would leave them in relation to ongoing claim management. It also suggested there ought to be additional incentives to have a certificate, such as a requirement that no fee is paid until a certificate is provided.

Law practice certificate for existing claims

The ICA considered that as well as requiring the provision of two certificates, one at lodgement and one at settlement, the Bill should also apply to include the settlement of claims currently on the insurer's books.[176]

Queensland Treasury response

When a law practice is sold

Treasury rejected the QLS' suggestion that if a 'new practice' discovers that a 'current practice' may have committed claim farming offences, the 'new practice' will not be guilty of any offence, nor precluded from recovering professional fees or outlays from the claimant. Treasury considered the suggestion unnecessary because a person the supervising principal nominates would be taken to be completing and signing the law practice certificate with the knowledge, authority and approval of the supervising principal.[177]

Request for clarification

In response to the ICA's queries, Treasury advised that, while an insurer may waive compliance in relation to a notice of a claim, or in circumstances where compliance in relation to a notice of claim is presumed, the obligation for a supervising principal to complete and give a law practice certificate continues. Treasury also advised that a claimant is not disadvantaged and the claim can continue, enabling the insurer to progress and support the claimant's rehabilitation and treatment.[178]

Treasury rejected ICA's suggestion that the Bill should contain a provision that a legal practitioner is unable to charge any legal costs until they provide a law practice certificate to the insurer.[179]

Law practice certificate for existing claims

Treasury rejected ICA's suggestion that a law practice certificate should be provided at settlement of claims currently on an insurer's books.[180]

Committee comment

The committee notes Treasury's response that answers concerns of some law firms by noting that a lawyer nominated by the supervising principal can sign the law practice certificate.

The committee notes the law practice certificate is integral to the Bill.

3.5 Bolstering the Commission's enforcement and special investigations powers

To ensure the Commission can investigate contraventions of the new claim farming offences, the Bill proposes to:

- replace the Commission's existing investigative powers with a modern suite of powers consistent with current legislation (amending 5A to become the new part 5A in the Act), and[181]

176 Submission 6, p 3.

177 Treasury, correspondence received 16 July 2019, p 18.

178 Treasury, correspondence received 16 July 2019, p 9.

179 Treasury, correspondence received 16 July 2019, p 9.

180 Treasury, correspondence received 16 July 2019, p 9.

181 Bill, cl 19.

- extend the Commission's existing special investigations power to allow it to appoint an investigator to investigate the relevant affairs of a law practice or lawyer acting for a claimant, or an associate of a law practice or lawyer. Currently, the power only extends to investigating the affairs of an insurer (creating a new part 5B in the Act).[182]

The explanatory notes advise that these proposed powers are modelled on those in the *Fair Trading Inspectors Act 2014*.[183]

3.5.1 Proposed new investigative powers

The Bill proposes to give the Commission power to:

- enter premises
- seize evidence without consent or warrant, and
- require a range of information.[184]

The Bill also proposes to create offences for non-compliance with the above items.[185]

Stakeholder views

Slater and Gordon considered that the reforms proposed by this part of the Bill were 'overwhelming in terms of the scope of the powers that will vest in authorised persons.'[186] It considered that the conduct the Bill seeks to stop is not of such a nature that it is in the public interest to give such sweeping powers of investigation, entry and seizure.[187]

3.5.1.1 Proposed powers of entry

The Bill proposes at new s 87G to allow Commission staff (authorised persons) to enter a premises, either by consent or with a warrant.[188]

If the entry is provided by consent, the authorised person must explain the purpose of the entry to the occupier, and explain that the occupier is not required to consent to the entry, that the consent may be subject to conditions and can be withdrawn at any time. If the occupier gives consent to entry, the authorised person may ask the occupier to sign an acknowledgment of the consent. The acknowledgement must include, among other things, the purpose of the entry and that the occupier has been informed that they are not required to provide consent, and the consent can be withdrawn at any time.[189]

If there is any disagreement that consent has been provided to enter a premises, the onus is on the authorised person to prove that the occupier consented to the entry.[190]

When exercising a power in relation to a person in the person's presence, an authorised person must:

- produce their identity card for the other person's inspection before exercising the power, or

182 Bill, cl 25.

183 Explanatory notes, p 30.

184 Bill, cl 19.

185 Bill, cl 19.

186 Submission 3, p 8.

187 Submission 3, p 8.

188 Bill, cl 19.

189 Bill, cl 19, new ss 87H-87K.

190 Bill, cl 19.

- have the identity card displayed so it is clearly visible to the other person when exercising the power.[191]

However, if it is not practicable to comply with this requirement, the authorised person must produce the identity card for the other person's inspection at the first reasonable opportunity. An authorised person does not exercise a power in relation to a person only because the authorised person has entered a place that is a public place and entry is made when the place is open to the public, or it is a licensed insurer's premises and open for carrying on business or otherwise open for entry.[192]

The Bill also proposes to provide an authorised person with the ability to apply to a magistrate for a warrant to enter a premises. The warrant must include information such as the names of those suspected of having committed an offence, any evidence that may be seized under the warrant and the time authorised persons can enter the premises.[193]

Before entering a premises with a warrant, the authorised person must make a reasonable attempt to:

- identify themselves to the occupier of the premises
- provide a copy of the warrant
- inform the occupier of the premises that the warrant gives the authorised person permission to enter the premises, and
- give the occupier the chance to allow the authorised person to enter the premises without the authorised persons needing to use force.[194]

The authorised person would be allowed to enter the premises without the occupier's permission if they reasonably believe entry to the premises is required.[195]

Stakeholder views

Proposed power to enter places

The QLS submitted that entry to a place should only be exercised with a warrant, consent or following an appropriate notice period. It noted that s 4(3)(e) of the *Legislative Standards Act 1992* (LSA) provides that legislation should generally confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other Judicial officer. It considered this was particularly the case if entry was gained simply because the premises were open for business or otherwise open for entry. The QLS considered that entry should be obtained via consent or a warrant, and highlighted the potential for the power to be misused. It also considered there to be privacy concerns as many businesses will possess commercially sensitive, private and confidential information.[196]

The QLS also expressed concern at the proposed ability for authorised persons to enter premises without a warrant if they have a 'reasonable belief' entry without compliance is required. It suggested that entry should only be possible once a warrant is obtained. It also considered this to be necessary if an authorised person wishes to seize evidence.[197]

191 Bill, cl 17; explanatory notes, p 29.

192 Bill, cl 17, new ss 87L-87Q.

193 Bill, cl 19.

194 Bill, cl 19.

195 Bill, cl 19, s 87RD.

196 Submission 11, p 6.

197 Submission 11, p 7.

Suncorp recommended this proposed section be removed from the Bill, considering that giving the Commission the right to enter premises would increase the Commission's powers beyond what is required.[198]

Requirement for authorised person to produce or display identity card

Regarding the requirement for an authorised person to produce or display an identity card, the QLS suggested amending clause 17 to that below (proposed changes underlined):

> *… an authorised person does not exercise a power in relation to a person only because the authorised person has entered a place as mentioned in section 87G(1)(b) or(d) unless the authorised person enters the place with the intention of exercising a power in relation to a person.*[199]

3.5.1.2 General powers of authorised persons after entering a premises

The Bill proposes to give an authorised person general powers including the power to search a premises, to inspect, examine or film any part of the premises, take an item for examination, take an extract from a document and produce an image or writing from an electronic document.[200]

The authorised person may require an occupier of a premises to provide reasonable help, such as producing a document. The proposed maximum penalty for breaching this provision is 200 penalty units.

The person who is asked to provide help can refuse, if they have a reasonable excuse to do so. A reasonable excuse to not help in such an instance could be if to do so might incriminate the individual or expose them to a penalty.[201]

3.5.1.3 Power to seize items

The Bill proposes to give authorised persons the right to seize evidence at a premises, if they consider:

- an item is evidence of an offence against the Act or the *National Injury Insurance Scheme (Queensland) Act 2016* (National Injury Act),
- the seizure is necessary to prevent the item being hidden, lost or destroyed, and
- when entry is gained via consent – seizing the item is consistent with the purpose of entering the premises as explained to the occupier when asking for consent to enter.[202]

Once an authorised person has seized an item, they can leave it where it was seized and take reasonable action to restrict access to it,[203] or they can remove it. The authorised person can require an occupier to do these things and the occupier must comply, unless they have a reasonable excuse, or face a proposed maximum penalty of 50 penalty units.[204]

The Bill proposes that tampering with a seized item or entering a place where access has been restricted will each be offences with maximum penalties of 50 penalty units. Neither will be an offence

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198 Submission 7, p 6.

199 Submission 11, p 6. S 87G(1)(b) refers to a place that is a public place and entry is made when the place is open to the public. S 87(G)(1)(d) refers to a licensed insurer's premises that is open for carrying on business or otherwise open for entry.

200 Bill, cl 19.

201 Bill, cl 19.

202 Bill, cl 19.

203 Bill, cl 19, s 87RG(2), such as by sealing the item, or access to it, and mark the item to indicate that access to it is restricted. If applicable, an item can be made inoperable, by dismantling it or removing a component.

204 Bill, cl 19.

if the occupier has an authorised person's approval, or a reasonable excuse, to tamper with an item or enter a place.[205]

The Bill also proposes to allow the Commission to decide that a seized item is forfeited to the state if an authorised person cannot find an owner, return an item to the owner, or reasonably believes it is necessary to keep the item to prevent it from being used to commit an offence.[206]

3.5.1.4 Proposed powers for the Commission to obtain information

The Bill proposes to give the Commission the power to obtain a person's name and address,[207] with a proposed maximum penalty of 50 penalty units for a breach of this requirement.[208]

The Bill also proposes to give the Commission the power to require information, such as a document.[209] A breach of this requirement carries a proposed maximum penalty of 200 penalty units.[210]

However, a person does not breach the requirement to provide information if they have a reasonable excuse for not doing so. A person would be entitled to refuse to give information in a court proceeding if giving the information might incriminate the individual or expose the individual to a penalty. A reasonable excuse could also be that the cost of producing a document would be unreasonable, having regard to its evidentiary value and any other relevant circumstances.[211]

Stakeholder views

The QLS was concerned that authorised persons would be able to request a person's name and address. It noted this power was a compulsive power usually vested in officers of the Queensland Police Service or similar organisations who have rigorous training and are subject to legislative obligations and codes of conduct with respect to such powers.[212]

The QLS disagreed with the breadth of other information that can be required by an authorised person in the absence of legal advice in relation to the consequences of providing this information and without a warrant.[213]

3.5.1.5 Proposed rights of appeal

The explanatory notes advise that the Commission's proposed enhanced enforcement powers will be balanced by allowing an affected person to apply to the Commission for internal review of an original

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205 Bill, cl 19.

206 Bill, cl 19.

207 This power can be used if an authorised person:
- finds a person committing an offence against the Act or the *National Injury Insurance Scheme (Queensland) Act 2016* (National Injury Act)
- finds a person finds a person in circumstances that lead the authorised person to reasonably suspect the person has just committed an offence against this Act or the National Injury Act, or
- has information that leads the authorised person to reasonably suspect a person has just committed an offence against this Act or the National Injury Act.

208 Bill, cl 19.

209 This power applies if an authorised person reasonably believes a person has information relevant to:
- a liability under the statutory insurance scheme
- an entitlement under the statutory insurance scheme, or
- an offence the authorised person reasonably believes has been committed against the Act or the National Injury Act.

210 Bill, cl 19.

211 Bill, cl 19.

212 Submission 11, p 7.

213 Submission 11, p 7.

decision made for an authorised officer to seize a thing or for the Commission to forfeit a seized thing to the state.[214]

Once a request for an internal decision is made the Commission must, within 20 days, review the original decision and confirm, amend or substitute the decision for another decision. The application for an internal decision can only be dealt with by a person who did not make the original decision and is more senior than the person who made the original decision.[215]

A person can apply to the Magistrates Court for a stay of the original decision or to appeal the original decision.[216] Currently, the Act only allows an insurer to apply to the Queensland Civil and Administrative Tribunal for external review of a decision by the Commission to withdraw or suspend an insurer's licence.[217]

3.5.1.6 Right to claim compensation from the Commission

A person may claim compensation from the Commission if they incur loss because of the exercise, or purported exercise, of a power by or for an authorised person including a loss arising from compliance with a requirement made of the person (excluding loss arising from a lawful seizure or a lawful forfeiture).[218]

The compensation may be claimed and ordered in a proceeding:

- brought in a court with jurisdiction for the recovery of the amount of compensation claimed, or
- for an alleged offence against this Act or the National Injury Act, the investigation of which gave rise to the claim for compensation.[219]

A court may order the payment of compensation only if it is satisfied it is just to make the order in the circumstances of the particular case. In considering whether it is just to order compensation, the court must have regard to any relevant offence committed by the claimant.[220]

A regulation may prescribe other matters that may, or must, be taken into account by the court when considering whether it is just to order compensation.[221]

Stakeholder views

The QLS expressed concern that a regulation may prescribe the matters that may, or must, be taken into account by the court when considering whether to order compensation. It considered a regulation should only recommend the matters a court may take into account when considering whether to order compensation. It suggested removing the words 'or must' from the clause so a court has discretion as to matters to be taken into account when considering whether it is just to order compensation to a person.[222]

3.5.1.7 Proposed powers of court on appeal

The Bill proposes to allow an affected person to appeal against an internal review decision. When deciding an appeal against an internal review decision, the court:

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214 Explanatory notes, p 5.

215 Bill, cl 19.

216 Bill, cl 19.

217 Explanatory notes, p 5.

218 Bill, cl 19.

219 Bill, cl 19.

220 Bill, cl 19.

221 Bill, cl 19.

222 Submission 11, p 8.

- has the same powers as the Commission in making the internal review decision
- is not bound by the rules of evidence, and
- must comply with natural justice.

An appeal is by way of rehearing. The court may:

- confirm the internal review decision
- substitute another decision for the internal review decision, or
- set aside the internal review decision and return the matter to the Commission with directions the court considers appropriate.[223]

Stakeholder views

The QLS was particularly concerned that the Bill proposes that when deciding an appeal against an internal review decision, the court is not bound by the rules of evidence. It considered the rules of evidence provide an appropriate degree of fairness and certainty for parties during the appeal process. It saw no justification for their abrogation, especially given the nature of the investigative powers proposed to be afforded to authorised persons under the Bill.[224]

3.5.1.8 Information from Commissioner of Queensland Police

The Bill proposes to allow the Commission to ask the Commissioner of the Police Service for a written report about the criminal history of a person if an authorised person reasonably suspects the person:

- may be present at a place when the authorised person enters the place under part 5A, and
- may create an unacceptable level of risk to the authorised person's safety.[225]

The Commissioner of the Police Service must give the report to the Commission. However, the report is required to contain only criminal history in the Commissioner's possession or to which the Commissioner has access.[226]

A person must not use or disclose to anyone else a report about a person's criminal history, or information contained in the report, unless the use or disclosure is allowed. The proposed maximum penalty for breaching this provision is 100 penalty units.

The person may use the information, or disclose the information to another person, if the use or disclosure is:

- for the purpose of the other person performing a function under this Act
- with the consent of the person to whom the information relates, or
- otherwise permitted or required by law.[227]

Stakeholder views

The QLS expressed concern about the unlawful or inadvertent disclosure of a person's personal information including details of any criminal history. It suggested amending the provision where it is discussed that the person may use the information, or disclose the information to another person, if the use or disclosure (proposed changes underlined):

223 Bill, cl 19.

224 Submission 11, p 8.

225 Bill, cl 22.

226 Bill, cl 22.

227 Bill, cl 22.

… is for the purpose of the other person performing a function under the Act provided that purpose is related to the original offence which formed the basis for the request under section 87V…[228]

3.5.1.9 Proposed ability for the Commission to obtain criminal history report about an offence

The Bill proposes to allow the Commission to ask the Commissioner of the Police Service for information in the possession of the Queensland Police Service about a person the Commission reasonably suspects to have committed an offence against the Act or the National Injury Act.[229]

Stakeholder views

The QLS considered this power to be unnecessary, beyond the scope of information that ought to be reasonably requested and at risk of being misused.[230]

Queensland Treasury response

Treasury stated that the proposed new enforcement powers outlined above are consistent with current legislation in the Queensland statute book and modelled on the *Fair Trading Inspectors Act 2014*.[231]

3.5.2 Extending the Commission's special investigations power

If the Commission suspects claim farming activity, the Bill would introduce new s 87ZC(2)(b) to give the Commission the ability to conduct special investigations into:

- an insurer
- a law practice or lawyer that is acting, or has acted, for a claimant
- an entity prescribed by regulation, and
- a body corporate.[232]

The Commission may, by written instrument, appoint an Australian legal practitioner, a qualified accountant or another appropriately-qualified person as an investigator. The written instrument must state the matters the investigation should probe.[233]

The Commission may appoint an investigator to investigate the relevant affairs of:

- a law practice or lawyer that is acting or has acted for a claimant, or
- an entity prescribed by regulation.[234]

Stakeholder views

The ICA suggested that the power to investigate related bodies corporate should be extended to a law practice or lawyer that is acting or has acted for a claimant, or an entity prescribed by regulation. This is because some law firms or other entities likely to be prescribed by regulation can have complex ownership structures.[235]

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228 Submission 11, p 8.

229 Bill, cl 22.

230 Submission 11, p 9.

231 Treasury, correspondence received 16 July 2019, p 11.

232 Bill, cl 25.

233 Bill, cl 25.

234 Bill, cl 25.

235 Submission 6, p 2.

The ICA highlighted drafting inconsistencies in cl 25, ss 87ZC(1) and 87ZC(2), with the former allowing the Commission to investigate into the 'affairs' of an insurer, and the latter allowing an investigation into an insurer's 'relevant affairs'. It recommended both sections refer to 'relevant affairs'.[236]

The ICA also noted that the definition of 'relevant affairs' under proposed s 87ZC(8) would be too narrow. It submitted that 'relevant affairs' should be defined as any arrangements, operations, practices, transactions or activities by the investigated person relating to the circumstances of referral and instruction of the investigated person, or an associate of the investigated person, in relation to a claim.[237]

The QLS was concerned that 'an entity' that may be investigated may be 'prescribed by regulation', which in effect delegates the special investigations power to the Executive by enabling regulations to amend the application or effect of the Act. While noting the reasoning behind this delegation was due to the 'evolving nature of the claim farming business model', the QLS was of the view that given the nature of the offences imposed by the Bill, the extent of the investigator's powers should be the subject of legislative scrutiny.[238]

Queensland Treasury response

Treasury advised that the investigation provisions replicate existing provisions under division 3 of part 5 of the Act (ss 74 to 87) and that the explanatory notes also specify the types of individuals the Commission would appoint as special investigators, to ensure the special investigations power cannot be misused.[239]

In response to the ICA's comment regarding the definition of 'relevant affairs', Treasury stated that one of the Commission's functions is to supervise insurers operating under the statutory insurance scheme and issue, suspend or withdraw licenses for insurers operating under the scheme. If a licensed insurer becomes insolvent it is the state, through the statutory body of the Nominal Defendant, that bears responsibility for the CTP liabilities of the insolvent insurer. Treasury advised (emphasis added):

> *As such, it is appropriate MAIC have power to investigate the **affairs** of an insurer; however, MAIC may only appoint an investigator to investigate the affairs of an insurer that is, or has been licensed under the Act, if it is desirable in the public interest.*[240]

3.5.2.1 Investigation of related bodies corporate

The Bill proposes that if an investigator considers it necessary, in investigating the affairs of an insurer, to investigate the affairs of a body corporate that is or has at any relevant time been a related body corporate for the insurer, the investigator may investigate the affairs of the body corporate with the Commission's written agreement.[241]

Stakeholder views

The ICA proposed that the scope of 'related bodies corporate' should be applied to all bodies that can be investigated, suggesting that this would allow the Commission to investigate any related subsidiaries of relevant law firms, medical providers, or other entities that interact with the scheme.[242]

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236 Submission 6, p 2.

237 Submission 6, p 2.

238 Submission 11, p 9.

239 Treasury, correspondence received 16 July 2019, p 11, referring to explanatory notes, p 17.

240 Treasury, correspondence received 16 July 2019, p 9.

241 Submission 6, p 3.

242 Submission 6, p 3.

3.5.2.2 Powers of investigators

The Bill proposes that an investigator can require an investigated person, or someone associated with that person, to produce documents and give the investigator all help they reasonably need for the investigation. An investigator can also require such people to appear before the investigator on oath or affirmation.[243]

The Bill proposes that an investigator must not, directly or indirectly, disclose confidential information. The proposed maximum penalty for breaching this provision is 100 penalty units. However, disclosing such information will not be an offence if:

- the confidential information is disclosed:
    - in the performance of functions under this part
    - with the written consent of the person to whom the information relates
    - to the person to whom the information relates, or
    - in a form that could not identify any person, or
- the disclosure of the confidential information is authorised under an Act or another law.[244]

Stakeholder views

The QLS was concerned the proposal appeared to be a positive obligation of an investigated person to appear before the investigator for examination on oath or affirmation. It submitted that the fundamental right to remain silent must be preserved, referring to s 397 of the *Police Powers and Responsibilities Act 2000* as an example.[245]

Confidentiality of information collected by an investigator

An investigator must not, directly or indirectly, disclose confidential information. The proposed maximum penalty for breaching this provision is 100 penalty units. However, it is not an offence to disclose information if it is disclosed:

- in carrying out the Act's new investigative powers
- with the written consent of the person to whom the information relates
- to the person to whom the information relates
- in a form that could not identify a person, or
- if the disclosure is authorised under an Act or other law.[246]

3.5.2.3 Obligations of investigated persons

Compliance with information request

The Bill proposes that an investigated person, or someone associated with that person, must not:

- fail to comply with a lawful requirement from an investigator
- give information they know to be false or misleading, or
- if appearing before an investigator:
    - state anything they know to be false or misleading, or

243 Bill, cl 25.

244 Bill, cl 25.

245 Submission 11, p 9.

246 Bill, cl 24.

- fail to be sworn or to make an affirmation.[247]

The proposed maximum penalty for breaching this provision is 300 penalty units or two years' imprisonment. The above requirements do not apply, however, if the person:

- tells the investigator, to the best of their ability, how the information is false or misleading, and
- gives the correct information to the investigator, if they have it or can reasonably obtain it.[248]

Complying with the above requirement does not contravene a provision of an Act imposing a statutory or commercial obligation or restriction to maintain secrecy, or incur any civil liability.[249]

Stakeholder views

The QLS was concerned about the requirement, and potential penalty (of 300 penalty units or two years' imprisonment) where an investigated person or associated person when appearing before an investigator for examination under a relevant requirement, fails to be sworn or to make an affirmation. It considered that the fundamental right to remain silent is a cornerstone principle that must be preserved.[250]

Queensland Treasury response

In response to QLS' points summarised above, Treasury considered the Bill strikes a balance between protecting the right of individuals and the public interest in minimising the potential for fraudulent behaviour, stopping harassing calls to Queenslanders and protecting the integrity, affordability and stability of the scheme.[251]

Compliance with an investigator's requirements

If an investigated person, or someone associated with that person, fails to comply with a requirement of an investigator, the investigator may give the Supreme Court a law practice certificate about the failure to comply. In such an instance, the court may inquire into the case and may:

- order the person to comply with the requirements within a period fixed by the court, and
- if satisfied the person failed without lawful excuse to comply with the requirement of the investigator – punish the person as if they had been guilty of contempt of court.[252]

Other offences regarding investigations

The Bill proposes that a person cannot:

- conceal, destroy, mutilate or alter a document of, or about, an investigated person whose affairs are being investigated, or
- send, cause to be sent or conspire with someone else to send out of the state a document or any property belonging to, or under the control of, the investigated person.[253]

The proposed maximum penalty for breaching this provision is 300 penalty units or two years' imprisonment.[254]

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247 Bill, cl 25.

248 Bill, cl 25.

249 Bill, cl 25.

250 Submission 11, p 9.

251 Treasury, correspondence received 16 July 2019, p 17.

252 Bill, cl 25.

253 Bill, cl 25.

254 Bill, cl 25.

It is a defence against prosecution if a defendant can prove that they did any of the things outlined above but when doing so did not act with intent to defeat the purposes of an investigation or to delay or obstruct an investigation.[255]

3.5.2.4 Protection from self-incrimination and legal professional privilege

The explanatory notes highlight the importance of special investigators accessing the information they need to assess potential claim farming offences and that attempts to gain such information are not hindered by claims from law practices that information cannot be given because it would disclose a 'privileged client communication'.[256]

An investigated person must provide information as requested by an investigator, and is not excused from this requirement if complying:

- might incriminate the person or expose them to a penalty, or
- would disclose a privileged client communication.[257]

The investigator must inform the investigated person of the above, and that there is a limited immunity against the future use of the information given when complying with the investigator's request.[258]

If, in complying with a requirement from an investigator, the person discloses a privileged client communication:

- the person is taken not to have breached legal professional privilege, and
- the disclosure does not constitute a waiver of legal professional privilege or otherwise affect any claim of legal professional privilege for any purpose other than a proceeding for an offence against the Act, an offence against sections relating to a law practice certificate and claim farming.[259]

See section 4.1.1 of this report in relation to the application of FLPs to the Bill.

Stakeholder views

The QLS was concerned that a person is not excused from answering a question or producing a document that might incriminate them and the purported removal of legal professional privilege. It outlined that it has universally taken the position that to promote certainty in the law and access to justice for all individuals that cornerstone principles such as legal professional privilege and protection against self-incrimination be maintained and be interfered with in the rarest of circumstances, and only then, for the most serious of matters the concern of courts or government.

The QLS stated that 'appropriate protection from self-incrimination is a fundamental legislative principle' and that the evidential 'limited immunity' granted does not justify the abrogation.[260] It was also concerned about the impact of the proposed provision on maintenance of legal professional privilege. It suggested removing the proposal to not excuse a person from failing to comply with a requirement to answer a question or produce a document on the basis that complying would disclose a privileged client communication because:

- *it is an abrogation of the fundamental common law right of legal privilege, and*

255 Bill, cl 25.

256 Explanatory notes, p 5.

257 Bill, cl 25.

258 Bill, cl 25.

259 Bill, cl 25.

260 Submission 11, p 10.

- *from a practical perspective, the power is not necessary as initial referral and source documents of a claim are unlikely to be privileged. If a claim for privilege is made, the matter could readily be determined by a court application if required.*[261]

The QLS explained that for an individual to receive unencumbered and frank advice about legal matters (or preliminary to matters) the relationship between a lawyer and client must be treated as unfettered and sacrosanct. The importance and significance of these issues also applies to the protection against self-incrimination. It is ordinarily only in closely monitored and protected coercive hearings that the shield of protection offered by these two principles is interfered with.[262]

Slater and Gordon expressed concern at the proposal to override the concepts of legal professional privilege and the common law privilege against self-incrimination, stating that these concepts represent fundamental cornerstones of justice under Australian law. It considered that Parliament should only override the protection afforded by these privileges in matters of significant importance, where the importance of the issue being dealt with clearly outweighs the importance of the right of the privilege, and that claim farming is not such an area. It suggested that if enacted, the provisions are 'highly likely to be subject to judicial challenge'.[263]

Queensland Treasury response

Treasury stated that the partial abrogation of legal professional privilege is balanced by the protections offered to a law practice or lawyer who discloses a privileged client communication, a client's legal privilege being unaffected by the partial abrogation and the narrow scope of an investigator's power to investigate the 'relevant affairs' of a law practice or lawyer.[264]

3.5.2.5 Failure of person to comply with investigator's requirement

The Bill proposes that if an investigated person, or associated person for an investigated person, fails to comply with a requirement of an investigator, the investigator may give the Supreme Court a certificate about the failure to comply.[265]

If an investigator gives such a certificate, the court may inquire into the case and may:

- order the person to comply with the requirements of the investigator within a period fixed by the court, and
- if the court is satisfied that the person failed without lawful excuse to comply with the requirement of the investigator – punish the person in the same way as if the person had been guilty of contempt of the court.[266]

Stakeholder views

The QLS was concerned regarding:

- the requirement for the court to 'inquire into the case'; in an adversarial system it is not the role of a judicial officer to conduct any such inquiries, and
- the proposed power to 'punish the person in the same way as if the person had been guilty of contempt of the court' such that it does not specify the nature and type of the contempt offence.

261 Submission 11, p 10.

262 Submission 11, p 10.

263 Submission 3, p 8.

264 Treasury, correspondence received 16 July 2019, p 17.

265 Bill, cl 25.

266 Bill, cl 25.

The QLS further submitted:

> *… whether it is contempt in the face of the court or outside the court, what conduct might constitute such contempt and the type of punishment which might be applied. Contempt is a serious offence and laws of contempt must be carefully balanced between the administration of justice and principles of natural justice including certainty of the law.*[267]

The QLS considered that to punish a person in the same way as if they had been guilty of contempt of court was 'an overreach'. It considered that it is sufficient for the court to have the power to make an order to comply with the investigator's requirements. If the court does make such an order and it is still not complied with, then a contempt argument can be pursued.[268]

See section 4.1.1.2 for further discussion on the application of FLPs to this provision.

3.5.2.6 Investigator's report

The Bill proposes that an investigator may, and if directed by the Commission, must make interim reports to the Commission. These reports, or parts of them, can be published on the Commission's website. If an investigator has given a record of an examination to the Commission with the report to which the record relates, a copy of the record may be given to any person, and with conditions, that the Commission considers appropriate.[269]

Stakeholder views

The QLS expressed concern at the potential implications of publication of an investigator's report on the Commission's website in circumstances where an investigated person may not have been convicted of an offence. It suggested that this should be limited to conviction.

Regarding records of examinations, to protect confidentiality and ensure the report does not incriminate the investigated person in any other potential proceeding, the QLS recommended the following re-drafting (proposed additions underlined):

> *If an investigator has given a record of an examination under this part to the commission with the report to which the record relates, a copy of the record may be given to any person provided it is given with respect to the offences the subject of the investigation, and on the conditions, that the commission considers appropriate.*[270]

3.5.2.7 Costs of investigation

The Bill proposes for the Commission to be able to recover the costs of, and incidental to, an investigation from the investigated person. However, costs cannot be recovered from an investigated person if the investigation did not establish an irregularity on the part of an insurer or related body corporate, or evidence of a contravention by a person.[271]

Stakeholder views

Slater and Gordon submitted that the Commission's ability to recover its costs from an investigated party should be contingent upon an actual conviction by a court in relation to a contravention of the relevant provisions. It noted that this would be consistent with the powers of other regulatory authorities granted legislative powers of investigation, such as in s 91 of the *Australian Securities and*

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267 Submission 11, p 10.

268 Submission 11, p 10.

269 Bill, cl 25.

270 Submission 11, p 11.

271 Bill, cl 25.

Investments Commission Act 2001 (Cth) and s 532K of the *Workers' Compensation and Rehabilitation Act 2003*.[272]

The ICA submitted that the Bill should also provide that the court may issue a cost order for an insurers' reasonable investigation and legal costs. It considered this to be reasonable, as scheme funds should be protected against actions brought by unmeritorious and fraudulent claims where prosecution is successful. A provision to seek reimbursement for costs incurred due to a Commission-initiated investigation would also balance the proposed powers for the Commission to appoint an investigator.[273]

Committee comment

The committee notes the Bill proposes to give the Commission substantial investigation powers, and notes the concerns of QLS in regards the protections offered by common law privilege.

3.6 Extraterritorial application of reforms

To prevent claim farmers in other states and territories engaging in claim farming in Queensland, the Bill proposes, by way of new ss 80, 87Y and 87ZR, that the following provisions are to apply outside Queensland to the full extent of the extraterritorial power of the Parliament:

- claim farming offences and compliance with the '50/50 rule'
- the proposed new investigative powers, to the extent necessary to investigate a contravention of the claim farming offences, or
- the special investigations power, to the extent necessary to investigate a contravention of the law practice certificate offences, the claim farming offences under ss 74 and 75, or the affairs of an investigated person.[274]

3.7 Expanding the Commission's functions and the objects of the Act

To ensure the Commission's functions are sufficiently broad to capture the new claim farming offences, the Bill proposes amending s 10 of the Act to provide the Commission with new functions:

- to regulate the insurance scheme, and
- to perform another function given to the Commission under the Act or another Act.[275]

Along with these expanded functions, the Bill proposes to strengthen the Commission's supervisory powers by allowing it to establish and revise standards about the proper management of claims with which licensed insurers must comply. These standards must be published on the Commission's website.[276]

The Bill proposes to amend the Regulation to prescribe compliance with the standards as a new condition of the licence[277] and to increase the maximum penalty amount for non-compliance from 150 penalty units to 300 penalty units (clauses 30 and 13 respectively).[278] The explanatory notes advise that the increased penalty will provide licensees with a greater deterrent for breaching the new licence

272 Submission 3, p 9.

273 Submission 6, p 2.

274 Bill, cl 24.

275 Bill, cl 5.

276 Bill, cl 5.

277 Bill, cl 30.

278 Bill, cls 13, 30.

condition and that it is consistent with the maximum penalty proposed for the claim farming offences, and offences for a failure to provide a law practice certificate.[279]

As well as expanding the Commission's functions, the Bill proposes to amend the objectives of the Act to encourage licensed insurers to act in a way that supports the integrity of, and public confidence in, the scheme.[280]

Stakeholder views

The QLS expressed concern that allowing the Commission to 'establish and revise standards about the proper management of claims with which licensed insurers must comply' was a delegated power that would not be subject to the scrutiny of the Legislative Assembly. It was also concerned that compliance with the claims management standards would be a licence condition, the maximum penalty for non-compliance would be increased and that a standard made would apply to the management of a claim from the day it was published, regardless of when the claim was made.

The QLS suggested that any standard should be created after adequate stakeholder consultation and should only apply to claims made on or after the standards are published.[281]

Suncorp suggested that if claims management standards are to be published, the Bill should be amended so that:

- the power to make and revise claims management should be narrowed in scope to only include practices regarding instances of claim farming
- a consultation period on any proposed standards should be provided to insurers and during this period a compliance timeframe should be agreed upon, and
- notice must be provided from the Commission to insurers on the publication of any new standards.[282]

Queensland Treasury response

Treasury noted the QLS' concern about the proposal for the Commission to publish claims management standards, stating that the power to issue, and enforce compliance with, claims management standards is consistent with the practice of regulatory authorities and ensures a consistent and firm industry response towards claim farming activity. It also stated that such standards will assist insurers by providing guidance on how to manage claims they believe are lodged due to claim farming. Treasury advised that the Commission will provide insurers with reasonable notice of new standards.[283]

3.8 Amendments to the Motor Accident Insurance Regulation 2018

3.8.1 Requirements for additional claimant information

The Bill proposes to amend s 17 of the Regulation to require claimants to provide extra information in a statement of information for the notice of claim. Some of the extra information proposed to be requested is:

- the claimant's Medicare number
- whether the claimant needs an interpreter

279 Explanatory notes, p 6.

280 Bill, cl 3.

281 Submission 11, p 3.

282 Submission 7, p 3.

283 Treasury, correspondence received 16 July 2019, p 18.

- a diagram showing, to the best of the claimant's knowledge, where the driver and each occupant of the vehicle was sitting in the vehicle at the time of the accident
- whether, in relation to the vehicle the claimant or injured person was travelling in at the time of the accident, a property damage claim has been made under a comprehensive insurance policy or a third party property damage policy
- if a claim was made under such a policy – the insurer for the policy, the policy number and the number of any property damage claim made under the policy
- for a claim other than a derivative claim:[284]
    - the date a doctor first physically examined the claimant in relation to personal injury resulting from the accident
    - the unique identifier given to the doctor under the *Health Practitioner Regulation National Law Act 2009*[285] (Health Practitioner Regulation National Law)
    - the date the certifying doctor first physically examined the claimant in relation to personal injury resulting from the accident
    - the unique identifier given to the certifying doctor under the Health Practitioner Regulation National Law[286]
- if the claimant has retained a law practice to act for the claimant in relation to the claim:
    - the name of the law practice, and
    - the date the claimant retained the law practice
- if the claimant consulted a lawyer about the possibility of making a claim – the date the claimant first consulted the lawyer.[287]

The Bill proposes to amend s 17(1)(e) of the Regulation to prescribe that the owner and driver of each vehicle involved in an accident provide their telephone numbers and email addresses.[288] It also proposes to amend s 17(1)(f) of the Regulation to require the telephone numbers and email addresses of witnesses to the accident.[289]

3.8.2 Requirement for additional information for a medical certificate

The Bill also proposes that s 18 of the Regulation will require the following information regarding a medical certificate:

- to state:
    - the doctor physically examined the claimant, and
    - whether the claimant was, at the date of the accident, an existing patient of the doctor or of a medical practice in which the doctor practices or was practising
- signed by the claimant to accompany the notice of claim. The certificate states:

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284 Regulation, s 17, a 'derivative claim' is a motor vehicle accident claim based on the death of, or injury to, a person in a motor vehicle accident other than the claimant. An example could be a claim brought on behalf of the dependants of a person killed in a motor vehicle accident.

285 Section 233, *Health Practitioner Regulation National Law Act 2009* (Health Practitioner Regulation National Law).

286 Section 233, Health Practitioner Regulation National Law.

287 Bill, cl 28.

288 Bill, cl 28; the Regulation currently requires only names and addresses, s 17(1)(e).

289 Bill, cl 28; the Regulation currently requires only names and addresses of witnesses, s 17(1)(f).

  - whether the claimant is making the claim on the claimant's own initiative
  - either the claimant was not personally approached or contacted by a person and solicited or induced to make the claim; or if the claimant was personally approached or contacted to make a claim, the name of the person and the circumstances in which the claimant was personally approached or contacted, and
  - if the claimant has retained a law practice to act for the claimant in relation to the claim – whether the claimant knows if the law practice gave consideration to a person for the referral of the claimant to the law practice
- must be in a form approved by the Commission and verified by statutory declaration, and
- if the claimant is at least 15 years old, they must provide identity documents, namely:
  - a certified copy[290] of an identity document, meaning a document issued by a government that is evidence of the claimant's identity and contains a photograph of the claimant, or
  - if the claimant does not hold an identity document – a recent certified photograph of the claimant. This is a passport-sized photograph of the claimant taken within the last two years and certified to be a photograph of the claimant by a person who has known the claimant for at least one year.[291]

For each notice of claim received, the Bill proposes that licensed insurers must give the Commission:

- the claimant's Medicare number, and
- if the notice of claim was accompanied by an identity document with a unique identifying number, the number on the identity document.[292]

The Bill proposes that for a notice of claim that is not disputed, or each disputed notice of claim that is resolved, the information required is:

- whether, in relation to the vehicle the claimant or the injured person was travelling in at the time of the accident, a property damage claim has been made under a comprehensive insurance policy or a third party property damage policy
- if a claim has been made under such a policy – the insurer for the policy, the policy number and the number of any property damage claim made under the policy
- for a claim other than a derivative claim, the following details as shown in the notice of claim:
  - the date a doctor first physically examined the claimant in relation to personal injury resulting from the accident
  - the unique identifier given to the doctor under the Health Practitioner Regulation National Law
  - the date the certifying doctor first physically examined the claimant in relation to personal injury resulting from the accident, and
  - the unique identifier given to the certifying doctor under the Health Practitioner Regulation National Law

[290] A certified copy of an identity document means certified by one the following as a true copy of the document: a lawyer, a notary public, a commissioner for declarations, or a justice of the peace.

[291] Bill, cl 29.

[292] Bill, cl 29.

- for a claim other than a derivative claim whether the claimant was, at the date of the accident, an existing patient of the doctor or of a medical practice in which the doctor practices or was practising, as shown in the certificate accompanying the notice of claim
- if the claimant has retained a law practice to act for the claimant in relation to the claim:
    - the name of the law practice, and
    - the date the claimant retained the law practice.[293]

Stakeholder views

The QLS suggested that the Regulation refer to the proposed offence of approaching or contacting for the purpose of making a claim, especially when the claimant will be required to provide the name of the person and the circumstances in which the claimant was personally approached or contacted.[294]

Noting that a practitioner will be required to explain the contents of the medical certificate so the claimant understands the reference to the proposed offence, the QLS suggested that the claimant's medical certificate be accompanied by a clear statement to the claimant that they can contact the Commission or the QLS confidentially about the certificate if they wish.[295]

Queensland Treasury response

Treasury advised that the proposed change to the Regulation allows claimants to generally describe the circumstances in which they were approached, which may suggest nothing inappropriate about the approach or contact (for example because the matter would fall under an exemption), without unfairly expecting a claimant to understand what is a contravention of the Bill.[296]

3.9 Cost of implementation

The explanatory notes advise that the only estimated costs for government to implement the legislative reforms are the potential costs of an investigation as part of the Commission's new investigative powers or its new special investigations powers into potential contraventions of an offence provision under the Act. For the latter, it is unlikely the Commission's staff would conduct such an investigation, but instead would likely engage an external contractor such as a specialised investigator, retired lawyer, barrister or Queen's Counsel.[297]

The explanatory notes acknowledge the need for a communication strategy to educate the public about the reforms and how to deal with potential instances of claim farming, and advise this would be funded from the Commission's existing budget.[298]

3.10 Commencement of the Bill

The explanatory notes do not indicate when the Bill would commence, if it is passed.

Stakeholder views

The QLS submitted that a 'reasonable' period be allowed before commencement of the Bill and that, if implemented, any Act be subject to regular reviews to ensure a balance is struck between eliminating claim farming and any unintended impacts on practitioners and/or the community.[299]

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293 Bill, cl 29.

294 Submission 11, p 11.

295 Submission 11, p 11.

296 Treasury, correspondence received 16 July 2019, p 19.

297 Explanatory notes, p 9.

298 Explanatory notes, p 9.

299 Submission 11, p 3.

3.11 Minor and consequential amendments

As well as proposing to merge the definition of 'claim' and 'motor vehicle claim' into the single definition of 'claim' in the Act and Regulation, the Bill proposes to do the same in the National Injury Act and the *Victims of Crime Assistance Act 2009*.[300]

3.12 Proposed penalties

The Bill proposes to establish new offences and penalties. The proposed penalties are set out at Appendix C of this report.

Stakeholder views

The ICA submitted that the proposed maximum penalties of 300 penalty points are an insufficient financial deterrent to the practices of claim farming. It suggested that penalties could be calculated based on company revenue.[301]

Queensland Treasury response

Treasury considered the proposed penalties of 300 penalty units to be consistent with other penalties in the Act and with existing offences in other legislation, such as the touting provisions of the PIPA, and proportionate given the serious nature of the offences.[302]

3.12.1 Contravention of the Bill by legal practitioners

The QLS considered that the greater penalty for a legal practitioner contravening provisions of the Bill would be a referral to the Legal Services Commission for prosecution with respect to the false signing and swearing of the law practice certificate. For this reason, it suggested amendments to the Notice of Accident Claim Form, which requires the practitioner to acknowledge and accept the potential consequences of prosecution and/or disciplinary proceedings under the Legal Profession Act for engaging in claim farming activities as well as not complying with a lawful requirement.[303]

3.12.2 The claimant as a 'party' to the offence

The QLS considered there was a strong argument that a claimant would inadvertently be a party (under ss 7 and 8 of the *Criminal Code Act 1899*) to an offence of claim farming as outlined in the proposed claim farming provisions.

It suggested two ways to address this:

- the incorporation of an exclusion of 'the claimant' in the provisions banning claim farming. That is, to include wording to the effect that, a person (other than the claimant) must not give or receive consideration for a claim referral or potential claim referral, or
- that there be an express policy of the government that it will not prosecute the claimant in these circumstances.[304]

300 Bill, Schedule 1.

301 Submission 6, p 3.

302 Treasury, correspondence received 16 July 2019, p 9.

303 Submission 11, p 11.

304 Submission 11, p 11.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the LSA states that FLPs are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the FLPs to the Bill and identified numerous clauses that raise potential FLP issues. The committee's consideration of these issues is outlined below.

4.1.1 Rights and liberties of individuals

4.1.1.1 Right to privacy regarding personal information

Clause 22 inserts proposed new ss 87V and 87VB, which provide for the Commission to access information about the criminal history of a person.

Specifically, proposed new s 87V will allow the Commission to ask the Police Commissioner for a written report about the criminal history of a person (including a brief description of the circumstances of any conviction or allegation), if an authorised person reasonably suspects the person:

- may be present at a place when the authorised person enters, and
- may create an unacceptable risk to the authorised person's safety.

On receipt of the information, the Commission must examine the report and give the authorised person any information in the report about offences involving the use of a weapon or violence against a person.[305] New s 173C describes the purpose of the provisions as being to 'help an inspector to decide whether the inspector's entry of a place, boat or vehicle under this part would create an unacceptable level of risk to the inspector's safety'.[306]

The Commission, or an authorised person to whom the report or written information in the report is given, must destroy the report as soon as practicable after the authorised person has considered the risk to the authorised person's safety.[307]

Proposed new s 87VB would also allow the Commission to ask the Police Commissioner for police information about a person, based on a reasonable suspicion that the person has committed an offence against the Act or the National Injury Act.

Proposed new ss 87V and 87VB raise a potential FLP issue in relation to the rights and liberties of individuals – specifically, regarding an individual's right to privacy with respect to their personal information.

The explanatory notes acknowledge the potential FLP issue with respect to s 87V, but argue that 'this power is necessary to ensure the safety of an authorised person':[308]

> *The provision allows the Commission to give an authorised person information about offences involving the use of a weapon or violence against the person. Section 87V also contains safeguards to ensure the power is not abused, such as requiring the Commission to be satisfied that the threshold requirement of an 'unacceptable level of risk' to an authorised person's safety*

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305 Bill, cl 22, new s 87V(4).

306 Bill, cl 22, new s 173C.

307 Bill, cl 22, new s 87V(6).

308 Explanatory notes, p 20.

is met, and requiring authorised persons to destroy the report as soon as practicable after they have considered the risk to their safety.[309]

With respect to s 87V, a person's criminal history can be obtained without their consent, however:

- there are limits on disclosure, and an offence for unauthorised disclosure[310]
- there is a requirement for destruction of the information as soon as practicable after the authorised person considers the risk to the authorised person's safety,[311] and
- the convictions included in a criminal history do not extend to spent convictions.[312]

Proposed s 87VA in particular provides that it is an offence for a person to disclose criminal history information to another person, unless the disclosure is:

- for the purpose of that other person performing a function under the Act
- made with consent of the person to whom the information relates, or
- otherwise required or permitted by law.

Proposed s 87VA(1) sets the maximum penalty for an unauthorised disclosure at 100 penalty units.

In relation to the requirement for the destruction of the criminal history information, this requirement is limited to the destruction of the document itself, and does not extend to any information within it. In contrast, the requirement in s 173A of the *Fisheries Act 1994*, as recently inserted by *Fisheries (Sustainable Fisheries Strategy) Amendment Act 2019*, requires the destruction of both the criminal history report, 'and any information given to an inspector in writing'.[313] In this instance, the position of an inspector under the *Fisheries Act 1994* is analogous to an authorised person under the Act.

The committee sought clarification from the Treasury on the drafting of this aspect of the provision, and was advised:

Treasury considers a similar effect to section 173E (Chief executive may obtain criminal history report) of the Fisheries Act 1994 can be achieved by amending new section 87V to include the words 'or written information' after the words 'destroy the report'. For example, clause 203 of the Land, Explosive and Other Legislation Amendment Act 2019 states (Amendment of Land Act 1994, section 390ZZD(3)):

"The chief executive or an authorised officer to whom the report or written information in the report is provided must destroy the report or written information as soon as practicable after the authorised officer considers the risk mentioned in section 390ZZB".[314]

The committee acknowledges Treasury's advice in regards the drafting of this provision:

Treasury is amenable to amending section 87V as suggested, as an amendment during consideration in detail.[315]

As further context, Treasury also advised:

The rationale for the provision is to create a higher threshold for obtaining a criminal history by requiring that authorised person to reasonably suspect both that the person may be present at

309 Explanatory notes, p 20.

310 Bill, cl 22, s 87VA.

311 Bill, cl 22, s 87V(6).

312 Act, s 4 (definition of 'criminal history'). The definition contained in s 4 of the Act is unaffected by the Bill.

313 *Fisheries Act 1994*, s 173A(7).

314 Treasury, correspondence dated 17 July 2019, p 2.

315 Treasury, correspondence dated 17 July 2019, p 2.

the place and that the person may create an unacceptable level of risk to the authorised person's safety. Clause 4(2) of the Bill defines 'reasonably suspects' as suspects on grounds that are reasonable in the circumstances.

Section 87V is modelled on section 63 of the Fair Trading Inspectors Act 2014 and has a different purpose to section 87VB of the Bill, which replicates existing section 87V of the Motor Accident Insurance Act 1994 (Act). The Bill will strengthen the Motor Accident Insurance Commission's (MAIC) enforcement powers to allow it to investigate and enforce the claim farming offences, which are different to existing offences under the Act. Given the largely unknown, surreptitious and adaptive nature of claim farming, section 87V is considered necessary in ensuring the safety of authorised officers when entering a place. This provision will allow authorised officers to plan a claim farming investigation and deal with unexpected or complicated matters that may arise in such an investigation. Considering the safeguards the Bill provides to prevent unauthorised use or disclosure of a criminal history report under section 87VA, and the obligation to destroy the criminal history report, it is considered the Bill has sufficient regard to FLPs.[316]

In respect to proposed new s 87VB, the committee sought comment from Treasury and was advised:

Section 87VB replicates existing section 87V of the Act, which was inserted by the Motor Accident Insurance Amendment Act 2000. That Amendment Act inserted part 5A to expand MAIC's powers to investigate and prosecute fraud within the statutory insurance scheme (scheme). Section 87V prescribed information, such as a person's criminal history and any brief of evidence, that may be given by the Commissioner of Police to MAIC. The information provided must not be used for any purpose other than an investigation or prosecution under the Act. As a result, the Criminal Law (Rehabilitation of Offenders) Act 1986 does not apply.

The original policy intent of section 87V of the Act remains the same and the provision is considered essential in enabling MAIC to fulfil its functions to develop and coordinate strategies to identify and combat fraud in or related to claims under the scheme. The provision has regards to the rights and liberties of the individual by ensuring a person's criminal history is protected from use or disclosure under new section 87VC. New section 87VB replicates section 87V but not section 87V(4)(b) because the provision was considered unnecessary given the broader safeguard offered by the prohibition on use and disclosure under new section 87VC, which also includes an offence provision.[317]

Treasury also noted that, '[s]ection 87VC is based on s 64 of the *Fair Trading Inspectors Act 2014*'.[318]

Clause 28 amends s 17 of the Regulation, which sets out matters that must be included in a notice of accident claim form. The clause adds some more requirements, including the following:

- Medicare number
- whether the claimant requires an interpreter and, if so, in what language, and
- a diagram showing, to the best of the claimant's knowledge, where the driver and each occupant of the vehicle was sitting in the vehicle at the time of the accident.

The amendment to the Regulation will also provide for:

- certificates to accompany the claim form
- the medical certificate signed by the doctor that accompanies the claim form must state the doctor physically examined the claimant, and

316 Treasury, correspondence dated 17 July 2019, p 1.

317 Treasury, correspondence dated 17 July 2019, p 2.

318 Treasury, correspondence dated 17 July 2019, p 2.

- the date a doctor or a certifying doctor first physically examined the claimant, a statement as to whether the claimant was an existing patient of the certifying doctor or the medical practice, and the doctor's unique identifier.[319]

As the explanatory notes acknowledge:

> *The amendments … may infringe the fundamental legislative principle that legislation should have sufficient regard to an individual's right to privacy and should not unnecessarily collect and use an individual's personal information without sufficient justification.*[320]

In offering a justification for the breach of FLP, the explanatory notes state:

> *This principle* [that legislation should have sufficient regard to an individual's right to privacy]*, however, is subject to overriding legislation and the need to balance the protection of an individual's privacy with the interests of entities, such as the Commission and licensed insurers, in carrying out their functions and activities*.[321]

As to whether a breach of FLP is sufficiently justified, the explanatory notes state:

> *In this instance, the information requested from claimants will help claimants resolve their claim for damages and enable insurers to deliver better customer service whilst also allowing the Commission and insurers to better detect claim farming and fraud. Additionally, the Act has adequate safeguards to ensure the information requested is only used or disclosed for the purposes set out in the Act and Regulation.*
>
> *Information about a claimant's need for an interpreter will enable insurers to provide claimants with access to an interpreter who can help the claimant and insurer communicate effectively … Information about the date a doctor or a certifying doctor first physically examined the claimant, combined with the statement in the medical certificate as to whether the claimant was an existing patient of the certifying doctor or the medical practice, will help to alert insurers and the Commission to potential instances of claim farming. Anecdotal evidence suggests claim farmers and legal practitioners involved in claim farming tend to recommend individuals involved in a motor vehicle accident attend specific medical centres rather than the patient's usual general practitioner and, in some instances, these medical practitioners may only examine patients through Skype and not in person.*
>
> *Both a claimant's Medicare number (which is a unique identifier for an individual) and identification documents can help the Commission to better identify fraud networks, not only in Queensland but in other schemes. Similarly, where a doctor works across several practices, the unique identifier given to the doctor and the certifying doctor under the Health Practitioner Regulation National Law will allow the Commission to track claim farming networks by identifying practitioners who may be examining patients across different practices. Information as to whether a claim was made under the vehicle's comprehensive insurance policy or a third party damage policy will help insurers and the Commission verify how accidents occurred and the severity of the accident.*
>
> *Furthermore, the confidentiality requirements under section 92 of the Act will mitigate any potential breaches of individuals' privacy by prohibiting a person engaged in work related to the administration of the scheme, or claims made under the scheme, divulging information of a private or confidential nature acquired during the work. This obligation applies to the Commission and insurers. As an APP entity, insurers also have obligations under the Privacy Act 1988 (Cth) to comply with the Australian Privacy Principles (schedule 1) in managing personal*

319 Explanatory notes, p 7.

320 Explanatory notes, p 21.

321 Explanatory notes, p 21.

information. An APP entity is an organisation as defined under section 6C of that Act, namely a body corporate that is not a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory. Likewise, the Commission as an agency is subject to the privacy principles under the Information Privacy Act 2009 when collecting or using an individual's personal information.[322]

Committee comment

The committee is satisfied that the provisions are appropriate in the circumstances, recognising that an individual's right to privacy must be balanced against overriding legislation and the activities of entities such as the Commission, in carrying out their functions and duties.

4.1.1.2 Liability to be dealt with as though guilty of contempt

Proposed new s 87ZJ allows a court to punish a person as if the person had been guilty of contempt of court, in the following circumstances.

If an investigated person or associated person fails to comply with a requirement of an investigator, an investigator may give the Supreme Court a certificate about the failure to comply. The Supreme Court may then enquire into the case and may:

- order the person to comply with the requirements of the investigator within a fixed period, and
- if satisfied the person failed, without lawful excuse, to comply with the requirement, punish the person as if the person had been guilty of contempt of the court.[323]

Section 87ZJ might be considered to breach the FLP that legislation should have sufficient regard to the rights and liberties of individuals.

Section 87ZJ re-enacts existing s 80 of the Act, extending its reach to a law practice or lawyer that is acting or has acted for a claimant.[324] The QLS expressed reservations regarding the reach of these provisions.[325]

The explanatory notes state:

The provision would ensure that, in those extreme and rare instances where an investigated person or an associated person for an investigated person fails to comply with an investigator's requirement, an investigator has the ability to seek the court's intervention. It is expected that an investigator investigating the affairs of an insurer or the relevant affairs a law practice would only resort to this power where compliance with an investigator's requirement would be crucial to the outcome of the investigation. A similar provision exists in section 195 of the Financial Intermediaries Act 1996.[326]

4.1.1.3 Abrogation of the common law right of legal professional privilege

Proposed s 87ZI provides that a law practice or lawyer that is acting, or has acted, for a claimant (or an associated person for the law practice or lawyer) is not excused from answering a question or producing a document on the basis that complying would disclose a privileged client communication.

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322 Explanatory notes, p 21.

323 Explanatory notes, p 35.

324 The current s 80 of the Act applies only to an officer of an insurer and will be repealed by virtue of cl 14 if the Bill is passed.

325 Submission 11, p 10.

326 Explanatory notes, p 18. Section 195 of the *Financial Intermediaries Act 1996*, referred to in the explanatory notes, is slightly different in its wording. It provides that an investigator may certify the failure to the Supreme Court where the investigator *considers that the person did not have a lawful excus*e for the failure.

Section 87ZI involves an abrogation of legal professional privilege, a common law right. In this respect, it breaches the FLP that legislation should have sufficient regard to the rights and liberties of individuals.

The explanatory notes acknowledge the breach of FLP. They give this background:

> *A privileged client communication means a communication protected against disclosure by legal professional privilege that operates for the benefit of a client of the investigated person.*
>
> *Legal professional privilege is a significant right that enables full and frank communication between lawyers and their clients. The intent of the Bill is not to uncover those full and frank communications between a lawyer and client about the client's claim under the scheme. The Bill's sole intent is to uncover how a law practice received and was referred instructions for a claim and how it gave or referred instructions for a claim. … A client's legal privilege would continue unaffected by these amendments.*
>
> *…*
>
> *The partial abrogation of legal professional privilege will enable the Commission to investigate a law practice and gather the necessary evidence to prosecute a potential breach of a claim farming offence … without the proposed partial abrogation the potential exists for a law practice to use the privilege for its own benefit (and not the client's benefit) to conceal any wrongdoing, resist the production of documents concerning the sourcing of the claim and thereby frustrate or defeat the investigation altogether.*
>
> *The Bill's objective is to stop claim farming and to achieve this objective it is vital for the Commission to be able to investigate how law practices received or were referred, or gave or referred, instructions for a claim and whether that referral was in breach of the offence provisions. The public interest in not only protecting the integrity, affordability and stability of the scheme but also in minimising the potential for fraudulent behaviour by stopping claim farming and ensuring compliance with the Act outweigh the public interest in preserving the right of a lawyer to claim legal professional privilege. This is particularly so given a client's legal privilege would be unaffected by the partial abrogation, which relates only to the law practice's sourcing of the claim, and the safeguards afforded under section 87ZI to a law practice or lawyer who discloses a privileged client communication.*[327]

The QLS opposed the provision by stating:

> *We submit that proposed section 87ZI(2)(b) should be removed as:*
>
> *a) It is an abrogation of the fundamental common law right of legal privilege; and*
>
> *b) From a practical perspective, this power is not necessary as initial referral and source documents of a claim are unlikely to be privileged. If a claim for privilege is made, the matter could readily be determined by a court application if required.*
>
> *For an individual to receive unencumbered and frank advice about legal matters (or preliminary to matters) the relationship between a lawyer and client must be treated as unfettered and sacrosanct. The importance and significance of these issues also applies to the protection against self-incrimination. It is ordinarily only in closely monitored and protected coercive hearings that the shield of protection offered by these two principles is interfered with.*[328]

The committee sought comment from Treasury on arguments presented by the QLS and was advised:

> *Treasury agrees the 'relevant affairs' of an investigated person that is a law practice or lawyer would not be matters that would generally fall within the definition of 'privileged client*

[327] Explanatory notes, pp 16-17.

[328] Submission 11, p 10.

communication'. That is, communication protected against disclosure by legal professional privilege that operates for the benefit of a client of an investigated person. For that reason, section 87ZI should not generally be triggered if an investigator requests a law practice or lawyer answer a question or produce a document to an investigator relating to how the law practice or lawyer sourced a claim, and the law practice complies with the request.

In his report dated 17 January 2017, Mr Douglas QC recommended MAIC be vested with powers to investigate claim farming activities, particularly the conduct of law practices and legal practitioners. Mr Douglas QC considered the ability to investigate involvement by law practices and legal practitioners in CTP claim farming was likely to be the most effective mechanism to destroy the claim farming market impacting the scheme.

However, in any attempt to investigate a law practice and legal practitioners as part of a special investigation, investigators may face claims that documents cannot be produced, or information cannot be given because of legal professional privilege. Although it is acknowledged that law practices or legal practitioners will make privilege claims genuinely to protect the interests of claimants they represent, a concern exists that in some cases legal practitioners might try to use their clients' privilege to conceal evidence of their own improper conduct.

For that reason, the intent of section 87ZI is to facilitate a special investigation. It enables special investigators to compel legal practitioners to disclose client privileged communication to prevent a special investigation into suspected contravention of the claim farming offences under section 74 or 75 being completely thwarted by legal practitioners who act for a claimant asserting privilege over their client's entire file. The intent of section 87ZI, as stated in the Explanatory Notes, is not to uncover full and frank communication between a lawyer and client about the client's claim under the scheme.[329]

Committee comment

The committee notes the QLS' concerns regarding the proposed provisions. However, the committee also notes the intent of the provision applies to investigations under certain circumstances and is not intended to undermine full and frank communication between lawyer and client.

4.1.1.4 Provision for authorised person to require information

Clause 19 inserts new ss 87RS and 87RT. These provisions empower an authorised person to require information if they reasonably believe a person has information relevant to a liability, offence or entitlement under the scheme.

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

These new provisions are based on an amalgamation of similar provisions (parts of ss 60 and 61) in the *Fair Trading Inspectors Act 2014* and existing s 87G of the Act. Note that the current maximum penalty in the Act is 50 penalty units. The maximum penalty under the provisions of the *Fair Trading Inspectors Act 2014* is 200 penalty units or one year's imprisonment.[330]

The explanatory notes provide the following justification:

The original policy intent of section 87G was to assist the Commission to investigate and combat fraud. This policy intent remains the same and the provision is still considered essential in enabling the Commission to fulfil its functions to develop and coordinate strategies to identify and combat fraud in or related to claims under the scheme. The provision still has regard to rights and liberties of individuals by allowing a person, under section 87RT, to refuse to give the information or produce a document if the person has a reasonable excuse. Furthermore, the

[329] Treasury, correspondence dated 17 July 2019, pp 2-3.

[330] Explanatory notes, p 17; *Fair Trading Inspectors Act 2014*, ss 60-61.

person does not commit an offence if the information or document sought is not relevant (section 87RT(3)).[331]

The provisions do largely mirror an existing provision in the Act (section 87G), noting that the maximum penalty for non-compliance has increased considerably.

The QLS submitted:

With respect to proposed section 87RS, we do not agree with the breadth of information that might be required by an authorised person in the absence of:

a) legal advice in relation to the consequences of providing this information; and

b) the obtaining of a warrant from the court.

Having regard to section 87RT(3) and the broad scope of matters on which information may be requested under proposed section 87RS(1), there may also be unintended consequences in the applicability of the offence in proposed section 87RT.[332]

The committee sought comment from Treasury to the submission of the QLS in respect to this provision, and for comment concerning the increase in the maximum penalty and proportionality of the new penalty. Treasury advised:

The maximum penalty amount under section 87RT (for section 87RS(2)), was increased from 50 penalty units to 200 penalty units to bring it in line with the Fair Trading Inspectors Act 2014, the legislation on which the extended enforcement powers have been modelled. The Fair Trading Inspectors Act 2014, section 61, imposes a penalty of 200 penalty units for contravening an information requirement.[333]

4.1.1.5 Recovery of costs

Clause 25 inserts new s 87ZO which allows the Commission, in certain circumstances, to recover the costs of, and incidental to, an investigation from the investigated person to which the organisation relates.

This provision re-enacts existing s 86 of the Act, but also extends its application to a law practice or lawyer that is acting or has acted for a client.[334]

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

The introduction of this provision might be seen to be unfair to an individual investigated under the Act.

The explanatory notes offer this justification:

… the provision balances the rights and liberties of individuals by not allowing the Commission to recover costs if the investigation established no irregularity on the part of the insurer or body corporate, or no evidence of a contravention by a law practice or lawyer of section 74(1) or (2) or 75. Furthermore, the Commission may only initiate a special investigation into the affairs of an insurer if it considers it desirable in the public interest or, in the case of a law practice, if it reasonably suspects that sections 74(1), 74(2) or 75 may have been contravened. Accordingly, it is considered in the public interest that the Commission have the discretion to consider whether an insurer or a law practice or lawyer should be liable for the cost of the investigation. These are

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331 Explanatory notes, p 18.

332 Submission 11, p 7.

333 Treasury, correspondence dated 17 July 2019, p 3.

334 Act, s 86. Section 86 has been unamended since its enactment in 1994 and is essentially limited to insurers or a body corporate, explanatory notes, p 19.

serious breaches and, in some instances, it may not be in the public interest for the Queensland community to bear the cost of a special investigation.[335]

4.1.1.6 Penalties and offences

Various clauses establish new offences and penalties. These provisions are set out at Appendix C of this report.

There is one increase proposed to an existing penalty: cl 13 amends s 64 to increase the current maximum penalty amount for a failure to comply with a condition of a licence from 150 penalty units to 300 penalty units.

The creation of new offences and penalties affects the rights and liberties of individuals, raising an issue of proportion and relevance.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, penalties and other consequences imposed by legislation are proportionate and relevant to the actions to which the consequences relate.[336]

Offences relating to claim farming

The explanatory notes give this justification for the offences and penalties in proposed ss 74 and 75:

These provisions are fundamental in ensuring claim farming does not become an accepted practice in the scheme and insurance industry. But neither of the offence provisions intend to restrict a claimant's access to compensation or reduce a claimant's entitlement to damages. Instead, both offence provisions aim to attack the claim farming business model by removing the financial incentive for persons to buy and sell referrals of claimants or potential claimants, or to contact Queensland residents to induce them to make a claim…

… the maximum penalty of 300 penalty units is considered proportionate to the seriousness of the offence and consistent with existing comparable offences in the legislation mentioned above for part 4.[337]

Offences relating to legal practice certificates

The explanatory notes give this justification for the creation of these offences:

These offences are key in deterring legal practitioners from engaging in claim farming. The provisions will ensure legal practitioners certify at various stages of the claim process that they are complying with the '50/50 rule' and the Act and are not bringing a claim because of engaging in claim farming. Requiring a law practice that is selling all or part of its practice's business to another law practice to also complete a law practice certificate ensures claim farming does not occur under the guise of law practices transferring or exchanging files. The requirement also gives the new law practice confidence that the referred claims have not been claim farmed.[338]

The explanatory notes state the maximum penalty of 300 units for these offences:

… is considered proportionate given the serious nature of the offences. The maximum penalty amount is also consistent with existing offences in other legislation, such as the anti-touting provisions of the Personal Injuries Proceedings Act 2002 (sections 67 and 68), and existing

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335 Explanatory notes, p 19.

336 Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

337 Explanatory notes, p 14. This last reference to legislation is to the *Personal Injuries Proceedings Act 2002* (PIPA) (ss 67 and 68), and existing provisions in the Act prohibiting inducements and discounting of CTP premiums (ss 96 and 97 respectively).

338 Explanatory notes, p 13.

provisions in the Act prohibiting inducements and discounting of CTP premiums (sections 96 and 97 respectively).[339]

The explanatory notes detail a possible alternative approach to the provisions in s 36D:

The conduct under section 36D may also be covered by section 193 … and section 194 … of the … Criminal Code. Section 193 applies to a person who makes a verified statement the person knows is false in a material particular when the person is required by law to make the statement in the form of a verified statement. A 'verified statement' is a statutory declaration made under the Oaths Act 1867. Unlike the offence under new section 36D, the offence under section 193 carries a maximum penalty of 7 years imprisonment. Section 194 prohibits making a declaration that the person knows to be false in a material particular, before a person authorised by law to take or receive declarations. A 'declaration' includes a statement and an affidavit. This offence also differs to section 36D in that it carries a maximum penalty of three years imprisonment.

Whilst it is possible for the Commission to rely on the application of sections 193 and 194 of the Criminal Code, it is considered preferable to include new section 36D in the Bill to provide an offence that has a penalty consistent with other offences applying to legal practitioners providing a law practice certificate, and to ensure the associated investigative, enforcement and procedural powers apply consistently to all the offences. By having the provision in the Act, it also ensures readers are aware of the offence for signing or giving a misleading law practice certificate.[340]

Offences in aid of enforcement powers

The explanatory notes give the following for the creation of these offences:

The proposed offences are considered necessary and justified to ensure authorised persons can carry out their functions and exercise their powers effectively and efficiently. These offences will enable authorised persons to continue to monitor compliance with the Act and investigate any suspected offences under the Act, minimise potential for fraudulent behaviour and assist in maintaining public confidence in the scheme.[341]

In relation to the penalties for these offences, the explanatory notes assert that they are 'generally consistent' with penalty amounts in state legislation for corresponding offences.[342]

Confidentiality offences

The explanatory notes give the following justification for the maximum penalty of 100 penalty units in the confidentiality provisions in Part 5A (proposed ss 87VA(1), 87VC(1) and 87Z(1)):

This penalty is considered appropriate and indispensable in protecting a person's criminal history report from unauthorised disclosure and preventing authorised persons directly or indirectly disclosing confidential information.[343]

Special investigations offences

Proposed ss 87ZH and 87ZP essentially replicate, with modifications, existing ss 78 and 87 of the Act respectively. Each of these offences currently provides for a maximum penalty of 300 penalty units or imprisonment for two years. These same maximum penalties apply to the new provisions. The explanatory notes state:

339 Explanatory notes, p 13.

340 Explanatory notes, p 13.

341 Explanatory notes, p 15.

342 Explanatory notes, p 15.

343 Explanatory notes, p 15.

> *Both the penalty amount and the term of imprisonment are considered justified given the detrimental effect a breach of these provisions would have by delaying and obstructing a special investigation.*[344]

In relation to the offence for an investigator to disclose confidential information created by proposed s 87ZS(1), the explanatory notes observe that the penalty is consistent with a like provision in the *Fair Trading Inspectors Act 2014*.[345]

Increase in an existing penalty

In relation to the increase in the maximum penalty in s 64 from 150 to 300 penalty units, the explanatory notes state:

> *One of the amendments proposed to the Regulation to support the Act amendments is to prescribe a condition that a licensed insurer must comply with the requirements set out in the claims management standards. To deter insurers from breaching the proposed new condition, it is proposed to increase the maximum penalty from 150 penalty units to 300 penalty units. The penalty increase makes section 64(6) consistent with other offence provisions for claim farming and for failing to provide a law practice certificate, which impose a maximum penalty of 300 penalty units, and is considered proportionate to the seriousness of the breach.*[346]

Committee comment

The committee is satisfied that the proposed new offences and penalties have sufficient regard for the rights and liberties of individuals in the circumstances.

4.1.2 Onus of proof

4.1.2.1 Liability for the acts of a representative

Section 76 deals with responsibility for the acts or omissions of a representative. It is aimed at assigning liability to a person (for example, a partner in a law practice) for the acts or omissions of the person's representative within the scope of the representative's actual or apparent authority.[347]

Under s 76(5), 'representative' means an employee or agent of an individual (which includes a partner of a partnership), or an executive officer, employee or agent of a corporation.

In effect, s 76 obviates the prosecution's obligation to prove the fault element and physical element of the claim farming offences (under ss 74(1) and (2) and 75) by:

- for the fault element – specifying it is enough to show the person's representative did or omitted to do the act (within the scope of the representative's actual or apparent authority) and had the 'state of mind',[348] and
- for the physical element – deeming the person to have done or omitted to have done the acts or omissions of the representative (within the scope of the representative's actual or apparent authority).[349]

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344 Explanatory notes, p 16.

345 Explanatory notes, p 16.

346 Explanatory notes, p 16.

347 Bill, cl 15.

348 'State of mind' includes the person's knowledge, intention, opinion or belief and the person's reasons for the intention, opinion, belief or purpose; explanatory notes, p 10.

349 Explanatory notes, p 10.

However, the provision creates a defence if the person proves the person could not have prevented the act or omission by exercising reasonable precautions and proper diligence.[350]

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[351]

The proposed cl 15 deems the person responsible for the representative's actions, if the act or omission was within the scope of the representative's actual or apparent authority. A person would need to prove that they had exercised reasonable precautions and proper diligence, meaning the onus of proof lies with the person.[352]

The explanatory notes recognise the reverse onus of proof and comment on the person being in the best position to disprove the guilt:

> *Reversing the onus of proof is considered the best way of striking a balance between, on the one hand, holding persons responsible for the serious conduct of their representatives (if that conduct is within the representative's actual or apparent authority) and, on the other hand, upholding persons' rights to rebut this presumption of guilt. A person can rebut this presumption of guilt by proving that despite taking reasonable precautions and exercising proper diligence the person could not have prevented the act or omission. In these circumstances, the person is in a better position to disprove guilt because of the person's position in the partnership or corporation. The provision also applies narrowly to only the claim farming offences and not all other offences under the Act.*[353]

One difficulty here is that this rationale does not address 'state of mind'. The committee sought comment from the Treasury on the proposed provision, and was advised:

> *Under section 76, 'state of mind' of a person includes the person's knowledge, intention, opinion, belief or purpose; and the person's reasons for the intention, opinion, belief or purpose. Section 76 uses the phrase 'exercise of reasonable precaution and proper diligence', which is consistent with current drafting practice, rather than the previously used phrase 'reasonable diligence'.*
>
> *Section 76 is based on section 139 of the Taxation Administration Act 2001. The latter section does not describe the conduct that would demonstrate a person could not, by the exercise of reasonable diligence, have prevented an act or omission in the commission of an offence against a tax law. Likewise, section 76 does not describe the conduct that would demonstrate that a person could not have prevented the commission of a claim farming offence by a representative of the person, by exercising 'reasonable precaution and proper diligence'.*
>
> *Treasury considered other potential precedent provisions in the statute, such as section 28 of the Biosecurity Act 2014. That section lists ways in which a person may show that he or she has exercised due diligence, including for example, by proving that the person took the precautions that were reasonable in all the circumstances to prevent the spread of any biosecurity matter. Section 28 applies in 'a proceeding for an offence against the general biosecurity obligation offence provision', which is a broad statutory duty that requires any person dealing with biosecurity matters or carriers to take reasonable and practical measures to prevent or minimise a biosecurity risk of which the person is, or should be, aware.*
>
> *The non-prescriptive approach to 'reasonable precaution and proper diligence' allows employers and supervising principals to rely on the defence in a wide variety of circumstances. This*

350 Explanatory notes, p 10.

351 LSA, s 4(3)(d).

352 Explanatory notes, p 9.

353 Explanatory notes, p 10.

approach was considered appropriate give[n] that little is known about how claim farmers identify potential claimants under the scheme. Also, claim farming is continually evolving and does not have a single business model. By leaving the question of what constitutes 'reasonable precaution and proper diligence' to be decided in the individual facts and circumstances of a prosecution means the defence can be relied on by various employers and supervising principals.

For example, a law practice might be able to avoid liability for a claim farming offence under section 74(1) or (2) or 75 committed by its employee by showing that in every case in which a prospective client sought to retain the practice to represent the claimant in a claim, the practice took steps to elicit information about whether the prospective client had been referred by a claim farmer. Such steps might, for example, include asking the prospective client what prompted him or her to consider making a claim and why he or she has chosen to contact that law practice.

In contrast, if employees of a tow truck operator were found to have been referring motor vehicle accident victims to a specific law practice, the operator might show that it instructed all its employees:

- *not to recommend to, or discuss with, victims any individual law practices or legal practitioners who could help the victims make a claim; and*
- *not to provide personal information about victims to a third party in exchange for payment or another kind of benefit.*

Treasury considers that section 76 balances the Bill's policy objective of stopping claim farming by ensuring that an employer or supervising principal who tacitly directs or approves its employees or agents committing a claim farming offence does not easily escape liability, while also ensuring that the provision does not automatically capture innocent employers or principals.[354]

4.1.2.2 Reasonable excuse provisions

The Bill creates numerous offences. Some of these make it an offence for a person to do certain acts unless the person 'has a reasonable excuse'.

In some cases the clause gives an example of what would, or would not, constitute a reasonable excuse. Some examples include:

- Section 87RH Offence to contravene seizure requirement:

  A person must comply with a requirement made of the person under s 87RG(2)(c) unless the person has a reasonable excuse.

  Maximum penalty – 50 penalty units.

- Section 87RI Offence to interfere:

  (1) If access to a seized thing is restricted under s 87RG, a person must not tamper with the thing or with anything used to restrict access to the thing without –

  (a) an authorised person's approval; or

  (b) a reasonable excuse.

  Maximum penalty – 50 penalty units.

  (2) If access to a place is restricted under s 87RG, a person must not enter the place in contravention of the restriction or tamper with anything used to restrict access to the place without —

[354] Treasury, correspondence dated 17 July 2019, pp 3-4.

(a) an authorised person's approval; or

(b) a reasonable excuse

Maximum penalty—50 penalty units.

- Section 87RR Offence to contravene personal details requirement:

(1) A person of whom a personal details requirement has been made must comply with the requirement unless the person has a reasonable excuse.

Maximum penalty—50 penalty units.

- Section 87RT Offence to contravene information requirement:

(1) A person of whom a requirement is made under s 87RS(2) must comply with the requirement unless the person has a reasonable excuse.

Maximum penalty—200 penalty units.

- Section 87RY Obstructing authorised person:

(1) A person must not obstruct an authorised person exercising a power, or someone helping an authorised person exercising a power, unless the person has a reasonable excuse.

The provisions provided as examples above may be seen to reverse the onus of proof. All these offences provide that a person does not commit an offence if the person has a reasonable excuse. The person bears the onus of proof to show that they had a reasonable excuse.

The committee requested comment from Treasury on the issue that an alleged offender may have to satisfy the evidential onus of proof for any defence or excuse they raise in providing a justification for the reasonable excuse provisions within proposed ss 87H, 87RI, 87RR, 87RT and 87RY. Treasury advised the committee:

Sections 87RC, 87RH, 87RI and 87RR, 87RT and 87RY require compliance unless a person has a 'reasonable excuse'.

Section 87RC makes it an offence for a person to contravene a help requirement made under section 87RB. It is a reasonable excuse for an individual not to comply if complying might tend to incriminate the individual or expose the individual to a penalty.

Section 87RH requires a person to comply with a requirement made under section 87RG (Power to secure a seized thing).

Section 87RI provides that if access to a seized thing, or access to a place, is restricted the person must not tamper with the thing or enter the place without an authorised person's approval or a reasonable excuse.

Section 87RR requires a person of whom a personal details requirement has been made to comply with the requirement unless the person has a reasonable excuse.

Section 87RT makes it an offence for a person not to comply with an information requirement made under section 87RS(2) unless the person has a reasonable excuse.

Section 87RY similarly makes it an offence for a person to obstruct an authorised officer exercising a power (or someone helping an authorised officer), unless the person has a reasonable excuse.[355]

[355] Treasury, correspondence dated 17 July 2019, pp 4-5.

Treasury further stated:

> *In these cases, the provisions are considered justified because they express clear grounds for liability but also stipulate specific exceptions. It is therefore reasonable that the person seeking an exception from the requirement should bear the onus of proof.*
>
> *For example, section 76 of the Justices Act 1886 outlines that it is considered appropriate in such cases that the onus of proving the exception on the balance of probabilities lies with the person seeking to rely on the exception.*[356]

Committee comment

The committee notes the additional information provided by Treasury and is satisfied the onus of proof and reasonable excuse provisions are justified in the circumstances prescribed by the provisions in the Bill.

4.1.3 Power to enter premises

The Bill provides for a wide range of powers for 'authorised persons', or investigators.

Proposed s 87G is a power of entry provision. Entry can be by consent of the occupier or upon warrant but neither consent nor a warrant is required:

- if it is a public place, during times it is open to the public, or
- it is a licensed insurer's premises and is open for carrying on business or otherwise open for entry.[357]

Neither of these listed situations authorise entry to premises used as a residence. The Bill provides that any consent must be an informed consent.[358]

Authorised persons have a range of powers which they can exercise after an entry is made. Proposed s 87RA provides that an authorised person may search, inspect, examine, film, take a thing for examination, place an identifying mark, take an extract or copy from a document, produce an image from an electronic document and remain at the place for the time necessary to achieve the purpose of the entry.

If an authorised person takes a document from the place to copy it, they must return it to the place as soon as practicable. If an authorised person takes an article or device from the place that is reasonably capable of producing a document from an electronic document, they must produce the document and return the article or device to the place as soon as practicable.[359]

Proposed s 87RB provides that an authorised person may make a 'help requirement' of an occupier or person at the place to give the authorised person reasonable help to exercise a general power, including, for example, to produce a document or give information. Proposed s 87R makes it an offence to fail to comply, unless the person has a reasonable excuse, with a maximum penalty of 200 penalty units.

Under proposed s 87R(2), it is a reasonable excuse for an individual not to comply with a help requirement if complying might tend to incriminate the individual or expose the individual to a penalty.

Proposed s 87RE allows an authorised person who is authorised to enter a place with consent or by warrant to seize a thing if they reasonably suspect the thing is evidence of an offence against the Act or the National Injury Act and the seizure is consistent with the purpose of entry. An authorised person

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356 Treasury, correspondence dated 17 July 2019, p 5.

357 Explanatory notes, p 30.

358 Bill, cl 19, s 87G referring to s 87Q.

359 Bill, cl 16, s 83.

may also seize anything else at the place if the inspector reasonably suspects the thing is evidence of an offence against the Act and the National Injury Act and the seizure is necessary to prevent the thing being hidden, lost or stolen, or if the authorised person reasonably suspects the thing has just been used in committing an offence against the Act.

Proposed s 87RQ provides an authorised person with the power to require a person to provide their name and residential address:

- if the authorised person finds the person committing an offence against the Act or the National Injury Act
- in circumstances that lead the authorised person to reasonably suspect the person has just committed an offence against the Act or the National Injury Act, or
- the authorised person has information that leads the inspector to reasonably suspect an offence has just been committed.

The reasonable suspicion threshold is included for name and address powers across a range of Acts. Failure to comply with the requirement without a reasonable excuse carries a maximum penalty of 50 penalty units.[360]

Proposed s 87RS provides that an authorised person may require a person to provide certain information by a stated reasonable time, if the authorised person reasonably believes the person has information relevant to any of these matters:

- a liability under the statutory insurance scheme
- an entitlement under the statutory insurance scheme
- an offence the authorised person reasonably believes has been committed against the Act or the National Injury Act.

Whether legislation has sufficient regard to the rights and liberties of the individual depends on whether, for example, it confers power to enter premises and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.[361]

Power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or other judicial officer. Legislation should confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge. This principle supports a long established rule of common law that protects the property of citizens.[362]

The explanatory notes provide this justification for the power of entry and associated powers:

> *It is considered the Bill has adequate safeguards to ensure the power of entry is not abused. For example, by requiring entry with the occupier's consent, specifying the occupier need not consent and by allowing the occupier to withdraw consent at any time. In addition, an authorised person can only exercise the power in certain circumstances by following specified processes, for instance informing the occupier of specified matters when entering the place. Moreover, an authorised person bears the onus of proving he or she entered the place in a lawful manner. The proposed suite of powers is considered proportionate to the contraventions that may be investigated and are typical of the powers available to authorised persons under Queensland legislation.*[363]

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360 Bill, cl 19, s 87RR.

361 LSA, s 4(3)(e).

362 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 44.

363 Explanatory notes, p 10.

The explanatory notes offer a general justification for the increased investigative powers:

> *The investigative powers under amended part 5A and new part 5B range from less to more intrusive. Given the serious nature of claim farming, it important to equip authorised persons and investigators with adequate powers to properly conduct an effective investigation.*[364]

The explanatory notes state:

> *When deciding what powers should be conferred on authorities, consideration must be given to the extent to which the power is capable of abuse or may otherwise be insufficiently sensitive to the rights and liberties of individuals.*
>
> *…*
>
> *Whilst these powers are extensive, they are not capable of abuse and are sensitive to the rights and liberties of individuals as they have been drafted with fundamental legislative principles in mind.*[365]

There are safeguards referenced in the explanatory notes that include:

- authorising entry to a place of residence only with an occupier's consent or a warrant
- requiring an inspector to give an offence warning before exercising specific powers
- seizing things only with appropriate justification (such as by warrant or if the authorised person reasonably believes the thing is evidence of an offence against the Act)
- requiring an inspector to give a receipt for a seized thing
- allowing the owner of a seized thing to have access to it at any reasonable time
- allowing the return of seized things, unless there are reasonable grounds for its forfeiture, and
- requiring an inspector to give notice of damage to the owner of the thing, and allowing the owner to make a claim for compensation.[366]

The Bill provides for powers of entry, and a wide range of consequential powers, including powers of search and seizure and potential forfeiture of property, which are not subject to consent or warrant.

The committee requested Treasury elaborate on the need for a power of entry without a warrant, and the threshold for the use of general powers on entry contained in the Bill. Treasury advised:

> *Proposed section 87G 'general power to enter places' and section 87RA 'general powers' are consistent with other Queensland legislation where investigators or authorised persons are appointed for specific purposes. Similar legislative provisions include sections 22 and 38 of the Fair Trading Inspectors Act 2014, sections 495 and 500 of the Heavy Vehicle National Law Act 2012 and sections 150BI and 135 of the Local Government Act 2009.*
>
> *MAIC's enforcement powers are being strengthened under the Bill to allow for the investigation of claim farming offences, which are different to existing offences under the Act; claim farming practices are still largely surreptitious and adaptive in nature. The power of entry under the Bill ensures authorised officers are equipped with adequate powers to properly conduct an effective investigation into claim farming offences. The Bill provides the standard safeguards for investigative powers.*

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364 Explanatory notes, p 19.

365 Explanatory notes, p 19.

366 Explanatory notes, p 19.

The amending of 'if the authorised person believes on reasonable grounds' to 'if the authorised person reasonably believes' is of a drafting nature only. Clause 4 of the Bill defines 'reasonably believes' as 'believes on grounds that are reasonable in the circumstances.'[367]

Committee comment

The committee notes the safeguards incorporated in the Bill with respect to the provisions relating to powers of entry without a warrant and the threshold for the use of general powers on entry contained in the Bill. The committee is satisfied the reduced threshold of a 'reasonable suspicion' is warranted under the circumstances prescribed in the Bill.

4.1.3.1 Protection against self-incrimination

Under s 87ZI(1) an investigated person or an associated person is not excused from answering a question or producing a document as required by an investigator if doing so might tend to incriminate the person or expose the person to a penalty.[368]

Whether legislation has sufficient regard to the rights and liberties of the individual depends on whether, for example, it provides appropriate protection against self-incrimination.[369]

The abrogation of the protection against self-incrimination exists under current s 79 of the Act in relation to an insurer. Proposed new s 87ZI will also extend to a law practice or lawyer that is acting or has acted for a claimant.

The protection against self-incrimination would be abrogated in the case of a special investigation into the affairs of an insurer, or the 'relevant affairs' of a law practice or lawyer that is acting or has acted for a claimant.

Under s 87ZC(8), 'relevant affairs' of an investigated person:

- means matters relating to:
    - how the investigated person received or was referred instructions for a claim, and
    - how the investigated person gave or referred instructions for a claim, and
- includes a transaction involving the investigated person (or an associated person for the investigated person) relevant to the receipt or referral of instructions.

Thus, according to the explanatory notes:

… the investigation would not be a blanket investigation into all the affairs of a law practice. Also, the Commission may only appoint an investigator if the Commission reasonably suspects an investigated person, or an associated person for the investigated person, may have contravened section 74(1) or (2) or section 75. While in the case of an insurer, the Commission may only appoint an investigator if it is desirable in the public interest.[370]

The principle that legislation should provide appropriate protection against self-incrimination:

… has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself.[371]

Denial of the protection afforded by the privilege against self-incrimination is only potentially justifiable if:

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367 Treasury, correspondence dated 17 July 2019, p 7.

368 Bill, cl 25.

369 LSA s 4(3)(f).

370 Explanatory notes, p 11.

371 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 52.

- the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means
- the legislation prohibits use of the information obtained in prosecutions against the person, and
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming a right).[372]

In light of these factors, the committee notes that the explanatory notes state that the abrogation of the privilege is justified, given:

- the information or documents sought, or questions asked, relate to information that is likely within the investigated person's or associated person's knowledge and it would be difficult for the Commission to establish this evidence by alternative means
- s 87ZQ sufficiently limits the use of information or documents given in a special investigation by giving individuals an evidential immunity, and
- s 87ZQ does not require an individual who produces or gives information to satisfy any conditions before being entitled to rely on the immunity.[373]

Proposed s 87ZQ provides a limited immunity. It provides that if an individual gives or produces information or a document to an investigator:

> *Evidence of the information or document, and other evidence directly or indirectly derived from the information or document, is not admissible against the individual in any proceeding to the extent it tends to incriminate the individual, or expose the individual to a penalty, in the proceeding.*[374]

However, this does not apply to:

- a proceeding about the false or misleading nature of the information or anything in the document or in which the false or misleading nature of the information or document is relevant evidence, or
- a proceeding for an offence against sections (s 36A, 36D, 36E, 37AB, 39A, 41A, 74(1) or (2) or 75).[375]

As noted, the abrogation of the privilege exists in the current s 79, which will be repealed by virtue of cl 14 if the Bill is passed.

4.1.3.2 Immunity from proceedings

Clause 18 amends the current s 87F of the Act to extend an existing protection from civil liability to a person acting under the authority or direction of an authorised person.

Section 87F currently states:

> *(1) An authorised person does not incur civil liability for an act done, or omission made, honestly and without negligence under this Act.*

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372 Scrutiny of Legislation Committee, *Alert Digest* 1 of 2000, p 7, para 57; *Alert Digest* 13 of 1999, p 31; and *Alert Digest* 4 of 1999, p 9, para 1.60.

373 Explanatory notes, p 11.

374 Explanatory notes, p 6.

375 Explanatory notes, p 36.

(2) If subsection (1) prevents a civil liability attaching to an authorised person, the liability attaches instead to the commission.

The amendment replaces the existing references to 'authorised person' with 'designated person', which will include both an authorised person and a person acting under the authority or direction of an authorised person.

The explanatory notes state that the extended application of the current immunity was necessitated by the expanded enforcement powers in the Bill, which give an authorised person the power to authorise or direct another person to provide help in exercising a power.[376]

One of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding, conferral of immunity is appropriate in certain situations.[377]

Three features of this provision can be noted:

- an immunity provision is more acceptable if it does not extinguish liability entirely, but instead shifts liability to the state, thus the latter is effectively the case here, with liability shifting to the Commission
- an immunity provision should not extend to liability for dishonesty or negligence, and in the Bill, the immunity is for an act done, or omission made, honestly and without negligence under the Act, and
- the clause is extending an existing immunity to a wider class of persons, but not its scope.

Committee comment

Given that the clause is extending an existing immunity, the committee is satisfied that there is adequate justification for the extension of immunity.

4.1.4 Institution of Parliament

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament.

4.1.4.1 Delegation of legislative power

Clause 25 introduces new s 87ZC(2). This provision states that the Commission may appoint an investigator to investigate the relevant affairs of either of the following entities:

- a law practice or lawyer that is acting or has acted for a claimant, and
- an entity prescribed by regulation for this section.

The new provision allows the Commission to investigate an entity that is not prescribed in the Act. Rather, the entity will be named in regulation. It is arguable whether the naming of the entity would be better placed in an Act rather than regulation, particularly given that the entity is subject to an investigation.

In this regard, the explanatory notes state:

> *The power to delegate prescribing this matter is considered necessary and practical given the evolving nature of the claim farming business model. The claim farming offence provisions and section 87ZC(2)(b) intend to capture a broad range of persons or entities who might engage in claim farming. These persons or entities (in addition to legal practitioners and law practices) include marketing services, allied health services, claims-assistance or claims-management*

[376] Explanatory notes, p 11.

[377] OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 64; Scrutiny of legislation Committee, *Alert Digest* 1 of 1998, p 5.

> *services, 'spun-off' or inhouse marketing services of a law firm, 'spun-off' or in-house services of an insurer themselves. The concern is that, without a regulation-making power, once Parliament enacts the Bill other claim farming business models will emerge and defeat the policy intent. The regulation-making power will enable the Bill to achieve its policy objective of stopping claim farming, irrespective of the claim farming business models that may emerge.*[378]

This justification centres on the need to address the 'evolving nature' of claim farming. The issue is whether amendment to principal legislation would be more appropriate and sufficient to meet this need for flexibility. In this respect, the QLS expressed concern at 'an entity' being prescribed by regulation and observed:

> *In effect, the bill delegates the special investigation power under Part 5B to the Executive by enabling regulations to amend the application or effect of the Act.*
>
> *Although we note the policy reasoning behind this delegation is due to the "evolving nature of the claim farming business model', the Society is of the view that given the nature of the offences imposed by the bill, the extent of the investigator's powers should be the subject of legislative scrutiny.*[379]

The explanatory notes argue that the power to delegate prescribing entities for investigation is 'considered necessary and practical given the evolving nature of the claim farming business model'[380] and that the provision is intended to capture a broad range of persons or entities who might engage in claim farming:

> *These persons or entities (in addition to legal practitioners and law practices) include marketing services, allied health services, claims-assistance or claims-management services, 'spun-off' or in-house marketing services of a law firm, 'spun-off' or in-house services of an insurer themselves.*[381]

The committee sought clarification from the Treasury on why the additional entities listed as examples in the explanatory notes could not be captured in the provisions of the Bill, and was advised:

> *Given the illusive and evolving nature of claim farming, it was considered necessary to include a regulation-making power to allow other entities to be prescribed under part 5B in a timely manner. No entities have been prescribed under the amendments to the Motor Accident Insurance Regulation 2018 (Regulation) in the Bill. If an entity were to be prescribed in the future, it would be subject to Ministerial approval and any necessary consultation with relevant stakeholders.*[382]

4.1.4.2 Scrutiny of the Legislative Assembly

Clause 5(2) adds to the functions of the Commission set out in s 10 of the Act by proposing to '*establish and revise standards about the proper management of claims with which licensed insurers must comply*'.[383]

Clause 5(7) would add these provisions to s 10:

- the commission must publish such standards on its website (s 10(3)), and

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[378] Explanatory notes, p 9.

[379] Submission 11, p 9.

[380] Explanatory notes, p 9.

[381] Explanatory notes, p 9.

[382] Treasury, correspondence dated 17 July 2019, p 5.

[383] Explanatory notes, p 12.

- such a standard applies to the management of a claim from the day the standard is published, whether the claim was made before or after that day (s 10(4)).

The explanatory notes state:

> *Given this power would exist without the scrutiny of the Legislative Assembly, the power may be considered inconsistent with fundamental legislative principles. However, the Commission will limit the content of the proposed standards to only the proper management of claims. Therefore, given this limitation, an abuse of the power is unlikely.*[384]
>
> *…*
>
> *The publication of the standards on the Commission's website will also mitigate any potential breach of fundamental legislative principles as licensed insurers will be able to readily access the standards to know and understand their obligations and alter their behaviour as needed. The Commission will also provide insurers with reasonable notice of new standards to ensure compliance is fair and achievable. This type of power to issue, and enforce compliance with, standards or guidelines (for example by licensees) is commonly found in legislation governing regulatory bodies.*[385]

The publication of standards on the commission's website is mandated by s 10(3). The committee sought comment from Treasury on how the Commission would inform insurers of the publication of a new standard. The committee was advised:

> *One of the objects of the Act is to provide for licensing and supervision of insurers providing CTP insurance under the scheme. An associated function for MAIC is to supervise insurers operating under the scheme, and to monitor the management of claims by insurers under the scheme. MAIC already has the legislative power to issue prudential standards under section 10(1)(b) of the Act, as well as rehabilitation standards and guidelines. To date, MAIC has not issued a prudential standard because it relies on the Australian Prudential Regulation Authority setting those standards for general insurers.*
>
> *Under schedule 4, part 2, section 4 of the Regulation, MAIC may issue rehabilitation standards and guidelines for insurers with respect to their rehabilitation obligations to injured claimants. MAIC, in consultation with insurers and health professionals, has developed rehabilitation standards to ensure an injured claimant receives timely, appropriate and reasonable rehabilitation, regardless of which CTP insurer is managing their claim. These standards are available on MAIC's website.*
>
> *MAIC has issued six guidelines between 1994 and 1998 aimed at helping insurers in how to interpret or apply the Act to their business operations. However, these guidelines do not have the same weight or implications as a standard.*
>
> *The power to issue and enforce compliance with claims management standards is consistent with the practice of regulatory authorities in other jurisdictions. For example, NSW's State Insurance Regulatory Authority's power to issue claims guidelines with respect to any matter that is authorised or required by its Act is found in section 10.2 of the Motor Accident Injuries Act 2017 (NSW), while section 10. 7 makes it a condition of an insurer's licence under that Act that the insurer comply with relevant provisions of Motor Accident Guidelines.*
>
> *The methods by which CTP insurers manage claims can encourage or deter the pursuit of claims and can have a significant impact on the long-term viability of the scheme. The establishment of a set of binding standards with which licensed insurers must comply will support and encourage insurers to adopt a consistent approach that best detects and manages claims suspected of being*

[384] Explanatory notes, p 12

[385] Explanatory notes, p 12.

farmed. Increasing the existing maximum penalty amount for breaching a licence condition from 150 penalty units to 300 penalty units will encourage compliance and is consistent with other penalties for offences that have, or may have, an adverse effect on the financial stability of the scheme.

MAIC regularly meets with licensed insurers, both on an individual basis, as well as collectively, to discuss a range of scheme trends and developments. It is envisaged similar communication channels will be utilised by MAIC to engage with insurers and seek their feedback on any proposed claims management standards. MAIC will publish these standards on its website, but only after it gives reasonable notice to insurers and only after undertaking extensive consultation to ensure compliance is both fair and achievable. A balanced approach will be adopted in terms of allowing insurers sufficient time for staff training or potential IT system changes before a standard takes effect with the need for the standard to be adopted as soon as practicable in order to have the desired effect on claims management practices.

Treasury considers MAIC's ability to establish and revise standards about the proper management of claims with which licensed insurers must comply does not have retrospective effect. The standards will apply to claims on foot but only prospectively to conduct from the date of publication.[386]

The committee also sought clarification from Treasury concerning new standards and any additional or differing requirements for insurers in relation to claims made prior to the publication of the standard. Treasury advised the committee:

In relation to existing claims made before the publication of a claims management standard, insurers are expected to continue to comply with their existing legislative and regulatory obligations under the Act and the Regulation.

MAIC issuing and publishing claim management standards will help insurers by providing guidance on best practice for claims management. It will also provide certainty and consistency across the industry in how to manage claims, including those claims suspected of claim farming activity. Claims management standards will also enable insurers to establish sound processes and provide consistent staff training.

While a licensed insurer may voluntarily choose to adopt published claims management standards to the management of existing claims, the standard will only apply to prospective conduct.[387]

Treasury also advised the committee of the mechanisms in place for Treasury to consult with insurers on the making of standards:

As is current practice, MAIC have regular face-to-face meetings with licensed insurers, both on an individual basis, as well as collectively, to discuss a range of scheme trends and developments. Industry meetings are generally scheduled on a quarterly basis and performance benchmark meetings are held with individual insurers half-yearly. Ad-hoc meetings occur as needed throughout the year, whether initiated by MAIC or at the request of insurers. Email communications are also an effective and low-cost means of ensuring timely, open and two-way dialogue between licensed insurers and MAIC.

MAIC has, from time to time, convened training sessions for insurers' claims staff to discuss specific elements of claim management, for example, with respect to claim fraud detection and management.

386 Treasury, correspondence dated 17 July 2019, pp 5-6.

387 Treasury, correspondence dated 17 July 2019, pp 6-7.

It is proposed that similar mechanisms will be used to consult with insurers in relation to claims management standards. Claims management standards will only be published on MAIC's website following adequate notice and extensive consultation with insurers to ensure compliance is fair and achievable.[388]

4.1.4.3 Constitutional validity of extraterritorial application

Clause 15 inserts new Part 5AA, including s 87 which states that, for new Part 5AA:

(1) This part, other than section 78, applies both within and outside Queensland.

(2) This part applies outside Queensland to the full extent of the extraterritorial legislative power of the Parliament.

Clause 24 inserts new ss 87Y and 87ZR. Section 87Y states that, for Part 5A:

(1) This part applies both within and outside Queensland to the extent necessary for any investigation of a contravention of section 74(1) or (2) or 75.

(2) For subsection (1), this part applies outside Queensland to the full extent of the extraterritorial legislative power of the Parliament.

Section 87ZR states that, for Part 5A:

(1) This part applies both within and outside Queensland to the extent necessary for any investigation of:

(a) a contravention of section 36A, 36D, 36E, 37AB, 39A, 41A, 74(1) or (2) or 75; or

(b) the affairs of an investigated person under section 87ZC(2).

(2) For subsection (1), this part applies outside Queensland to the full extent of the extraterritorial legislative power of the Parliament.

The wording of the provisions here is expressly aimed at establishing a link to Queensland and a clear intention for there to be an extraterritorial effect. The explanatory notes state:

The constitutional validity of sections 80, 87Y and 87ZR may be called into question because they give extraterritorial application to the claim farming offences, the '50/50 rule', and the enforcement and special investigation powers to the extent necessary to investigate certain contraventions.

However, sections 80, 87Y and 87ZR are considered to be a valid exercise of the power of the Queensland Parliament to legislate with extraterritorial effect. This is because the sections are worded clearly and unambiguously to displace the legal assumption that legislation is assumed not to have extraterritorial effect, and to establish a sufficient connection between Queensland and the matter regulated by the claim farming offences, section 79 (which applies the '50/50 rule'), and the enforcement and special investigation powers. All the provisions being given extraterritorial effect concern a 'claim'.

A 'claim' is a claim for damages on a scheme that is established and regulated under Queensland legislation and a scheme that applies to vehicles registered under Queensland law.[389]

The explanatory notes also state:

[388] Treasury, correspondence dated 17 July 2019, p 7.

[389] Explanatory notes, p 22.

Also, as the claim farming offences apply extraterritorially, the conduct being prevented or restrained under the injunction power (section 78) may occur outside Queensland. Section 78 makes clear that it applies to conduct 'whether in Queensland or elsewhere'.[390]

4.1.5 Regard for the institutional integrity of the courts and judicial independence

4.1.5.1 Delegation of legislative power

Clause 19 inserts s 87RW in the Act. It provides that:

(1) A person may claim compensation from the commission if the person incurs loss because of the exercise, or purported exercise, of a power by or for an authorised person including a loss arising from compliance with a requirement made of the person under division 3.[391]

Applications for compensation are to be made to a court, and s 87RW(5) and (6) provide:

(5) In considering whether it is just to order compensation, the court must have regard to any relevant offence committed by the claimant.

(6) A regulation may prescribe other matters that may, or must, be taken into account by the court when considering whether it is just to order compensation.

In short, s 87RW(6) would allow a regulation to prescribe matters that a court may, or must, have regard to in making determinations on such compensation claims.

A Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons.[392]

Section 87RW(6)) would allow the executive to specify matters (which are not set out or limited in the Act as amended as proposed) that a court *must* take into account in considering a compensation matter. It could be argued that it is inappropriate for such matters to be provided for in regulation.

The explanatory notes do not refer to any issue of FLP arising in relation to the provision. As such there is no indication of the reason for this aspect being left to regulation, or why the provision includes a 'mandatory' element.

The QLS submitted that the provision should be amended:

… to remove the words "or must" so that a court has discretion as to matters to be taken into account when considering whether it is just to order compensation to a person.[393]

The committee notes advice provided by Treasury in respect to this provision:

Section 87RW(6) of the Bill replicates existing section 87P(5) of the Motor Accident Insurance Act 1994. There are presently no matters prescribed under section 87P(5) in the Motor Accident Insurance Regulation 2018 and Treasury is not aware of any instances where a matter has been prescribed under this section in the past.

This is a common provision in Queensland legislation containing investigatory powers. For example, section 67(6) of the Fair Trading Inspectors Act 2014, section 232 of the Health Ombudsman Act 2013 and section 313H of the Public Health Act 2005.[394]

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390 Explanatory notes, p 22.

391 Bill c 19, division 3.

392 LSA, s 4(4)(a).

393 Submission 11, p 8.

394 Treasury, correspondence dated 17 July 2019, p 8.

Committee comment

The committee is satisfied that the provisions in the Bill in relation to the delegation of legislative power, the scrutiny role of the Legislative Assembly, the constitutional validity of extraterritorial application and the integrity of the courts and judicial independence are appropriate, have sufficient regard to the institution of Parliament and the integrity of the courts.

Should the Bill be passed, the Committee considers an active program of education and information sharing be instigated by the Commission to industry stakeholders and the wider community in respect of new and proposed claims management standards.

4.2 Explanatory notes

Part 4 of the LSA relates to explanatory notes and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendix A – Submitters

Sub #	Submitter
001	Bicycle Queensland
002	Triathlon Queensland Ltd
003	Slater and Gordon Lawyers
004	Australian Lawyers Alliance Queensland
005	Asbestos Disease Support Society
006	Insurance Council of Australia
007	Suncorp (AAI Limited)
008	Tom O'Donnell
009	Shine Lawyers
010	Kerry Splatt
011	Queensland Law Society

Appendix B – Witnesses at the public briefing and public hearing

Public briefing — 1 July 2019

Queensland Treasury

- Mr Geoff Waite, Executive General Manager, Risk and Intelligence
- Mr Neil Singleton, Insurance Commissioner, Motor Accident Insurance Commission
- Ms Melissa Pignolet, Manager, Policy and Communication, Motor Accident Insurance Commission
- Ms Celica Bojorge, Principal Legal Officer

Public hearing — 22 July 2019

Insurance Council of Australia

- Tony Mobbs, General Manager, CTP – Allianz
- Jodie Crews, Manager, CTP Scheme Performance – RACQ

Suncorp (AAI Limited)

- Dan Wilkinson, Executive Manager Queensland CTP
- Chloe Job, Manager CTP and Specialty Claim Initiatives
- Sharyn Sullivan, Head of CTP Claims

Australian Lawyers Alliance Queensland

- Rodney Hodgson, National Director
- Greg Spinda, Queensland President

Slater and Gordon Lawyers

- Karen Murphy, General Manager, Queensland
- Peta Yujnovich, Practice Group Leader, Queensland
- Helen Vines, Special In House Counsel

Shine Lawyers

- Peter Gibson, General Manager – Queensland

O'Donnell Legal

- Tom O'Donnell, Principal

Splatt Lawyers

- Kerry Splatt, Principal

Queensland Law Society

- Bill Potts, President
- Michael Garbett, Chair, Accident Compensation/Tort Law Committee
- Luke Murphy, Deputy Chair, Accident Compensation/Tort Law Committee

Bar Association of Queensland

- Mr Keith Howe, Committee Member, General Litigation Committee

Queensland Treasury

- Neil Singleton, Insurance Commissioner, Motor Accident Insurance Commission
- Celica Bojorge, Principal Legal Officer
- Melissa Pignolet, Manager, Policy and Communication, Motor Accident Insurance Commission

Appendix C – Proposed new or amended offence provisions

[NOTE: ONE PENALTY UNIT = $133.45 AS OF 1 JULY 2019]

Clause	Offence	Proposed maximum penalty
6	**Insertion of new pt 4, div 2A** Part 4— *insert*— **Division 2A Law practice certificates generally and certificates before notice of claim** **36A Law practice retained by claimant before notice of claim** (2) The supervising principal of the law practice must— (a) complete a law practice certificate for the claim; and (b) give the certificate to the claimant before the claimant gives notice of the claim under section 37. Maximum penalty—300 penalty units. **36D False or misleading law practice certificate** (1) A supervising principal of a law practice must not sign, or give to a claimant or an insurer, a law practice certificate the principal knows is false or misleading in a material particular. Maximum penalty—300 penalty units. **36E Law practice referral through sale of business** (2) The supervising principal of the current practice must, before the referral occurs— (a) complete a law practice certificate for the claim; and (b) give the law practice certificate to the new practice and a copy of the certificate to the claimant. Maximum penalty—300 penalty units.	$40,035.00 $40,035.00 $40,035.00
9	**Insertion of new ss 37AA and 37AB** After section 37— *insert*— **37ABLaw practice retained by claimant after notice of claim** (2) The supervising principal of the law practice in relation to the claim must within 1 month after the practice is retained— (a) complete a law practice certificate for the claim; and (b) give the law practice certificate to the insurer. Maximum penalty—300 penalty units.	$40,035.00

11	**Insertion of new s 39A** After section 39— *insert—* **39A Duty to give law practice certificate if waiver or presumption** (4) The supervising principal must, within a month after the claimant is notified of the waiver or the presumption takes effect— (a) complete a law practice certificate for the claim; and (b) give the certificate to the insurer and a copy of the certificate to the claimant. Maximum penalty for subsection (4)—300 penalty units.	$40,035.00
12	**Insertion of new s 41A** After section 41— *insert—* **41A Supervising principal must complete law practice certificate on settlement or judgement** (2) The supervising principal of the law practice in relation to the claim must— (a) complete a law practice certificate for the claim; and (b) give the certificate to the insurer and a copy of the certificate to the claimant within 7 days after the acceptance or judgement. Maximum penalty—300 penalty units.	$40,035.00
13	**Amendment of s 64 (Conditions of licence)** Section 64(6), penalty— *omit, insert—* Maximum penalty—300 penalty units.	$40,035.00
15	**Insertion of new pt 5AA** After section 73— *insert—* **Part 5AA Referrals of claims and contact to solicit or induce claims** **74 Giving or receiving consideration for claim referrals** (1) A person (a **payer**) must not give, agree to give or allow or cause someone else to give consideration to another person (a **payee**) for a claim referral or potential claim referral. Maximum penalty—300 penalty units	$40,035.00

	(2) A person (also a **payee**) must not receive, agree to receive or allow or cause someone else to receive consideration from another person (also a **payer**) for a claim referral or potential claim referral. Maximum penalty—300 penalty units	$40,035.00
	75 Approach or contact for the purpose of making a claim (1) A person (the ***first person***) must not personally approach or contact another person (the ***second person***) and solicit or induce the second person to make a claim. Maximum penalty—300 penalty units.	$40,035.00
19	**Replacement of pt 5A, divs 2–4** Part 5A, divisions 2 to 4— *omit, insert—* **87RC Offence to contravene help requirement** (1) A person of whom a help requirement has been made must comply with the requirement unless the person has a reasonable excuse. Maximum penalty—200 penalty units. **87RH Offence to contravene seizure requirement** A person must comply with a requirement made of the person under section 87RG(2)(c) unless the person has a reasonable excuse. Maximum penalty—50 penalty units. **87RI Offence to interfere** (3) If access to a seized thing is restricted under section 87RG, a person must not tamper with the thing or with anything used to restrict access to the thing without— (c) an authorised person's approval; or (d) a reasonable excuse. Maximum penalty—50 penalty units. (4) If access to a place is restricted under section 87RG, a person must not enter the place in contravention of the restriction or tamper with anything used to restrict access to the place without— (c) an authorised person's approval; or (d) a reasonable excuse Maximum penalty—50 penalty units. **87RR Offence to contravene personal details requirement** (2) A person of whom a personal details requirement has been made must comply with the requirement unless the person has a reasonable excuse. Maximum penalty—50 penalty units.	$26,690.00 $6,672.50 $6,672.50 $6,672.50 $6,672.50

	87RT Offence to contravene information requirement (2) A person of whom a requirement is made under section 87RS(2) must comply with the requirement unless the person has a reasonable excuse. Maximum penalty—200 penalty units. **87RY Obstructing authorised person** ***(2)*** A person must not obstruct an authorised person exercising a power, or someone helping an authorised person exercising a power, unless the person has a reasonable excuse. Maximum penalty—50 penalty units. **87RZ Impersonating authorised person** A person must not impersonate an authorised person. Maximum penalty—50 penalty units.	$26,690.00 $6,672.50 $6,672.50
21	**Insertion of new s 87UA** After section 87U— *insert—* **87UA Giving authorised person false or misleading information** (1) A person must not, in relation to the administration of this Act or the National Injury Act, give an authorised person information the person knows is false or misleading in a material particular. Maximum penalty—150 penalty units.	$20,017.50
22	**Replacement of pt 5A, div 6 (Information from Commissioner of Police Service)** Part 5A, division 6— *omit, insert—* **87VA Confidentiality of criminal history under s 87V** (2) A person must not use or disclose to anyone else a report about a person's criminal history, or information contained in the report, given under section 87V unless the use or disclosure is allowed under subsection (2). Maximum penalty—100 penalty units. **87VC Confidentiality of information under s 87VB** (1) A person must not use or disclose, directly or indirectly, to anyone else information given under section 87VB unless the use or disclosure is allowed under subsection (2). Maximum penalty—100 penalty units.	$13,345.00 $13,345.00

24	**Insertion of new pt 5A, div 9** Part 5A— *insert—* **87Z Confidentiality of information** (1) An authorised person must not, whether directly or indirectly, disclose confidential information. Maximum penalty—100 penalty units.	 $13,345.00
25	**Insertion of new pt 5B** After section 87Z, as inserted by this Act— *insert—* **87ZH Examination of investigated person or associated person** (1) An investigated person or associated person for an investigated person must not— (c) when appearing before an investigator for examination under a relevant requirement— (i) state anything knowing it is false or misleading in a material particular; or (ii) fail to be sworn or to make an affirmation. Maximum penalty—300 penalty units or 2 years' imprisonment. **87ZP Other offences about investigations** (1) A person must not— (a) conceal, destroy, mutilate or alter a document of or about an investigated person whose affairs are being investigated under this part; or (b) send, cause to be sent or conspire with someone else to send out of the state a document mentioned in paragraph (a) or any property belonging to or under the control of the investigated person Maximum penalty—300 penalty units or 2 years' imprisonment. **87ZS Confidentiality of information** (1) An investigator must not, whether directly or indirectly, disclose confidential information. Maximum penalty—100 penalty units	 $40,035.00 or 2 years imprisonment $40,035.00 or 2 years imprisonment $13,345.00

Statement of reservation

NON-GOVERNMENT STATEMENT OF RESERVATION

The Non-Government Members of the Economic and Governance Committee wish to make the following Statement of Reservations and concerns regarding the Motor Accident Insurance and Other Legislation Amendment Bill 2019.

During the committee's consideration of the proposed Bill, repeated concerns were raised with the far-reaching provisions contained within new section 74 and 75 (clause 15). As per the below excerpts, hearing witnesses advised the committee that as the Bill stands it will lead to the consolidation of business to firms that have links to industrial organisations:

> *"... it seems to me that if referral arrangements are impacted then inevitably it will push consumers to those firms that either have links with industrial organisations and/or advertise a great deal or possibly those who have good links with community associations... The reality is that small firms cannot afford those types of relationships. As such, if referral arrangements were squeezed out, in my view it would squeeze small firms out of the market."*
>
> ***- O'DONNELL, Mr Tom, Principal, O'Donnell Legal, 22 July 2019***

Staggeringly, even the proposed Bill's draft explanatory notes directly allude to the blatant vested union interests it seeks to serve. The explanatory notes state that offences do not apply if the person is from an industrial organisation. Furthermore, the explanatory notes state that unions will be excluded from having their advertising or sponsorship deals captured by the offence proposed to specifically address payments received for claim referrals.

Industry also raised concerns with the perceived high $200 value limit for gifts and hospitality relating to persons giving or receiving referral of a claimant or potential claimant. The committee heard that this value limit may be exploited by unscrupulous operators still seeking to profit off claim farming. It is unsurprising to note that unions will be completely exempted from the $200 value limit for gifts and hospitality allowing industrial organisations to effectively generate uncapped earnings from claim referrals.

Stakeholders also raised concerns that the anti-competitive sections in the proposed Bill that benefit the union movement may adversely impact law firms operating in regional Queensland. Yet again the Brisbane centric Palaszczuk Labor Government is making it harder for regional Queenslanders to get ahead. Disappointingly, under this government regional Queenslanders always lose out to Labor's vested interests.

The proposed Bill is just another example of how the Palaszczuk Labor Government is legislating lock, stock and barrel for the union movement. There seems no public interest of exempting industrial organisations from the claim referral restrictions.

The LNP Members will further outline concerns with the policy objectives of the bill during its Second Reading debate.

Ray Stevens
Deputy Chair of Economics and Governance Committee
State Member for Mermaid Beach

Sam O'Connor
Member for Bonney

Dan Purdie
Member for Ninderry