

# Motor Accident Insurance and Other Legislation Amendment Bill 2019

## Explanatory Notes

### Short title

The short title of the Bill is the Motor Accident Insurance and Other Legislation Amendment Bill 2019.

### Policy objectives and the reasons for them

The Bill's policy objective is to stop claim farming. 'Claim farming', as it is known in the insurance industry, involves 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. 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 harass individuals to make a claim under the 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.

To stop this practice, the Bill will amend the Act to:

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

The Bill will also make a minor amendment to the Act to merge the definitions of *claim* and *motor vehicle accident claim* into one definition (*claim*) to avoid duplication, and a consequential amendment to the *Legal Profession Act 2007* to insert a note in section 347 directing readers to new section 79 of the Act. The note alerts readers section 347 applies to claims under the scheme.

To further support the Act amendments, the Bill will 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 the doctor physically examined the claimant; and
- compliance with claim management standards as a new condition on a licence.

The Honourable Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships announced on 24 July 2018 that the Queensland Government would introduce legislation to crack down on claim farming in the scheme. Claim farming has become a growing concern in Queensland. The Commission has received over 1000 complaints from members of the public concerned about privacy breaches and unsolicited contact from anonymous persons pressuring them into making a claim. To stop these types of nuisance calls, minimise the potential for fraudulent behaviour and protect the affordability and stability of Queensland's scheme, the Bill prohibits both the cold-calling and the business model to ensure claim farming no longer operates as a profitable business and imposes significant penalties on those who contravene the law.

Concurrent with complaints to the Commission about the growing number of harassing calls, there has been a 20 per cent increase in the number of legally-represented, minor injury claims, despite fewer road casualties and a reduction in reported motor vehicle accidents. Available claims data suggests claim farming is a contributing factor and may be promoting a rise in claims for minor injuries, which are often the target of claim farmers.

Whilst only a minority of legal professionals and service providers are suspected to be engaging in claim farming activity, such persons play a crucial role in enabling the continuation of the claim farmer business model. Without this legislative reform, claim farming activities are likely to escalate, resulting in more harassing cold-calls and privacy breaches.

## **Achievement of policy objectives**

The Bill will achieve its policy objective by implementing the reforms outlined below.

### ***Claim farming offences***

The Bill will create two offences. The first offence removes the financial incentive for persons to engage in claim farming while the second offence bans claim farmers from approaching or contacting members of the public to solicit or induce them to make a claim under the scheme.

The first offence under new section 74 (clause 15) will prohibit a person giving or receiving (or agreeing or allowing or causing another person to give or receive) consideration for the referral of a claimant or potential claimant. Consideration will mean 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 definition excludes money to prevent cash payments of up to \$200 for a claim referral. The second offence under new section 75 (clause 15) will prohibit a person personally approaching or contacting another person to solicit or induce that person to make a claim under the scheme. Personal approach or contact captures contact in person, by mail, telephone, email or other form of electronic communication.

Importantly, the first offence does not apply if a law practice (current practice) is selling all or part of its law practice's business to another practice (new 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. Furthermore, a 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. For example, an advertisement of a law practice's services on the website or newsletter of a sporting association or charity, or the distribution of promotional stationery or clothing that displays a law practice's logo to members of an industrial organisation.

Likewise, the second offence will not apply if the person making the contact either does not expect or intend to receive (and does not receive) consideration because of the approach or contact; or does not ask for someone else to receive consideration or agree to someone else receiving consideration because of the approach or contact. Equally, the prohibition will not apply if a law practice or lawyer is supplying, or has previously supplied, services to the person (or a relative of the person) contacted and reasonably believes the person will not object to the approach or contact. Nor will the offence apply if a law practice or lawyer approaches or contacts a person because a representative of a community legal service or industrial organisation (on behalf of the service or organisation) has asked the law practice or lawyer to do so and advised the person will not object to the approach or contact. Section 75(5) defines 'community legal service' by reference to the *Legal Profession Act 2007*, schedule 2, and 'industrial organisation' by reference to the *Industrial Relations Act 2016*.

### ***Injunction to prevent or restrain claim farming conduct***

New section 78 allows the Commission to apply for an injunction if it reasonably suspects a person has engaged in, or is proposing to engage in, conduct contravening those sections whether in Queensland or elsewhere. The Commission will therefore be able to take immediate action and apply to a court of competent jurisdiction for an injunction restraining the offending party from engaging in claim farming conduct. 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* (Qld) and the corresponding laws of the other States and Territories.

### ***Law practice certificate***

The Bill will also achieve its objective of stopping claim farming by requiring 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 section 36A, clause 6) or settled (new section 41A, clause 12) or when a new law practice is retained after a claim has been made (new section 37AB, clause 9). The obligation to complete a law practice certificate is unaffected by an insurer's ability to waive compliance or the presumption of compliance under section 39 (see new section 39A).

Furthermore, if a law practice (current practice) sells all or part of the law practice's business to another law practice (new law practice) before a claimant lodges a claim, the current law practice must give the new law practice a law practice certificate, and a copy to the claimant, before the referral occurs (new section 36E, clause 6). But, if the new practice does not receive

the law practice certificate from the current practice, it must, as soon as practicable, notify the Commission it has not been received.

A breach of an obligation to complete a law practice certificate attracts a maximum penalty of 300 penalty units under sections 36A(2), 36E(2), 37AB(2), 39A(4) and 41A(2).

In addition to the penalties under the offences, law practices may need to refund, or may not be entitled to recover, fees and disbursements paid in connection with a claim. Under new section 37AA (clause 9), if a law practice does not give a law practice certificate under section 36A and because of that failure the claimant cannot satisfy the requirements under section 37 and terminates in writing the engagement of the law practice, the principal must within 14 days of the termination refund to the claimant all fees and costs, including disbursements, the claimant paid in relation to the claim. And, under new section 77 (clause 15), if a law practice is convicted of an offence under section 41A the law practice is not entitled to recover any fees or costs including disbursements that relate to the provision of services for the claim and must repay any amount received.

New section 36B (clause 6) sets out the contents of a law practice certificate; it must state:

- the principal who has the primary responsibility for the conduct of the claim (supervising principal) and each associate of the law practice have not given or received (or agreed to give or receive or allowed or caused another person to give or receive) consideration in contravention of section 74 or personally approached or contacted a person other than as allowed under section 75; and
- the costs agreement satisfies new section 79 or the ‘50/50 rule’ under section 347 of the *Legal Profession Act 2007*.

But, if a claimant had retained a law practice to act in relation to the claimant’s claim before these provisions commenced and the claim has not been settled, decided or otherwise concluded immediately before commencement, new section 115 makes it clear that the certificate must state the matters in the two dot points above in section 36B only in relation to conduct on or after commencement.

The ‘50/50 rule’ specifies legal practitioners can only 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 or expenses. New section 79 (clause 15) specifies the maximum amount a law practice (including an interstate law practice) acting on a speculative basis may charge and recover from a client is the amount worked out using the formula in section 347 of the *Legal Profession Act 2007*. This requirement applies despite anything to the contrary contained in the costs agreement relating to the claim. Clause 1 in schedule 1 makes a consequential amendment to the *Legal Profession Act 2007* to insert a note in section 347 flagging section 79.

However, section 79 is subject to section 116, which specifies that section 79 does not apply to the legal costs a law practice may charge and recover from a client for work done in relation to the claim if the client retained the law practice before commencement to act in relation to the client’s speculative motor accident claim and the law practice continues to have the conduct of the claim on commencement.

Although new section 36B requires the supervising principal to sign a law practice certificate, if that supervising principal cannot sign the certificate under sections 36A, 36E, 37AB, 39A or

41A, or the notice mentioned under section 36E(3), new section 36C allows another principal of the law practice or, if a law practice has only one principal, another lawyer nominated by the supervising principal, to sign the certificate or notice.

New section 36D (clause 6) makes it an offence for a supervising principal of a law practice to sign, and give a claimant or an insurer, a law practice certificate the principal knows is false or misleading.

**Annexure 1** to these Explanatory Notes summarises the requirements for the law practice certificate.

### ***Enforcement and special investigations***

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

- replace existing investigative powers under part 5A with a modern suite of powers consistent with current legislation; and
- extend the Commission's existing special investigations power under division 3 of part 5 by creating a new part 5B 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.

The Commission's enhanced enforcement powers under amended part 5A will be balanced by allowing an affected person to apply to the Commission for internal review of an original decision made under sections 87RJ, 87RL or 87RN for an authorised officer to seize a thing or for the Commission to forfeit a seized thing to the State. The amendments also allow the person to appeal to the Magistrates Court if dissatisfied with the internal review decision. 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 the insurer's licence.

In extending the Commission's power under new part 5B to investigate the relevant affairs of a law practice or lawyer, it is crucial to ensure a special investigation into a potential contravention of a claim farming offence is not impeded by claims from law practices that documents cannot be produced or information cannot be given because it would disclose a 'privileged client communication'; that is, a communication protected from disclosure by legal professional privilege that operates for the benefit of a client of an investigated person. If law practices use legal professional privilege as a shield it can prolong and, as a result, increase the cost of the investigation or, worse, defeat the investigation altogether. For the Commission to perform its statutory functions it is important that, in a special investigation into a potential contravention of the claim farming offences, it can obtain information from law practices about how the law practice received, gave or was referred instructions for a claim. For that reason, the Bill proposes to partially abrogate legal professional privilege in the case of an investigation of a law practice or lawyer. The Bill will also abrogate the privilege against self-incrimination for both licensed insurers and law practices or lawyers.

However, the Bill will counterbalance the abrogation of both privileges by specifying that:

- if 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 against section 36A, 36D, 36E, 37AB, 39A, 41A, 74(1) or (2) or 75; and
- if an individual gives or produces information or a document—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, other than:
  - a proceeding about the false or misleading nature of the information or anything in the document; or
  - a proceeding for an offence against section 36A, 36D, 36E, 37AB, 39A, 41A, 74(1) or (2) or 75.

### ***Expanding the Commission’s functions and objects of Act***

In addition, to ensure the Commission’s functions are sufficiently broad to capture the new claim farming offences, the Bill will include the following new functions:

- to regulate the insurance scheme;
- to perform another function given to the Commission under the Act or another Act.

Along with these expanded functions, the Bill strengthens 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. The Commission will publish the standards on its website.

The Bill amends the Regulation to prescribe compliance with the standards as a new condition of the licence under section 64 of the Act and increases the penalty amount for non-compliance with a condition from 150 penalty units to 300 penalty units (clauses 30 and 13 respectively). An increased penalty will provide licensees with greater deterrence for breaching the new condition on their licence. The increased maximum penalty of 300 penalty units is also consistent with the maximum penalty proposed for the claim farming offences and offences for a failure to provide a law practice certificate.

As well as expanding the Commission’s functions, the Bill will amend the objects of the Act to encourage licensed insurers to act in a way that supports the integrity of, and public confidence in, the scheme. The Bill also clarifies potentially ambiguous wording in one of the existing objects of the Act under section 3(b) by splitting it into two new paragraphs.

### ***Extraterritorial application of reforms***

Furthermore, new sections 80, 87Y and 87ZR collectively will ensure the effectiveness of these reforms by specifying the following apply outside Queensland to the full extent of the extraterritorial power of the Parliament:

- sections 74 to 80 (other than section 78), which include the claim farming offences and compliance with the ‘50/50 rule’;
- the enforcement powers under part 5A, to the extent necessary to investigate a contravention of the claim farming offences under section 74(1) or (2) or 75;

- the special investigations power under part 5B, to the extent necessary to investigate a contravention of the law practice certificate offences, the claim farming offences under section 74(1) or (2) or 75, or the affairs of an investigated person under section 87ZC(2).

### ***Regulation amendments***

Finally, to ensure implementation of these reforms as a comprehensive package the Bill amends the Regulation to:

- require claimants to give extra information in the notice of claim;
- prescribe a claimant certificate as a document to accompany the notice of claim;
- specify the certificate signed by the doctor must state the doctor physically examined the claimant;
- prescribe compliance with the claim management standards as a condition on a licence;
- prescribe extra information insurers must include in returns; and
- make minor consequential amendments.

The information claimants will give under the notice of claim (section 17 of the Regulation) will help the Commission identify incidents of claim farming and fraudulent claims on the scheme. The information consists of:

- the claimant's Medicare number;
- whether the claimant needs an interpreter and, if so, the interpreter's language;
- 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 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 date a doctor first physically examined the claimant in relation to personal injury resulting from the accident; and
  - the unique identifier given to the doctor under the Health Practitioner Regulation National Law, section 233;
  - 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, section 233;
- if the claimant consulted a lawyer about the possibility of making a claim—the date the claimant first consulted the lawyer; and
- 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.

The claimant certificate being prescribed under section 18 of the Regulation will require the claimant to state:

- whether the claimant is making the claim on his or her 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, 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 in relation to the claim—whether the claimant knows if the law practice gave consideration to a person for the claimant’s referral to the law practice.

Under section 18, the claimant (if the claimant is at least 15 years) will also need to give a copy of identity documents, namely:

- a document issued by a government that is evidence of the claimant’s identity and contains a photograph of the claimant; or
- a passport-sized photograph of the claimant taken within the last 2 years and certified to be a photograph of the claimant by a person who has known the claimant for at least 1 year.

Furthermore, under section 18, the certificate signed by the doctor will need to state:

- that the doctor physically examined the patient; and
- whether the claimant was, at the date of the accident, an existing patient of the doctor or a medical practice in which the doctor practices or was practising.

The extra information claimants will give insurers through the notice of claim and the certificate signed by the doctor will in turn be given by insurers to the Commission in returns information under section 26 of the Regulation. For each notice of claim received, the Bill will prescribe insurers give the Commission ‘required claim details’:

- the claimant’s Medicare number; and
- if the notice of claim was accompanied by an identity document under section 18 that has a unique identifying number—the number.

And for a notice of claim that is not disputed (or a disputed notice of claim that is resolved), the Bill will prescribe ‘required further claim details’, which is substantially the same information listed above.

As noted above, to ensure licensed insurers meet requirements under the claims management standards, the Regulation will prescribe compliance as a condition of the licence. Lastly, the Bill consequentially amends the Regulation to replace references to ‘motor vehicle accident claim’ with ‘claim’ and to update cross-references to sections.

## **Alternative ways of achieving policy objectives**

Legislative amendment is the only way to:

- make it an offence for a person to engage in the practice of claim farming;
- make it an offence for a law practice to not complete and give a law practice certificate;
- expand the Commission’s functions, and its enforcement and special investigation powers; and
- consequentially amend the Act, Regulation and other Acts.

## **Estimated cost for government implementation**

The only estimated costs for government to implement the legislative reforms are the potential costs of an investigation under amended part 5A or new part 5B into potential contraventions of an offence provision under the Act. For part 5B, it is unlikely the Commission’s existing full-time employees would conduct such an investigation. The Commission is likely to engage



an external contractor and such an external contractor may include a specialised investigator, retired lawyer, barrister or Queen’s Counsel.

Aside from the cost of prosecuting a contravention of an offence provision, the Commission’s only other expected cost would be the cost of implementing a communication strategy to support the amendments in the Bill. This will involve a public awareness campaign along with education about the amendments and the way to deal with potential instances of claim farming. However, the Commission would fund the communications strategy within its existing budget.

## **Consistency with fundamental legislative principles**

The Bill is consistent with fundamental legislative principles, but potential breaches of the principles listed in the *Legislative Standards Act 1992*, and principles not listed in that Act, are discussed below.

***Legislation should allow the delegation of administrative powers only in appropriate cases and to appropriate persons—Legislative Standards Act 1992, section 4(3)(c)***

***Legislation should have sufficient regard to the institution of Parliament—Legislative Standards Act 1992, section 4(4)(a)***

The Bill delegates to the Executive, rather than the Parliament, the power to prescribe an entity that may be investigated under the special investigations power (new section 87ZC(2)(b) clause 25)). This provision may also be inconsistent with the fundamental legislative principle that legislation should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly, as it enables regulations to amend the application or effect of the Act.

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 services, ‘spun-off’ or inhouse marketing services of a law firm, ‘spun-off’ or in-house services of an insurer and insurers 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.

***Legislation should not reverse the onus of proof in criminal proceedings without adequate justification—Legislative Standards Act 1992, section 4(3)(d)***

New section 76 (clause 15) ascribes responsibility to a person (for example, a corporation or 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.

Under section 76(5), a ‘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, section 76 obviates the prosecution's obligation to prove the fault element and physical element of the claim farming offences under section 74(1) and (2) and section 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'. (State of mind includes the person's knowledge, intention, opinion or belief and the person's reasons for the intention, opinion, belief or purpose.); 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).

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.

This defence reverses the onus of proof by requiring, for example, a partner of a law practice or a director of a corporation to prove that he, she or it, could not have prevented an employee's, agent's or executive officer's conduct by exercising reasonable precautions and proper diligence. 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.

***Legislation should 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—Legislative Standards Act 1992, section 4(3)(e)***

Clause 19 inserts new divisions 2–4 in part 5A. Division 2 allows authorised persons to enter a place if:

- an occupier at the place consents to the entry and section 87G has been met;
- it is a public place and the authorised person enters when the place is open to the public;
- the entry is authorised under a warrant and, if there is an occupier of the place, section 87Q has been met; or
- it is a licensed insurer's premises and is open for carrying on business or otherwise open for entry.

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.

***Legislation should provide appropriate protection against self-incrimination—Legislative Standards Act 1992, section 4(3)(f)***

Under section 87ZI(1) (clause 25) an investigated person or an associated person for an investigated person is not excused from answering a question or producing a document if doing so might tend to incriminate the person or expose the person to a penalty. The protection against self-incrimination would be abrogated in the limited circumstances 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. The abrogation of the protection against self-incrimination exists now under section 79 of the Act but only in relation to an insurer. New section 87ZI extends to a law practice or lawyer that is acting or has acted for a claimant.

Under section 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, 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.

In this instance, the abrogation of the protection against self-incrimination is considered 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; and
- section 87ZQ sufficiently limits the use of information or documents given in a special investigation by giving individuals an evidential immunity; and
- section 87ZQ does not require an individual who produces or gives information to satisfy any conditions before being entitled to rely on the immunity.

***Legislation should not confer immunity from proceedings or prosecution without adequate justification—Legislative Standards Act 1992, section 4(3)(h)***

Clause 18 amends existing section 87F to extend the protection from civil liability to a person acting under the authority or direction of an authorised person. The new enforcement powers under part 5A necessitated this extended application because an authorised person has the power to authorise or direct another person to help in exercising a power. The clause replaces existing references to ‘authorised person’ with ‘designated person’, which captures both an authorised person and a person acting under the authority or direction of an authorised person. Accordingly, a ‘designated person’ will not incur civil liability for an act done, or omission made, honestly and without negligence under the Act. Importantly, the Bill balances the conferral of the immunity from civil liability by attaching to the Commission the liability that would otherwise apply to the designated person.

***Legislation should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly—Legislative Standards Act 1992, section 4(4)(b)***

Clause 5(2) inserts a new function to enable the Commission to establish and revise standards about the proper management of claims with which licensed insurers must comply. 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. 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.

***Fundamental legislative principles not listed in the Legislative Standards Act 1992—Legislation should have sufficient regard to the rights and liberties of individuals***

***Proportion and relevance—Offences and level of penalties***

Legislation should have sufficient regard to the rights and liberties of individuals and any consequences imposed by legislation should be reasonably proportionate and relevant to the actions to which the consequences apply. The Bill creates new offences for engaging in claim farming, and for not completing and giving a law practice certificate. As noted above, the Bill also replaces existing enforcement powers with modern powers for authorised persons to investigate potential contraventions of the claim farming offences and other offences under the Act. Those new enforcement powers in turn create new offences. Likewise, the Bill expands the power for special investigations to a law practice or lawyer that is acting or has acted for a claimant.

As a result, the Bill creates the following offence provisions in parts 4, 5AA, 5A and 5B of the Act:

**Amendment of part 4 (Claims)**

- clause 6, new section 36A(2)—Law practice retained by claimant before notice of claim (maximum penalty—300 penalty units);
- clause 6, new section 36D(1)—False or misleading law practice certificate (maximum penalty—300 penalty units);
- clause 6, new section 36E(2)—Law practice referral through sale of business (maximum penalty—300 penalty units);
- clause 9, new section 37AB(2)—Law practice retained by claimant after notice of claim (maximum penalty—300 penalty units);
- clause 11, new section 39A(4)—Duty to give law practice certificate if waiver or presumption (maximum penalty—300 penalty units);
- clause 12, section 41A(2)—Supervising principal must complete law practice certificate on settlement or judgement (maximum penalty—300 penalty units).

Under these provisions, a supervising principal will commit an offence if he or she:

- fails to complete a law practice certificate when:
  - a claim is lodged under section 37;
  - the new practice is engaged by the claimant after a claim is lodged; or
  - the insurer or the claimant accept an offer of settlement for the claim or judgement is given on the claim;
- is a principal of a current practice that sold all or part of its law practice's business to another law practice (new practice) and fails to complete and give a law practice certificate to the new practice and the claimant before the referral occurs;
- signs or gives a law practice certificate knowing that it is false or misleading; or
- fails to complete a law practice certificate and to give it to the insurer (and a copy to the claimant) after a claimant is notified of a waiver under section 39(1) or the presumption of compliance takes effect under section 39(3).

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.

The conduct under section 36D may also be covered by section 193 (False verified statements) and section 194 (False declarations) of the *Criminal Code Act 1899* (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.

The proposed maximum penalty of 300 penalty 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 provisions in the Act prohibiting inducements and discounting of CTP premiums (sections 96 and 97 respectively).

New part 5AA (Referrals of claims and contact to solicit or induce claims)

- clause 15, sections 74(1) and 74(2)—Giving or receiving consideration for claim referrals (maximum penalty—300 penalty units);
- clause 15, section 75(1)—Approach or contact for the purpose of making a claim (maximum penalty—300 penalty units).

New section 74 prohibits, firstly, a person (payer) giving, agreeing to give or allowing or causing another person to give, consideration to another person (payee) for a claim referral or potential claim referral. Secondly, it prohibits a payee receiving, agreeing to receive or allowing or causing someone else to receive consideration from the payer for a claim referral or potential claim referral. ‘Claim referral’ means a referral of a claimant by the payee (or someone else) to the payer for the purpose of the payer or someone else providing a service to the claimant. A claimant includes a potential claimant. ‘Service’ means a service related to the claimant’s claim. New section 75 prohibits a person (first person) personally approaching or contacting another person (second person) and soliciting or inducing the second person to make a claim.

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.

As noted above, section 74 does not apply to a payment for a referral of a claimant as part of a law practice’s sale of all or part of its law practice’s business to another law practice. Nor does a claim referral include advertisement or promotion of a service or person that results in a claimant using the service or person if the advertisement or promotion is made to the public or a group of persons. Furthermore, section 75 does not intend to make it an offence for persons to offer information about a potential claimant’s rights in relation to a claim under the scheme if those persons do not expect or intend to receive, and do not receive, consideration.

As with the offence provisions for not giving a law practice certificate, 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.

Amended part 5A (Enforcement)

- clause 19, section 87RC(1)—Offence to contravene help requirement (maximum penalty 200 penalty units);
- clause 19, section 87RH—Offence to contravene seizure requirement (maximum penalty 50 penalty units);
- clause 19, section 87RI(1) and (2)—Offence to interfere (maximum penalty 50 penalty units);
- clause 19, section 87RR(1)—Offence to contravene personal details requirement (maximum penalty 50 penalty units);
- clause 19, section 87RT(1)—Offence to contravene information requirement (maximum penalty 200 penalty units);
- clause 19, section 87RY(1)—Obstructing authorised person (maximum penalty 50 penalty units);

- clause 19, section 87RZ—Impersonating authorised person (maximum penalty 50 penalty units);
- clause 21, section 87UA(1)—Giving authorised person false or misleading information (maximum penalty 150 penalty units);
- clause 22, section 87VA(1)—Confidentiality of criminal history under s 87V (maximum penalty 100 penalty units);
- clause 22, section 87VC(1)—Confidentiality of information under s 87VB (maximum penalty 100 penalty units);
- clause 24, section 87Z(1)—Confidentiality of information (maximum penalty 100 penalty units).

All these offences relate to the Commission's new enforcement powers. The Bill does not amend existing division 1 of part 5A, which deals with authorised persons (including their functions), but it does insert new divisions 1A and 2–4 to prescribe new rules for powers that authorised persons may exercise. These new powers include entry into a place, requiring production of documents, requiring reasonable help to exercise a general power, seizing property and requiring personal details.

When prescribing these types of powers for authorised persons, contemporary legislative schemes normally include provisions making it an offence to, for example: obstruct or impersonate an authorised officer; contravene a help or seizure requirement or a requirement to give an authorised person information or personal details; tamper with a seized thing; or use or disclose a report about a person's criminal history or information contained in the report without authorisation.

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.

The Bill prescribes the following penalties for these offences:

- 200 penalty units—sections 87RC(1) and 87RT(1). The penalty for these offences is considered proportionate and justified given the effect a breach of these provisions would have on an authorised person's ability to exercise his or her powers to undertake an effective investigation;
- 150 penalty units—section 87UA(1). This penalty is considered justifiable and proportionate given the seriousness of giving an authorised person fraudulent or misleading information;
- 100 penalty units—sections 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;
- 50 penalty units—sections 87RH, 87RI(1) and (2), 87RR(1) and 87RY(1). This penalty is proportionate to the offences of interfering or hindering an authorised person during an investigation into a contravention of the Act.

These penalty amounts are generally consistent with penalty amounts prescribed in Queensland legislation for corresponding offences.

New part 5B (Special investigations)

- clause 25, section 87ZH(1)—Examination of investigated person or associated person (maximum penalty 300 penalty units or imprisonment for 2 years);
- clause 25, section 87ZP(1)—Other offences about investigations (maximum penalty 300 penalty units or imprisonment for 2 years); and
- clause 25, section 87ZS(1)—Confidentiality of information (maximum penalty 100 penalty units).

As noted above, part 5B replaces the existing special investigation power under division 3 of part 5 to enable the Commission to appoint an investigator to investigate the relevant affairs of a law practice or lawyer that is acting or has acted for a claimant. Currently, division 3 only applies to the affairs of a licensed insurer.

Sections 87ZH and 87ZP replicate, with modifications, existing sections 78 and 87 of the Act respectively. Section 87ZH requires an investigated person or an associated person for an investigated person, when required to attend an examination by an investigator, to comply with a lawful requirement of the investigator. Section 87ZP prohibits a person from concealing, destroying, mutilating or altering a document of or about an investigated person; or sending or causing to be sent, or conspiring with another person to send (out of the State) a document or property belonging to or under the control of the investigated person.

Both offences attract a maximum penalty of 300 penalty units or a term of imprisonment of two years. 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.

Section 87ZS replicates section 92 of the *Fair Trading Inspectors Act 2014*. This provision prohibits an investigator disclosing directly or indirectly confidential information. The maximum penalty of 100 penalty units is also consistent with that Act.

*Proportionality and relevance—Increasing penalty amount for section 64(6) of the Act*

Clause 13 amends section 64 to increase the maximum penalty amount for failing to comply with a condition of a licence from 150 penalty units to 300 penalty units. 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.

*Abrogation of common law rights must be justified—Legal professional privilege*

Legislation should not abrogate common law rights without sufficient justification. New section 87ZI (clause 25) partially abrogates the common law right of legal professional privilege by stating 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. 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. This includes a transaction involving the law practice and an associated person for the practice that is relevant to the referral of instructions. Claimants should therefore not be concerned the Bill will affect their access to justice or confidential discussions with their lawyers about the prospects of their claim. A client's legal privilege would continue unaffected by these amendments. Nor does the partial abrogation under section 87ZI apply to licensed insurers.

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. As noted above, 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.

The safeguards under that section mean that in complying with the requirement:

- a 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 section 36A, 36D, 36E, 37AB, 39A, 41A, 74(1) or (2) or 75.

Furthermore, to ensure the powers for a special investigation cannot be misused, the type of individual who would be appointed as a special investigator would be a senior lawyer who is highly experienced, a senior barrister or Queen's Counsel or a retired judge with suitable expertise to conduct an investigation of this nature. Under existing provisions of the Act, the Commission may also establish an Advisory Committee to provide additional oversight and guidance to the Commission in exercising its special investigation powers. As is now the case, the Minister, on the Commission's nomination, would appoint members of the Advisory Committee. The Minister would decide the terms on which the members of an Advisory Committee hold office.

*Power to require information—New sections 87RS and 87RT*

New sections 87RS and 87RT (clause 19) empower an authorised person to require information if the authorised person reasonably believes a person has information relevant to a liability or entitlement under the scheme. These provisions may be considered to breach the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals.

Sections 87RS and 87RT amalgamate parts of sections 60 and 61 of the *Fair Trading Inspectors Act 2014* and existing section 87G of the Act. Existing section 87G was inserted into the Act in 2000 when the Commission's enforcement powers were amended following a review of the scheme.<sup>1</sup> 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 person does not commit an offence if the information or document sought is not relevant (section 87RT(3)).

*Failure to comply with a requirement—New section 87ZJ*

Section 87ZJ (clause 25) may also be considered to breach the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals because it allows a court to punish a person as if the person had been guilty of contempt of court. Section 87ZJ re-enacts existing section 80<sup>2</sup> but extends its application to a law practice or lawyer that is acting or has acted for a claimant. Currently, section 80 applies only to an officer of an insurer.

Section 87ZJ allows an investigator to give the Supreme Court a certificate if an investigated person or associated person fails to comply with a requirement of an investigator. The Supreme Court is then empowered to enquire into the case and may order the person to comply with the requirements and (if the court is 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.

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*.

---

<sup>1</sup> Motor Accident Insurance Amendment Act 2000 No. 17.

<sup>2</sup> Section 80 has been unamended since its enactment in 1994.

*Cost of investigation—New section 87ZO*

Section 87ZO (clause 25) is another provision that may be considered inconsistent with the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals. Section 87ZO re-enacts existing section 86 of the Act<sup>3</sup> and extends its application to a law practice or lawyer that is acting or has acted for a claimant. New section 87ZO allows the Commission to recover the costs of, and incidental to, an investigation under amended part 5B from the investigated person.

It is considered that 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 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.

*Investigative powers*

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.

The Bill extends the Commission's existing enforcement powers to allow it to investigate potential contraventions of the claim farming offences, and the existing powers for special investigations to allow it to appoint a special investigator to examine the relevant affairs of a law practice or lawyer that is acting or has acted for a claimant. The enhanced enforcement powers under part 5A are central to ensuring the Commission has a modern and effective suite of powers to enable it to investigate and prosecute breaches of the claim farming offences and other offences under the Act. The Bill has modelled these powers on the *Fair Trading Inspectors Act 2014*. The extension of the power for special investigations to a law practice or lawyer that is acting or has acted for a claimant will ensure the Commission can investigate the relevant affairs of a law practice to determine whether claims have been 'farmed' in contravention of new section 74 or 75.

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 is important to equip authorised persons and investigators with adequate powers to properly conduct an effective investigation. 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. For this reason, part 5A of the Bill sets out standard safeguards for investigative powers, including:

- 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;

---

<sup>3</sup> Section 86 has been unamended since its enactment in 1994.

- 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.

While in the case of part 5B, the Bill provides evidential immunity for individuals under section 87ZQ to balance the abrogation of the privilege against self-incrimination.

#### *Forfeiture of property*

New section 87RM (clause 19) allows the Commission to decide that a seized thing is forfeited to the State. This provision may be considered to breach a fundamental legislative principle as acquisition of property should generally occur only with compensation, unless there is good reason. In this case, the fact that forfeiture of a thing would only occur after an authorised person has made reasonable inquiries or efforts to return the thing to the owner tempers any potential breach of a fundamental legislative principle. An authorised person must also have regard to the thing's condition and value in deciding whether it is reasonable to make inquiries or efforts and what inquiries or efforts are reasonable.

Furthermore, a person affected by this provision may apply for a stay of the decision if the person appeals against the decision (section 87SE). A person would also be afforded procedural fairness by having the ability to apply to the Commission for internal review of the decision or for external review by the Magistrates Court if the person is dissatisfied with the internal review decision. In this case, it is suggested that a proper balance has been reached between protecting the rights of the individual and enabling evidence to be forfeited to the State where appropriate.

#### *Privacy and use of confidential information—Act amendment*

New section 87V (clause 22) allows the Commission to obtain a criminal history report 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. While this section may raise concerns about the collection of a person's confidential information, this power is necessary to ensure the safety of an authorised person. 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 is met, and requiring authorised persons to destroy the report as soon as practicable after they have considered the risk to their safety.

In addition, section 87VA prohibits disclosure of the report (unless authorised) and imposes a maximum penalty of 100 penalty units. Importantly, the definition of 'criminal history' under section 4 of the Act is consistent with the definition of 'criminal history' and 'conviction' under the *Criminal Law (Rehabilitation of Offenders) Act 1986*. Also, section 87V does not displace the rehabilitation period provisions or other provisions of the latter Act.

If the Commission were to rely on section 87V (which would not be often), the Commission and the Queensland Police Service can administratively resolve any costs associated with a request for a criminal history report. Where the Commission makes such a request, it will meet any costs associated with the request from its existing budget.

*Privacy and use of confidential information—Regulation amendments*

The amendments to section 17 (clause 28), which ask claimants to give extra information in the notice of claim, 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. This principle, 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. 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. This is particularly important if claimants find not only the claim process but also the subject matter and medical and legal terminology complex. More effective communication will enable insurers to offer claimants suitable rehabilitation services and help claimants resolve their claim expeditiously. 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 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.

### ***Fundamental legislative principles not listed in the Legislative Standards Act 1992—The institution of Parliament***

#### ***Constitutional validity—Extraterritoriality***

Laws that are legally effective serve to enhance the institution of Parliament, but laws that a court holds to be invalid call into question Parliament's authority and the competence with which its affairs are being conducted. 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. The relevant definitions are as follows:

- *claim* means a claim for damages based on a liability for personal injury arising out of a *motor vehicle accident*, and, for a fatal injury, includes a claim on behalf of the deceased's dependants or estate;
- *motor vehicle* means a vehicle for which registration is required under the *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010*;
- *motor vehicle accident* means an incident from which a liability for personal injury arises that is covered by insurance under the *statutory insurance scheme*;
- *statutory insurance scheme* means the insurance scheme established by the Act.

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'.

## **Consultation**

An exposure draft of the Bill was released for targeted stakeholder consultation on 20 February 2019. Stakeholders were invited to provide written submissions over a four-week period. The Commission also 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. Feedback was considered and incorporated into the Bill where appropriate.

A public awareness campaign ran concurrently with the targeted consultation process from 4 February to 31 March 2019. The objective of the campaign was to alert Queenslanders to claim farming tactics and how to detect and avoid claim farmers. The campaign encouraged the public to hang up and report the incident to the Commission.

The Office of Best Practice Regulation was consulted regarding the regulatory impact analysis requirements of the *Queensland Government Guide to Better Regulation* and advised that no further assessment was required.

## Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland, and is not uniform with, or complementary to, legislation of the Commonwealth or another State or Territory.

Queensland will be among the first States to introduce offence provisions 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. In May this year, the Australian Capital Territory enacted the *Motor Accident Injuries Act 2019* (not yet commenced), which also aims to deter claim farming practices by prohibit payments by a lawyer (or their related entity) for referrals of defined benefit applications or damages claims for legal representation. Section 485 makes it an offence for a lawyer (or a related entity) to give or receive consideration for a referral for legal representation. The maximum penalty is 200 penalty units. Consideration is defined as including a fee or other financial benefit but does not include hospitality that is reasonable in the circumstances.

In New South Wales, section 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. Thus, a failure to comply with the duty is not an offence. Similarly, 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.

Neither Queensland nor Commonwealth legislation currently prohibit claim farming, but both jurisdictions may regulate some aspects of claim farming to a degree through various Acts. For example, in Queensland, the *Personal Injury Proceedings Act 2002* prohibits touting at the scene of an accident (section 67), and payment and seeking of payment of a fee for soliciting or inducing a potential claim (section 68). The *Australian Solicitors Conduct Rules 2012* (Qld) 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 2007* imposes the '50/50 rule' for speculative personal injury claims. The 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.

In the Commonwealth, the *Do Not Call Register Act 2006* prohibits unsolicited telemarketing calls and faxes to a number registered on the Do Not Call Register. The *Spam Act 2003*

regulates commercial emails and electronic messages and prohibits unsolicited electronic messages. The *Telecommunications Act 1997* also provides for telemarketing calls, marketing faxes and commercial electronic messages. Claim farming conduct may also be captured by the *Privacy Act 1988* and the *Competition and Consumer Act 2010*.



# Notes on provisions

## Part 1 Preliminary

*Clause 1* states the Act will be cited as the *Motor Accident Insurance and Other Legislation Amendment Act 2019*.

## Part 2 Amendment of Motor Accident Insurance Act 1994

*Clause 2* states part 2 amends the *Motor Accident Insurance Act 1994*.

*Clause 3* supports the claim farming amendments by extending the objects of the Act to encourage licensed insurers to act in a manner that supports the integrity of the scheme. The clause also amends existing paragraph 3(b) by splitting it into two paragraphs to remove potential ambiguity in the wording of the provision. Finally, the clause makes a minor consequential amendment to substitute references to ‘motor vehicle accident claims’ with ‘claims’ because of the amendments to the Act made under Schedule 1, clauses 1 and 2. Those amendments in Schedule 1 merge existing definitions of *motor vehicle accident claim* and *claim* into a single definition of *claim*.

*Clause 4* inserts new definitions in section 4 because of amendments to parts 4 and 5A, and the insertion of new parts 5AA and 5B.

*Clause 5* expands the Commission’s functions under section 10 to include: a general function to regulate the scheme, establishing standards about the proper management of claims and performing another function given to it under the Act or another Act. The standards will enhance the Commission’s ability to supervise licensed insurers’ management of claims, which is crucial to the viability of the scheme. The Commission will publish the standards on its website and they will apply to the management of claims from the publication date, whether the claim was made before or after that date. The standards will be enforced by prescribing a new condition on the licence under section 64(1) for licensed insurers to comply with the standard (see clause 30). The clause also makes a minor consequential amendment to substitute singular and plural references to ‘motor vehicle accident claim’ with ‘claim’ or ‘claims’ as the case requires.

*Clause 6* inserts new sections 36A–36E, which set out requirements for completing and giving a law practice certificate at various stages of a claim.

New section 36A requires a principal of a law practice retained to act for a claimant to complete a law practice certificate and give it to the claimant before the claimant has given notice of the claim under section 37. The maximum penalty for a breach is 300 penalty units.

New section 36B specifies the content requirements for a law practice certificate. The certificate must be in a form approved by the Commission and state the supervising principal and each associate of the law practice did not give or receive (or agree or allow or cause someone else to give or receive) consideration for a claim referral or potential claim referral in contravention of section 74; nor did they approach or contact a person and solicit or induce the person to make a claim in contravention of section 75; and they meet the ‘50/50 rule’ under the *Legal Profession Act 2007* or section 79 of the Act. Importantly, the section does not require

a supervising principal to give information about communication with a claimant that is subject to legal professional privilege.

In relation to the matters that a supervising principal is required to state under section 36B(2) to (4), new section 115 specifies that if a claimant retained a law practice before commencement to act in relation to the claimant's claim and the claim was not settled, decided or otherwise concluded immediately before commencement, for sections 36A, 36E, 37AB, 39A or 41A, the law practice certificate must state those matters only in relation to conduct on and after commencement (see transitional provision under clause 26).

If a supervising principal cannot comply with sections 36A, 36E, 37AB, 39A or 41A, new section 36C allows another principal of a law practice or, in the case of a law practice with only one principal, another lawyer nominated by the supervising principal to complete and give the law practice certificate or the notice mentioned in section 36E(3). This provision will enable law practices to meet the certificate requirement if a supervising principal cannot sign the certificate or notice.

New section 36D makes it an offence for a principal to sign, or give the claimant or insurer, a false or misleading law practice certificate. The maximum penalty is 300 penalty units.

New section 36E requires a law practice (current practice) that refers a claimant (who has not yet given notice of the claim under section 37) as part of a sale of all or part of its law practice's business to another law practice (new practice) to complete and give a law practice certificate, before the referral occurs, to the new practice and a copy to the claimant. If the new practice does not receive the certificate, the supervising principal of the new practice must give a notice to the Commission stating it has not received the certificate. The maximum penalty for the current practice not giving the certificate is 300 penalty units.

*Clause 7* makes a minor consequential amendment to section 37 (Notice of accident claim) to substitute a reference to 'motor vehicle accident claim' with 'claim'. This amendment arose because Schedule 1 amends the Act to merge the definitions of *claim* and *motor vehicle accident claim* into one definition (*claim*) to avoid duplication. Clause 7 also amends the section to include a new requirement for the claimant to include in the notice of claim:

- the law practice certificate under section 36A; and
- if a claim was referred through a sale of a law practice's business—the law practice certificate under section 36E.

*Clause 8* amends section 37A, which concerns an additional information form that insurers may ask claimants to provide about the claim. Clause 8(1) makes a minor consequential amendment to replace a reference to 'motor vehicle accident claim' with 'claim'. This amendment is needed because Schedule 1 amends the Act to merge the definitions of *claim* and *motor vehicle accident claim* into one definition (*claim*) to avoid duplication. Clause 8(2) amends subsection 37A(2) to make it consistent with subsection (1) by including the additional words 'or about the circumstances in which the claim is made'. The contents of existing paragraphs 37A(2)(a) and (b) remain unchanged.

Clause 8(3) amends subsections (3) and (4) by merging the provisions into one subsection and substituting the two periods in which a claimant must complete and return the additional information with a single period of 1 month. Currently, claimants tend to only produce the form on the later of the two dates allowed for under the section, which would be too late in the

claim process to be valuable. A shorter period of 1 month would be more useful and practical for insurers and consistent with other provisions in the Act, such as section 45 (Duty of claimant to cooperate with insurer).

*Clause 9* inserts new sections 37AA and 37AB. Section 37AA requires a principal of a law practice retained to act for a claimant to refund to the claimant all fees and costs including disbursements the claimant paid in relation to the claim if the principal fails to give the claimant a law practice certificate and because of that failure the claimant is unable to satisfy the requirements of section 37 and terminates in writing the engagement of the law practice. The provision ensures a supervising principal's failure to comply does not disadvantage the claimant.

Section 37AB applies if a claimant retains a new law practice to act in relation to the claimant's claim after the claimant gives the notice of claim. The supervising principal must give a law practice certificate to the insurer as soon as practicable after it is retained. A principal's failure to comply attracts a maximum penalty of 300 penalty units.

*Clause 10* amends section 39 to make it subject to section 39A.

*Clause 11* inserts a new section 39A to ensure the obligation to give a law practice certificate under section 36A continues despite a waiver or presumption of compliance under subsection 39(1) or (3) respectively. Accordingly, if an insurer notifies the claimant of a waiver or the presumption of compliance takes effect under section 39:

- if the supervising principal (or another principal or nominated lawyer under section 36C(2)) gave the claimant a law practice certificate under section 36A but the claimant did not give it to the insurer—the supervising principal must give the insurer a copy of the certificate as soon as practicable; or
- if the supervising principal (or another principal or nominated lawyer under section 36C(2)) did not give the claimant a law practice certificate under section 36A—the supervising principal must, within a month after the claimant is notified of the waiver or the presumption takes effect, complete the certificate and give it to the insurer (and a copy to the claimant). A supervising principal who breaches the requirement is liable to a maximum penalty of 300 penalty units.

*Clause 12* inserts new section 41A, which requires a supervising principal of the law practice retained by a claimant to act in relation to the claimant's claim to give the insurer a law practice certificate (and a copy to the claimant) within 7 days after either the insurer or the claimant accept an offer of settlement or judgement is given on the claim. A failure to comply with the requirement attracts a maximum penalty of 300 penalty units.

*Clause 13* increases the maximum penalty under section 64(6), from 150 penalty units to 300 penalty units. As noted above, it is intended to prescribe compliance with the standards for the proper management of claims as a condition on the licence. Therefore, to deter insurers breaching this condition, the penalty is being increased to 300 penalty units.

*Clause 14* omits division 3 of part 5 of the Act concerning special investigations because the Bill replaces the division with new part 5B.

*Clause 15* inserts a new part 5AA (sections 74–80) to create the new claim farming offences.

New section 74 prohibits a person giving or receiving, agreeing to give or receive, or allowing or causing another person to give or receive, consideration for a claim referral or potential claim referral. 'Claim referral' means a referral of a claimant by the payee or someone else to:

- the payer for the purposes of the payer providing a service to the claimant; or
- the payer or someone else for the purposes of someone other than the payer providing a service to the claimant.

A claimant includes a potential claimant. Consideration means a fee or 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 definition of consideration excludes money to prevent a cash payment of up to \$200 for a claim referral. This offence provision attracts a maximum penalty of 300 penalty units.

The offence provision does not apply to the referral of a claimant as part of a sale by a law practice (current practice) of all or part of its law practice's business to another law practice (new practice). If the new practice gives or agrees to give or allows or causes someone else to give the current practice an amount for the referral, the amount for the referral is the current legal costs for the claimant. The new law practice must disclose the payment of the amount to the claimant in a costs agreement. Also, advertising or promoting a service or persons that results in a claimant using the service or person is not a claim referral if the advertising or promoting is to the public or group of persons.

New section 75 prohibits a person approaching or contacting another person to solicit or induce that person to make a claim under the scheme. This offence attracts a maximum penalty of 300 penalty units. However, the offence does not apply if the person making the approach or contact (first person):

- does not expect or intend to receive, and does not receive, consideration because of the approach or contact; and does not ask for someone else to receive consideration or agree to someone else receiving consideration because of the approach or contact; or
- is a law practice or a lawyer that is supplying, or has previously supplied, a legal service to the second person or the second person's relative and reasonably believes the second person will not object to the approach or contact; or
- is a law practice or lawyer that has been asked by a representative of a community legal service or industrial organisation (on behalf of the service or organisation) to contact the second person and advised the second person will not object to the approach or contact. Section 75(5) defines 'community legal service' by reference to the *Legal Profession Act 2007*, schedule 2, and 'industrial organisation' by reference to the *Industrial Relations Act 2016*.

This provision applies regardless of whether the person being contacted is entitled to make the claim or has already decided to make or had made the claim. Consideration has the same meaning as in new section 74(4).

New section 76 makes a person (individual or a corporation) responsible for the acts or omissions of the person's representatives by:

- 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'; and

- deeming the act done or omitted to be done by the person's representative (within the scope of the representative's actual or apparent authority) to have been done or omitted to be done by the person.

A representative means an employee or agent of an individual (including a partner of a law practice); or an executive officer, employee or agent of a corporation. 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.

New section 77 provides that a law practice convicted of a claim farming offence under section 74(1) or (2) or 75 or an offence against section 41A will not be entitled to recover any fees or costs including disbursements that relate to the provision of services for the claim and must repay any amount received that relate to the services.

New section 78 allows the Commissioner to apply to a court of competent jurisdiction for an injunction to restrain a contravention of section 74 or 75 whether in Queensland or elsewhere. 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* (Qld) and the corresponding laws of the other States and Territories.

New section 79 applies the '50/50 rule' set out in section 347(1) of the *Legal Profession Act 2007* to a speculative motor accident claim if section 347 does not apply to the law practice. The section applies despite anything to the contrary in the costs agreement that relates to the claim.

However, new section 116 provides that new section 79 does not apply to the legal costs a law practice may charge and recover from a client for work done in relation to claim if a client retains a law practice before commencement to act in relation to the client's speculative motor accident claim and the law practice continues to have the conduct of the claim on commencement (see clause 26 for transitional provision).

Section 80 applies new part 5AA (other than section 78, injunction) both within and outside of Queensland to the full extent of the extraterritorial power of the Parliament.

*Clause 16* inserts new division 1AA in existing part 5A, which contains new sections 81–83. These sections set out definitions and other interpretative provisions for the new enforcement powers for authorised persons. Section 83 specifies that a reference to a 'document' includes an image or writing that is produced from an electronic document or a document not yet produced, but capable of being produced.

*Clause 17* replaces existing section 87E (Display of authorised person's identity card) with a new section 87E that is worded along the lines of section 18 (Production or display of identity card) of the *Fair Trading Inspectors Act 2014*. This ensures section 87E is consistent with the other provisions in amended part 5A.

*Clause 18* makes consequential amendments to section 87F (Protection from liability) to replace references to 'authorised person' with the defined term 'designated person'. This term captures an authorised person and a person acting under the authority or direction of an authorised person. The amendment ensures the protection from liability for an act done or omission made honestly and without negligence under the Act applies not only to authorised

persons but also to persons acting under their authority or direction. The extended application arose because the new enforcement powers under amended part 5A allow an authorised person to authorise or direct another person to help in exercising a power. Under amended section 87F(2), if civil liability does not attach to the designated person, it will attach instead to the Commission.

*Clause 19* omits existing divisions 2–4 and inserts new divisions 2–4 in part 5A (new sections 87G–87SI). These amendments enhance the Commission’s powers to investigate potential contraventions of the claim farming offences. These powers are modelled on those in the *Fair Trading Inspectors Act 2014*.

Under subdivision 1 of division 2, new section 87G enables an authorised person to enter a place in the following circumstances:

- an occupier at the place consents;
- it is a public place and entry is when the place is open to the public;
- the entry is authorised under a warrant;
- it is a licensed insurer’s premises and it is open for carrying on business or otherwise open for entry.

New sections 87H–87K under subdivision 2 of division 2 concern entry into a place with the occupier’s consent, including incidental entry and matters an authorised person must tell the occupier. Section 87K allows the authorised person to request the occupier sign an acknowledgement of consent if the occupier consents to the entry.

Subdivision 3 of division 2 contains new sections 87L–87Q, which deal with entry to a place under a warrant. These provisions cover the application for a warrant, the issuing of a warrant, the procedure if the application is electronic, the impact of defects in a warrant and the entry procedure.

Subdivision 1 of division 3 (new sections 87R–87RC) sets out general powers of authorised persons after entering a place with an occupier’s consent or under a warrant, or after entering a licensed insurer’s premises, in accordance with section 87G. These general powers include searching any part of the place, taking a thing for examination, placing an identifying mark in or on anything at the place and taking an extract from a document or copying a document at the place (section 87RA). An authorised person may request an occupier’s reasonable help to exercise a general power (section 87RB). It is an offence for an occupier to refuse such a request, unless complying might tend to incriminate or expose the occupier to a penalty (section 87RC). The maximum penalty for non-compliance is 200 penalty units.

New sections 87RD–87RL in subdivision 2 of division 3 concern an authorised person’s power of seizure. These sections cover an authorised person’s power to seize evidence at a place that might be entered either: without consent or warrant, or only with consent or warrant. The sections outline what powers the authorised person has over the seized thing and in what manner the thing can be dealt with. These sections also make it an offence to contravene a seizure requirement or interfere with a seized thing, which includes tampering with the item, or restricting access to the item.

This subdivision also:

- allows the owner of the seized item to inspect the item at any reasonable time (unless it is impracticable to do so) until the item is forfeited or returned; and
- extends the authorised persons power to withhold the seized thing, if they are satisfied there are reasonable grounds to do so.

Subdivision 3 of division 3 (new sections 87RM and 87RN) concerns forfeiture. These sections allow the Commission to decide that a seized thing has been forfeited to the State if:

- an authorised person is unable to locate an owner; or
- the thing cannot be returned to the owner; or
- the authorised person reasonably believes it is necessary to keep the thing to prevent it being used to commit the offence for which it was seized.

If the Commission decides to forfeit the thing, the owner must be notified as soon as practicable.

Subdivision 4 of division 3 (new sections 87RO and 87RP) specifies how to deal with property that is forfeited or transferred to the State. If a thing is forfeited or if the owner transfers ownership to the State, the thing becomes property of the State and the Commission is entitled to deal with the thing in such a manner as the Commission considers appropriate. For example, the Commission may destroy it or give it away, but the Commission must not deal with the property in way that could prejudice the outcome of an appeal against the forfeiture.

Subdivision 5 of division 3 (new sections 87RQ–87RT) sets out other information-obtaining powers for authorised persons. Section 87RQ empowers authorised persons to require a person to state his or her name and address if the authorised person finds the person committing an offence or in circumstances that lead the authorised person to suspect the person has just committed an offence. It is an offence for a person to contravene this requirement, unless the person has a reasonable excuse. The maximum penalty is 50 penalty units. Section 87RS, which replicates existing section 87G, allows an authorised person to request a person give information relevant to a liability or entitlement under the scheme or an offence that has been committed under the Act. It is an offence to contravene an information requirement. The maximum penalty is 200 penalty units.

In subdivision 1 of division 4, new sections 87RU specifies that, in exercising a power, authorised persons have a duty to take reasonable steps to avoid inconvenience and to do as little damage as possible. If the authorised person damages something, new section 87RV requires the authorised person to give notice of the damage to the owner or the person in control of the thing, unless there is a reasonable reason not to. For example, if there was a reasonable suspicion that providing notice would frustrate the person and cause them to delay complying with the provision.

Subdivision 2 of division 4 contains new sections 87RW and 87RX, which deal with compensation and costs of investigation. Section 87RW amends existing section 87N and enables a person to 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. This does not include loss arising from a lawful seizure or forfeiture. Under section 87RX, if a court convicts a person of an offence against the Act (or the *National Injury Insurance Scheme*

*Queensland Act 2016* (National Injury Act)), the court may order the person pay the Commission's reasonable costs of an investigation into the offence.

Subdivision 3 of division 4 (new sections 87RY–87RZ) creates offences relating to authorised officers. New section 87RY expands existing section 87R by providing that it is an offence to not only obstruct an authorised person but also someone helping an authorised person. New section 87Y, because it is modelled on section 69 of the *Fair Trading Inspectors Act 2014*, also requires an authorised person to warn a person who has obstructed the authorised person that it is an offence to cause an obstruction (unless there is a reasonable excuse) and that the authorised person considers the conduct an obstruction. New section 87RZ replicates, without amendment, existing section 87S dealing with impersonation of authorised persons.

Subdivision 1 of division 4A (new sections 87S–87SD) allows for internal review. Under section 87S an affected person for an original decision may appeal to a Magistrates Court only following an internal review decision under this subdivision. Section 87SA allows an affected person for an original decision to apply to the Commission for an internal review. Under section 87SB an application for internal review must be written and include enough information to enable the Commission to make a decision. Section 87SC provides that the Commission must review and confirm the decision, amend the decision or substitute another decision within 20 days after receiving an application for internal review. Under section 87SD a notice for an internal review decision must state certain matters including, the decision, the reasons for the decision and that the person to whom the notice is given may appeal the decision.

Subdivision 2 of division 4A contains new section 87SE, which sets out the procedure for applying to the Magistrates Court to stay the operation of an original decision. A Court may order to stay the operation of the original decision if the order is desirable having regard to the following:

- the interests of any person whose interests may be affected by the making, or not making, of an order;
- any submissions made to the court by the entity that made the original decision;
- the public interest.

Subdivision 3 of division 4A (new sections 87SF–87SI) concerns appeals. Section 87SF specifies how a person may appeal an internal review decision. Section 87SG enables a person to apply to a court for a stay of the operation of an internal review decision.

Section 87SH states the appeal court has the same powers as the Commission and is bound by the rules of natural justice but not the rules of evidence. Section 87SH further provides the court may:

- confirm the internal decision; or
- substitute another decision for the internal review decision. Under new section 87SI(1), the substituted decision is taken to be the decision of the decision-maker and the court may give effect to the decision as if it were the original decision and as if no application for review or appeal of the original decision had been made; or
- set aside the internal review decision and return the matter to the Commission. Under section 87SI(2), a decision made in accordance with the directions may not be reviewed or appealed under this part.



*Clause 20* amends the heading of existing section 87U (False or misleading information or documents) to insert the words ‘about a claim’ after ‘documents’ and to redraft existing subsection (4) to match the drafting style of new section 87UA(3).

*Clause 21* inserts a new section 87UA to prohibit giving an authorised person false or misleading information. A person who contravenes this provision may be liable to a maximum penalty of 150 penalty units. This section applies to information given in relation to the administration of this Act or the National Injury Act.

*Clause 22* omits existing division 6 of part 5A (Information from Commissioner of Police Service) and inserts a new division 6 with a similar heading.

Subdivision 1 of division 6 contains new sections 87V–87VA. Section 87V allows the Commission to obtain a report about a person’s criminal history if an authorised person reasonably suspects the person may be present at a place when the authorised person enters and may create an unacceptable level of risk to the authorised person’s safety. To ensure an individual’s personal information is protected, section 87VA states this report must not be used or disclosed, unless authorised. The maximum penalty for contravening this provision is 100 penalty units.

Subdivision 2 of division 6 contains new sections 87VB and 87VC. Section 87VB, which replicates existing section 87V with some modifications, allows the Commission to ask the commissioner of the police service for the following about a person the Commission suspects committed an offence against the Act or the National Injury Act:

- a person’s criminal history or part of the person’s criminal history;
- a brief of evidence compiled by the Queensland Police Service on anything mentioned in the person’s criminal history;
- a document about a complaint made by or against the person.

To ensure this information is protected, section 87VC states that a person must not use or disclose this information, directly or indirectly, to anyone else, unless authorised under section 87VC(2). An unauthorised disclosure attracts a maximum penalty of 100 penalty units.

*Clause 23* inserts new sections 87WA and 87WB. Section 87WA specifies an authorised persons’ appointment and authority to do anything must be presumed in a proceeding under the Act, unless a party to the proceeding needs proof of it. Section 87WB specifies a signature purporting to be the signature of an authorised person is evidence of the signature.

*Clause 24* inserts a new division 9 in part 5A for new sections 87Y and 87Z. Section 87Y provides that part 5A applies extraterritorially to the extent necessary for any investigation of a contravention of section 74(1) or (2) or section 75. Section 87Z prohibits an authorised person directly or indirectly disclosing confidential information. The prohibition does not apply if the disclosure is authorised under an Act or another law; or the confidential information is disclosed in the performance of functions under part 5A, with the written consent of the person about whom the information relates, to whom the information relates or in a form that would not identify any person.

*Clause 25* inserts a new part 5B (new sections 87ZA to 87ZS) to extend the application of the existing special investigations power under division 3 of part 5 to a law practice or lawyer that

is acting or has acted for a claimant. Consequently, new sections 87ZB–87ZP are modified versions of existing sections 74–87.

Section 87ZA inserts definitions for the division, including *associated person* and *investigated person*.

New section 87ZB states that a reference to a document includes a reference to an image or writing produced from an electronic document or not yet produced, but reasonably capable of being produced, from an electronic document. The provision mirrors new section 83, part 5A.

New section 87ZC extends the application of existing section 74 to allow the Commission to appoint an investigator to investigate (in addition to the affairs of an insurer) the ‘relevant affairs’ of a law practice or lawyer that is acting or has acted for a claimant, or an entity prescribed by regulation, if the Commission reasonably suspects that section 74(1) or (2) or section 75 may have been contravened. Under section 87ZC(8), *relevant affairs*:

- 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.

Subsection 87ZC(4) lists the persons the Commissioner may appoint as an investigator.

New section 87ZD replicates existing section 83 to allow an investigator to delegate his or her powers. If a power is delegated, the investigator must be able to produce the instrument of delegation for inspection upon request.

New section 87ZE replicates existing section 75. This provision allows an investigator investigating the affairs of an insurer to also investigate the affairs of a related body corporate, with the Commission’s consent. An equivalent power is provided for under section 87ZC(3) in relation to an associated person for a law practice. Under new section 87ZA, an associated person for a law practice means a corporation associated with the law practice, and the corporation’s executive officers (in addition to an associate of the law practice and a barrister briefed by the lawyer in relation to relevant claims).

New section 87ZF expands an investigator’s powers under existing section 76 to include a law practice. The provision allows an investigator, by written notice, to require an investigated person, or an associated person for an investigated person, to produce a document to the investigator or to give the investigator all reasonable help in connection with the investigation.

New section 87ZG replicates existing section 77 to provide that if a document is produced under this part, the investigator may keep the document for as long as it is considered reasonably necessary, but the investigator must allow a person who would be entitled to inspect the document to inspect the document at all reasonable times. However, unlike existing section 77, new section 87ZG also requires an investigator to allow the owner of the document to copy it.

New section 87ZH replicates existing section 78, which sets out the obligations of a person who an investigator is examining. These obligations include complying with a lawful requirement and not knowingly giving false or misleading information. Contravening this

section may make an investigated person liable to a maximum penalty of 300 penalty units or 2 years imprisonment. However, persons will not contravene this section if they tell the investigator, to the best of their ability, how the information is false and misleading, and they give the investigator the correct information (if they can obtain the correct information). Under subsection (4), a person required to attend for examination is entitled to the allowances and expenses prescribed by regulation.

New section 87ZI replicates existing section 79 but expands its application in two ways. Firstly, it provides that an investigated person or an associated person for an investigated person is not excused from answering a question or producing a document on the basis that complying might tend to incriminate the person. This expands the abrogation of the protection against self-incrimination to a law practice or lawyer, not just an insurer or a related body corporate for an insurer. Secondly, section 87ZI partially abrogates the common law right of legal professional privilege for a law practice or lawyer (but not an insurer). Thus, the provision states an investigated person or an associated person is not excused from answering a question or producing a document on the basis that complying would disclose a privileged client communication, which means communication protected against disclosure by legal professional privilege that operates to the benefit of a client of an investigated person.

When putting a question to a person or requesting a document, the investigator must inform the person of the obligation to comply and, if the person is an individual, of the limited immunity against future use of the information or document given under section 87ZQ. If the investigator does not do so, and an individual does not comply with the investigator's request, the individual may not be convicted. Section 87ZI(5) further provides that if a person discloses a privileged client communication:

- the person is taken for all purposes not to have breached legal professional privilege in complying with the requirement; 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 section 36A, 36D, 36E, 37AB, 39A, 41A, 74 (1) or (2) or 75.

New section 87ZJ replicates existing section 80 and states that, if an investigated person or associated person for an investigated person does not comply with a requirement, the investigator may give to the Supreme Court a certificate about the failure to comply. The court may order compliance with the requirement and if the court finds that the person failed to satisfy the requirement without a lawful excuse, punish the person in the same way as though they had been guilty of contempt of the court.

New section 87ZK replicates existing section 81 and specifies an investigator must make a record of the questions asked and the answers given at an examination. The section further provides that, subject to section 87ZQ, a record of the examination may be used in evidence in a legal proceeding against the person. This record of the examination must be given to the person if the person requests it in writing. The record must also be included with the investigator's final report on the investigation. Subsection (5) confirms nothing in the section affects or limits the admissibility of other written or oral evidence.

New section 87ZL replicates existing section 84 and states an investigator may (and if directed by the Commission must) make interim reports to the Commission. An investigator must give a report to the Commission when the investigation ends. This report must hold an opinion on the matters under investigation, along with all facts on which that opinion was based. The

Commission must then give a final or interim report to the investigated person, unless it has a good reason for not divulging it. Unlike existing section 84(7), which is silent on how the report can be published, new section 87ZL provides the Commission may publish the report on its website or any other place it considers appropriate, if it is in the public interest to do so.

New section 87ZM replicates existing section 85 and provides that a copy of an investigator's report is admissible in a legal proceeding as evidence of facts stated in the report. However, this will not diminish existing protections given to witnesses by law.

New section 87ZN replicates existing section 84 and requires an investigator to give the Commission, at the end of an investigation, any documents the investigator has taken possession of under part 5B. The Commission can determine a reasonable period for the documents to be kept and who can inspect these documents. The Commission must allow a person who would be entitled to inspect the document, if it was not in the Commission's possession, to inspect the document at all reasonable times.

New section 87ZO replicates existing section 86 and enables the Commission to recover the costs of and incidental to an investigation. But, the Commission cannot recover costs if the investigation reveals no irregularity on the part of an insurer or related body corporate, or no contravention of sections 74(1), 74(2) or 75 by a law practice or lawyer.

New section 87ZP replicates existing section 87 and prohibits a person concealing, destroying, mutilating or altering a document of or about an investigated person whose affairs are being investigated under part 5B. Furthermore, a person must not send, cause to be sent or conspire with someone else to send out of the State such a document. A person who contravenes this section may be liable to a maximum penalty of 300 penalty units or 2 years imprisonment. It is a defence to a prosecution of an offence for the defendant to prove the defendant did not act with intent to defeat the purposes of part 5B, or to delay or obstruct the carrying out of an investigation under part 5B.

New section 87ZQ affords individuals evidential immunity if they give or produce information or a document to an investigator under section 87ZF. Accordingly, evidence of the information or document, and other evidence directly or indirectly derived from the information or document, is inadmissible against the individual in any proceeding to the extent it tends to incriminate the individual or expose the individual to a penalty, other than in:

- 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 document is relevant evidence; or
- a proceeding for an offence against sections 36A, 36D, 36E, 37AB, 39A, 41A, 74(1) or (2) or 75.

New section 87ZR provides that part 5B applies extraterritorially to the extent necessary for any investigation of a contravention of sections 36A, 36D, 36E, 37AB, 39A, 41A, 74(1) or (2) or 75 or the affairs of an investigated person under section 87ZC(2).

New section 87ZS, which is equivalent to new section 87Z in part 5A, prohibits an investigator directly or indirectly disclosing confidential information. The prohibition does not apply if the disclosure is authorised under an Act or another law; or the confidential information is disclosed:

- in the performance of functions under this part;

- with consent of the person about whom the information relates;
- to whom the information relates; or
- in a form that would not identify any person.

*Clause 26* inserts new division 7 in part 7 for two new transitional provisions. New section 115 makes it clear that for sections 36A, 36E, 37AB, 39A or 41A, the law practice certificate must state the matters in section 36B(2) to (4) only in relation to conduct on and after commencement if the claimant retained the law practice before commencement to act in relation to the claimant's claim and the claim was not settled, decided or otherwise concluded immediately before commencement. Similarly, new section 116 provides that new section 79 does not apply to the legal costs a law practice may charge and recover from a client for work done in relation to a claim if the client retained the law practice before commencement to act in relation to the client's speculative motor accident claim and the law practice continues to have the conduct of the claim on commencement.

### **Part 3 Amendment of Motor Accident Insurance Regulation**

*Clause 27* specifies part 3 amends the *Motor Accident Insurance Regulation 2018*.

*Clause 28* amends section 17 to prescribe extra information a claimant must include in the statement of information for the notice of claim, namely the following:

- the claimant's Medicare number;
- whether the claimant needs an interpreter and, if so, the interpreter's language;
- 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:
  - 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, section 233;
  - 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, section 233;
- if the claimant has retained a law practice to act for the claimant in relation to the claim:
  - the name of the law practice;
  - the date the claimant retained the law practice.

This clause also amends section 17(1)(e) to prescribe the telephone numbers and email address of the owner and driver of each vehicle involved in the accident. The provision currently requires only names and addresses. Likewise, section 17(1)(f) will also be amended to include the telephone numbers and email addresses of witnesses to the accident. The provision currently requires only names and addresses of witnesses.

Furthermore, clause 28 omits existing paragraph 17(1)(o) and inserts a reworded paragraph 17(1)(o) as follows:

- if the claimant consulted a lawyer about the possibility of making a claim—the date the claimant first consulted the lawyer.

Finally, clause 28 makes a minor amendment to move the definition of ‘derivative claim’ to schedule 5 given the term appears in several sections, and to insert a new definition of *certifying doctor* in section 17(4). A certifying doctor means the doctor who signed the certificate mentioned in section 18(1)(a).

*Clause 29* amends the heading to section 18 and prescribes the following matters:

- the 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;
- a certificate signed by the claimant to accompany the notice of claim. The certificate states:
  - 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;
- the claimant’s certificate must be in a form approved by the Commission and verified by statutory declaration;
- if the claimant is at least 15 years—the claimant must provide identity documents, namely:
  - a certified copy 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 2 years and certified to be a photograph of the claimant by a person who has known the claimant for at least 1 year.

Under section 18(2), a certified copy, of an identity document, means certified by the following persons as a true copy of the document: a lawyer, a notary public, a commissioner for declarations, or a justice of the peace.

The clause also amends existing section 18(1)(a)(i) to specify the certificate signed by the doctor also include the doctor’s email address.

*Clause 30* amends section 24 to prescribe a new condition (for section 64(1) of the Act) requiring licensed insurers follow the standards made under section 10(1)(d) of the Act about the proper management of claims.

*Clause 31* amends section 26 to prescribe extra information that licensed insurers must give the Commission by returns for a reporting period under section 88 of the Act.

For each notice of claim received, licensed insurers will give the Commission (‘required claim details’):

- the claimant’s Medicare number; and
- if the notice of claim was accompanied by an identity document under section 18 that has a unique identifying number—the number.

For a notice of claim that is not disputed (or each disputed notice of claim that is resolved), the information (‘required further claim details’) will be as follows:

- 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, section 233;
  - 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, section 233;
- 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;
  - the date the claimant retained the law practice.

The clause also inserts a new definition of *certifying doctor*.

Finally, because of the way the Bill amends section 26(6):

- existing paragraphs (d), (e) and (f) of the definition *required further claim details* have been omitted and reinserted as new paragraphs (f), (g) and (h) respectively. The Bill does not amend the content of these provisions; and
- existing paragraph (h) of the definition *required further claim details* has been reworded and reinserted as paragraph (k). The provision now states:
  - if the claimant consulted a lawyer about the possibility of making a claim—the date, as shown in the notice of claim, the claimant first consulted the lawyer.

## Part 4 Minor and consequential amendments

*Clause 32* inserts schedule 1, which makes minor and consequential amendments.

## **Schedule 1 Minor and consequential amendments**

### ***Legal Profession Act 2007***

*Clause 1* inserts a note in section 347 of the *Legal Profession Act 2007*, flagging section 79 of the *Motor Accident Insurance Act 1994* to ensure readers are aware section 347 also applies to a claim.

### ***Motor Accident Insurance Act 1994***

*Clause 1* omits the definitions of *motor vehicle accident claim* and *claim*.

*Clause 2* inserts a new definition of *claim*, which merges the existing definition of *motor vehicle accident claim* into this definition to avoid two definitions. The content of the definition is the same. This is a minor amendment to correct an inconsistent and duplicative use of the definition of *claim* and *motor vehicle accident claim*. The Act will now refer consistently to a single defined term—*claim*.

*Clauses 3 and 4* make consequential amendments to omit references to ‘motor vehicle accident claims’ and ‘motor vehicle accident claim’ respectively in several sections of the Act and substitutes those references with ‘claims’ and ‘claim’ respectively.

*Clause 5* consequentially amends section 67A(7)(e) to substitute a cross-reference to section 87 with section 73 because of renumbering of sections.

*Clause 6* consequentially amends section 67A(7) to insert a cross-reference to new part 5B.

### ***Motor Accident Insurance Regulation 2018***

*Clause 1* consequentially amends the heading of section 30 to substitute a cross-reference to section 78(3) with section 87ZH(4) due to the new renumbering of part 5B of the Act.

*Clause 2* consequentially amends section 30 to replace the cross-reference to division 3 of part 5 with new part 5B (special investigations).

*Clause 3* consequentially amends sections 3(3)(a) and (b) of schedule 4 to substitute references to ‘motor vehicle accident claims’ with ‘claims’ because the definition of *claim* merges the two terms into a single definition (see clauses 1 and 2, amendments to the Act under schedule 1).

*Clause 4* consequentially amends section 13(1) of schedule 4 to substitute a reference to ‘motor vehicle accident claim’ with ‘claim’ because these definitions are merged into a single definition (‘claim’). (See clauses 1 and 2, amendments to the Act under schedule 1.)

*Clause 5* consequentially amends the definition of *notice of claim* in schedule 5 to substitute a reference to ‘motor vehicle accident claim’ with ‘claim’ because these definitions were merged into a single definition of ‘claim’.



***National Injury Insurance Scheme (Queensland) Act 2016***

*Clause 1* consequentially amends section 103(2) to substitute the reference to section 10(1)(ha) with section 10(1)(m) because the amendments made to section 10 of the Act to insert new functions (see clause 6) lead to a renumbering of the paragraphs in section 10.

*Clause 2* amends the definition of *claim* in schedule 1 (Dictionary) to refer to the definition in section 4 (rather than a motor vehicle accident claim under the Act).

***Victims of Crime Assistance Act 2009***

*Clause 1* consequentially amends the definition of *motor vehicle accident claim* in schedule 3 to substitute the reference to ‘motor vehicle accident claim’ with ‘claim’.

## Annexure 1—Law practice certificate

