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3 July 2019

Ms Lucy Manderson
Acting Secretary
Economics and Governance Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Acting Secretary,

Please find attached Slater and Gordon's submission to the Economics and Governance Committee on the *Motor Accident Insurance and Other Legislation Amendment Bill 2019* (Bill).

Slater and Gordon welcomes the opportunity to make a submission and is supportive of the Bill's stated policy objective to stop the practice of "*claim farming*." We note that the practice of claim farming is detailed in the Explanatory Notes as "*anonymous persons contacting members of the public from local or overseas call-centres or via social media to ask whether they or a family member have been involved in a motor vehicle accident.*"

Unfortunately, rather than directly addressing the practice of "*claim farming*" the Bill proposes a regime which imposes further barriers that restrict the ability of Queenslanders with a legitimate third-party insurance claim from accessing their entitlements, and exposes existing and legitimate business practices to unnecessarily onerous regulatory burdens and/or significant adverse consequences.

Although we are supportive of stopping the practice of claim farming (as defined in the Explanatory Notes), we are concerned that the Explanatory Notes link untested data such as a purported "*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*" to the practice of claim farming without examining the validity of the data or testing whether other factors may be responsible, such as the behavior of insurers or whether improved vehicle safety is reducing injury severity from the higher to the lower end of the injury spectrum.

Slater and Gordon believes the Bill needs to be redrafted to more specifically define and prohibit the claim farming practices which it purports to address, while maintaining the rights of injured Queenslanders to access justice through compensation when they have been involved in an accident through no fault of their own.

The legislation would better meet its stated objective of closing down the claim farming industry if it directly addressed the core components of the practice.

The overriding objective of any reform must be to ensure that Queenslanders are not hindered from accessing their entitlements and learning of their rights under a scheme that they fund through a compulsory premium. The latter, public interest objective is not capable of being achieved through the legislation in its current form.

We would welcome the opportunity to address the Committee directly on the matters outlined in our submission.

Please feel free to contact the office of the General Manager, Queensland [redacted] if you would like any further advice in relation to our submission.

Yours sincerely,

Michael Neilson
Executive Director:
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Karen Murphy
General Manager,
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Motor Accident Insurance and other Legislation Amendment Bill 2019

Submission to the Economics and Governance Committee

Submitted on behalf of Slater & Gordon Ltd by:

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Date submitted: 3 July 2019

1. Introduction: addressing the policy objectives

1.1. Slater and Gordon welcomes the opportunity to make a submission to the Economics and Governance Committee on the *Motor Accident Insurance and Other Legislation Amendment Bill 2019* (**Bill**).

1.2. Slater and Gordon is supportive of the Bill's stated policy objective to stop the practice of "claim farming", the hallmarks of which, as noted in the Explanatory Notes to the Bill, are as follows:

- "anonymous persons contacting members of the public … 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"
- "Claim farmers induce and harass individuals to make a claim … often with the promise of quick and easy compensation"
- "Claim farmers sell individuals' personal information … to a legal practitioner or other claims management service provider who then handles the claim under (Queensland's Compulsory Third Party (**CTP**) Insurance Scheme)"

1.3. Unfortunately, rather than directly addressing the practice of 'claim farming', the core components of which are already outlawed by virtue of the *Personal Injuries Proceedings Act 2002* (**PIPA**), the Bill proposes a regime which appears to be motivated by an overarching, or at least parallel, desire to reduce the number of claims for minor injuries, regardless of their merits, so as to reduce the quantum of insurer payouts. We refer, in this regard, to the concurrent concern (as expressed on the second page of the Explanatory Notes to the Bill) about the:

> "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".

and the comment that:

> "claims data suggests claim farming ... may be promoting a rise in claims for minor injuries, which are often the target of claim farmers"

1.4. We note, in relation to these comments, that there is no evidence that the rise in the number of claims for minor injuries is directly and/or even as a consequence of 'claim farming' – indeed, we understand that there is a corresponding reduction in claims for major injuries, and evidence to suggest that this overall trend is more likely due to increased vehicular safety as well as greater road congestion, which in turn leads to slower speeds and less catastrophic accidents. There is also no evidence of a rise in non-genuine CTP claims. Although Mr Singleton of the Motor Accident Insurance Commission, in his appearance before the Committee on 1 July 2019, noted anecdotal (but unsubstantiated) reports from insurers that there has been a rise in the number of claims being commenced and then withdrawn when challenged by the insurer, our submission is that this could equally be due to more aggressive insurer behavior.

1.5. That a core motivation underlying the Bill is a desire to reduce the number of CTP claims is borne out through the fact that the regime proposed by the Bill fails to target 'claim farmers' in any substantive way at all, but rather, seeks to cruel legitimate practices entirely unrelated to the 'claim farming' practices outlined above, with the direct corollary that the rights of access to justice for Queenslanders with legitimate CTP claims will be severely impaired.

1.6. Having regard to the foregoing, Slater and Gordon believes the Bill (if it is necessary at all, given that the core components of 'claim farming' are already prohibited by PIPA) needs to be redrafted to more specifically define and prohibit the claim farming practices which it purports to address, whilst maintaining the rights of injured Queenslanders to access justice through compensation when they have been involved in an accident through no fault of their own.

1.7. Slater and Gordon therefore proposes that the legislation be redrafted to properly address the practice of "claim farming", the core components of which we submit are:

> Commercial arrangements the *sole or dominant purpose of which* is to provide *pre-agreed financial incentives* to *actively solicit potential claims without the informed consent of potential claimants*, in exchange for the referral of those potential claimants to a legal practitioner or other claims management service provider.

1.8. In addition, the legislation should be re-drafted to more directly address the undesirable behaviors described above, rather than imposing a blanket prohibition on approach or contact for the purpose of making a claim.

1.9. The legislation would better meet its stated objective of closing down the claim farming industry if it addressed the core components of the practice (as outlined above) – whilst simultaneously ensuring that everyday Queenslanders' are not hindered from accessing their entitlements and learning of their rights under a scheme that they fund through a compulsory premium. ***The latter, public interest objective is not capable of being achieved through the legislation in its current form***.

1.10. The balance of this submission addresses each of the aspects of the Bill that Slater and Gordon considers to be particularly problematic.

2. New Pt 4, Div 2A – Law practice certificates

2.1. The requirement to provide a certificate verified by a Statutory Declaration is onerous and unnecessary. The certificate effectively certifies that the law practice has complied with the law, which we submit is a redundant requirement, given lawyers' pre-existing and extensive professional duties (and the severe consequences flowing from any breach thereof).

2.2. Furthermore, the prohibition against paying/receiving a referral fee is not of such importance relative to other laws and requirements where certificates are not required that it warrants such a process.

2.3. We note, further, that the provisions regarding the timing of the certificate when read together are confusing or contradictory, presenting a genuine risk of technical or unintended non-compliance –

- Section 39A requires a certificate be provided to the insurer if it was given to the claimant but not given to the insurer "one month after the claimant is notified of the waiver of compliance".
- Section 37AB requires the law practice to give a certificate within one month of being retained if the notice of claim was already issued by the claimant directly.
- Section 41A requires a certificate be given by a supervising principal on settlement or judgment.

The Act can be read as requiring that the certificate be given prior to the notice of claim being issued, one month after the claimant is notified of the waiver of compliance, and/or one month of being retained and/or at settlement or judgment.

2.4. The proposed certification requirement is also in addition to the existing requirement that a "certificate of readiness" be provided by the solicitor for the claimant to the insurer/solicitor for the insurer 7 days prior to the compulsory conference taking place. The certificate is designed to ensure that the claimant has disclosed all the material they intend to rely upon and will make a genuine attempt to settle the claim when appraised by the costs consequences. As the regime currently stands the insurer is not required to provide a certificate to the claimant unless it has legal representation. The obligations are already heavily weighted against the claimant in this respect and a further certification that the claimant's solicitor has complied with the law is onerous and entirely unnecessary.

2.5. We accordingly submit that it is not appropriate to include the additional certification requirements at all.

2.6. However, if the provisions are maintained, responsibility for completing the certificate should rest with the practitioner with carriage of the claim. Although section 36C(2) allows for a lawyer nominated by the supervising principal to provide the certificate, that section only applies if the supervising principal is the only principal of the law practice. It is quite conceivable that there may be more than one legal practitioner director on the board of an incorporated legal practice – which means that, in such circumstances, section 36C(2) would not apply. Section 36C(2) should therefore be expanded to allow the delegation of the certification requirement by any legal practitioner director.

3. New Pt 5AA, section 74 – Referrals of claims

3.1. The proposed 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.

3.2. The primary concern we have with the current version of section 74 (being a broad-brush ban on the giving or receiving of consideration for referrals) is that it overlaps the existing prohibition on paying, or seeking payment of, a fee for the soliciting or inducing of a potential claimant to make a claim contained in section 68(1) of PIPA. We submit that the existing regulatory prohibitions on touting and the payment of referral fees are adequate to address the issue of lawyers paying claims farmers for potential claimants

and that the issue is one of enforcement. We note, in this regard, that a breach of the existing prohibition may constitute professional misconduct for the purposes of *the Legal Profession Act 2007*, with the consequence that they may have their practicing certificate suspended or cancelled or their right to practice made subject to conditions. It is our submission that this is a powerful disincentive to any legal practitioner who may otherwise be tempted to pay a claims farmer for potential claimants.

3.3. We submit that it is bad law to create two slightly different offences that broadly cover much of the same territory. It would be better to create a provision that defines and more specifically targets the actual problem that is sought to be cured by the objectives of the Bill. In this regard, we submit that the practice of "claim farming" be defined along the following lines:

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

3.4. The current drafting of section 74 is such that while it purports to stop 'claims farming', it will actually operate to reduce visibility and accessibility of justice for Queenslanders with legitimate compensable injuries and who have the right to know and understand their entitlements. It does this by seeking to cruel all traditional relationship-driven 'business development' and relationship building activities that law firms have undertaken for the benefit of the community over many years and in the ordinary course of business.

3.5. Some examples to demonstrate the problem the section 74 and the definition of 'consideration' and 'claim referral' creates:

- **Doctors referring clients with proper intent**

  Doctor 'A' sees a patient injured in a car accident. Doctor A knows Lawyer B to be a leading lawyer in the field of compensation law and, in the best interests of the patient, and for no referral fee refers the patient to Lawyer B. In preparing the case Lawyer B secures a medico-legal report from Doctor A and pays a fee of $500 for the report and the patient medical notes. Lawyer B is compelled to secure this report (Sections 37, 42, Division 4) and Doctor A is the most appropriate person to provide the report as the patient's physician. It is reasonable for Doctor A to expect payment for his professional time and expertise in preparing the report.

  The fact that Doctor A is being given the opportunity to provide professional services in this context could be considered 'consideration' for the referral of the patient, thereby potentially constituting a breach of prohibition in section 74.

  We note that the foregoing scenario does not currently contravene the similar prohibition contained in section 68(1) of PIPA by virtue of the exemption in section 68(2)(b). It is therefore imperative that a similar exemption should apply in the context of the proposed section 74 prohibition.

- **Charities, community organisations and representative bodies with public interest objectives**

  Law firm 'A' has a corporate social responsibility program that sees staff raise money for Charity 'B' related to brain injury. Funds raised by Law Firm A are given to the Charity B. Charity B refers those of its members who have acquired brain injuries through motor accident clients to Law Firm A.

  This arrangement could potentially breach Section 74 if it is deemed that the funds are given as 'consideration' to the charity in exchange for 'claim referrals'.

  Similarly, Law firm 'A' gives several bursaries to Union B for various benevolent and welfare causes, including depression, education, widows of deceased members killed in tragic events. In addition, Law Firm A will undertake free or heavily discounted work for Union B members as part of its support for the union workers and members. Union B therefore refers all its legal work to Law Firm A including motor vehicle claims.

  These arrangements could potentially constitute a breach of Section 74 as it is currently written.

  The effect of adopting the proposed prohibition, without clarification that such benevolent arrangements are exempt, would be to stop the type of beneficial arrangements that exist for the benefits of workers and which transcend the intent of the amendment.

- **Traditional relationship building**

  A practice group provides an educational seminar for a nearby medical practice accompanied by a sandwich lunch. The aggregate cost of the provision of this seminar exceeds $200, without even taking into account the 'cost' of the lawyer's time, use of office space, etc. There is no mention of 'referrals' on either side during or in the course of conducting the seminar, it is simply a mutually beneficial relationship building exercise. A week later, one of the doctors refers a potential claimant to the law practice.

  Under the current drafting of Section 74 and the defined terms "consideration" and "claim referral", the seminar and lunch could constitute 'consideration' for a referral.

- **Remuneration for lawyers**

  Lawyer 'A' is a leader in the profession, presents at seminars, wins high profile cases, and has an outstanding reputation. Lawyer A works for Law firm 'B'. Because of Lawyer A's reputation many clients retain Lawyer A to conduct their cases. Law firm B rewards Lawyer A with a component of his salary being contingent on Lawyer A's capacity to grow the market share of Law firm B based on Lawyer A's reputation, strong networks and good work. Such remuneration structures exist in most professional services' firms and reflect standard commercial employment arrangements.

  This standard aspect of "at risk" remuneration could breach Section 74 if it was found to be 'consideration' paid for generating 'claim referrals' to Law Firm B.

The effect of the amendment would be to collapse employment contracts and stifle an individual's ability to grow and be rewarded for their expertise and ability to build relationship networks.

3.6. Having regard to the foregoing examples, we note that the current drafting of section 74:

- opens lawyers and firms to unnecessary commercial risk, in circumstances where they already have extensive obligations under the legal professional regulations, in addition to pre-existing obligations not to pay referral fees under section 68(1) of the *Personal Injuries Proceedings Act 2002*;

- places an undue restriction on the many Queenslanders that are employed in the law and who genuinely wish to ensure that Queenslanders with legitimate compensable injuries are aware of their rights;

- fails to take into account the practicalities, models, structures and ethos of the practice of and the business of law for the majority of firms;

- inadvertently captures and damages the benevolent endeavours of many law firms that give to charities and support organisations within the community; and

- prevents referring medical practitioners from deriving a fee for services genuinely and appropriately provided to the law firm to progress their patient's claim, in circumstances where they are the most appropriate practitioner to provide a medical report.

3.7. It is a normal part of any professional service business for relationships to be built and maintained using hospitality. The fact that token gifts or hospitality with a value of $200 or less are exempted indicates that gifts or hospitality worth more than $200 are not exempted. It is our submission that the provision of general hospitality (ie: not clearly and directly in exchange for a referral) and educational benefits should not be considered consideration for a referral. We note that the equivalent referral restrictions contained within Reg 24 of the NSW *Motor Accidents Compensation Regulation 2015* expressly exclude hospitality that is "reasonable in the circumstances".

3.8. The following should also be excluded from the definition of "consideration":

- fees paid in exchange for provision of a professional service rendered in respect of the claim, thereby ensuring that treating doctors and other medical professionals can continue to be engaged to provide medico-legal reports in respect of their patients' claims;

- donations, bursaries, education, fee discounts and other benefits provided to charitable organisations, community organisations, unions and sporting associations;

- remuneration paid to employees of a law practice that is contingent upon achieving business targets. Business development is a normal part of any employee's role in a professional services business and it is usual for a component of an employee's salary to be "at risk" and contingent upon achieving designated KPIs.

3.9. We note, in in making this submission, that there is an existing restriction on touting (see section 67 of the *Personal Injuries Proceedings Act 2002)* that precludes employees from directly soliciting potential claimants. The further stifling of relationship referral marketing and associated educational initiatives will further impact the ability of legitimately injured Queensland motorists to be made aware of their rights.

4. New Pt 5AA, section 75 – Approach or contact for the purpose of making a claim

4.1. The proposed new section 75 prevents a person from personally approaching another person for the purpose of soliciting or inducing that second person to make a claim.

4.2. Whilst we support a general prohibition on "cold calling", we consider that the current drafting of section 75 is too broad and the exceptions too limited, operating to prevent legitimate approaches, with the undesirable effect that many injured Queenslanders' will be unaware of their rights and therefore denied access to justice.

4.3. A number of the examples provided in the previous section of our submission will also be relevant here, including the examples of treating medical professionals, unions and charitable organisations. It is common for such classes of person to inform their patient/member of the desirability of seeking legal advice in relation to their rights. Those persons derive consideration from law firms for the giving of referrals in the various forms described above. It is not in the public interest that these interactions be prohibited, as they could well be if the Bill is enacted in its current form. Accordingly, we submit that the prohibition should not apply to:

- Treating doctors and other medical professionals in circumstances where their approach results in them being engaged to provide their professional services in relation to the claim; and

- Charitable organisations, community organisations, unions and sporting associations, who may approach their members in relation to the bringing of a claim.

4.4. Further, if a person has previously consented to be contacted by a lawyer, then the lawyer's subsequent approach should not be caught by the prohibition.

5. Part 5A – Enforcement

5.1. The proposed reform introduced by the replacement of 5A, divisions 2 to 4 is overwhelming in terms of the scope of the powers that will vest in authorised persons. It is our submission that the conduct sought to be stopped by the Bill is not of such a nature that it is in the public interest to give such sweeping powers of investigation, entry and seizure.

5.2. We are particularly concerned by proposed new section 87ZI which purports to over-ride the time-worn concepts of legal professional privilege and the common law privilege

against self-incrimination. These concepts represent fundamental cornerstones of justice under Australian law. Parliament should only override the protection afforded by these privileges in matters of significant importance, where the importance of the issue being dealt with clearly outweighs the importance of the right of the privilege. Claims' farming is not such an area and the protections of legal professional privilege and privilege against self-incrimination should be maintained. If enacted, section 87ZI is highly likely to be subject to judicial challenge.

5.3. In relation to proposed new section 87ZO, we submit that the ability of the Commission to recover its costs from an investigated party should be contingent upon an actual conviction by a court in relation to a contravention of the relevant provisions. This is consistent with the powers of other regulatory authorities granted legislative powers of investigation (eg: section 91 of the *Australian Securities and Investments Commission Act 2001 (Cth*) and section 532K of the *Workers' Compensation and Rehabilitation Act 2003 (Qld*)).