22 March 2017

Mr Neil Singleton
Insurance Commissioner
Motor Accident Insurance Commission
Queensland Treasury
GPO Box 2203
BRISBANE QLD 4000
by email

Your ref
Our ref Accident Compensation / Tort law Committee

Dear Insurance Commissioner

Response to Report on Claim Farming – Queensland CTP Scheme

The Queensland Law Society (the Society) is pleased to have the opportunity to respond to the Report on Claim Farming in Queensland CTP Scheme prepared by Richard Douglas QC.

We are grateful to Mr Douglas QC for his work in producing the report. We consider that it provides sound analysis of what claim farming is, how it presents in Queensland, what legislative tools exist to curtail it and what more needs to be done.

As to the latter, we note that Mr Douglas QC has made several observations and recommendations in his report. These are broadly listed at paragraph 29 of the report and elaborated on further in subsequent paragraphs. We provide the Society’s response to each of the recommendations as follows.

Amendment to section 67(2)(b) of the PIPA

The Society supports the proposed amendment to section s67(2)(b) of the PIPA, found at paragraph 83 of the report.

Uniform operation of the “50/50” rule as to costs

As stated in our earlier submissions, the Society is supportive of extending the “50/50 rule”, found in section 347 of the Legal Profession Act 2007 (Qld) (LPA), to interstate practitioners dealing with Queensland claims. The Society is also supportive of this extension applying to all speculative personal injuries claims.

The drafting of any legislative amendment will need to deal with the extraterritorial issues inherent in extending provisions about what costs a lawyer can recover, to lawyers outside of Queensland. In our view, it is the locus of the client agreement, and the law it purports to be made under, that governs what law and costs regime will apply. We note that these issues have been addressed in the report.
As to the proposed section 347A, we are unsure that the section actually addresses the problem. The LPA already imports the "50/50" rule. We believe inserting the rule into the legislation governing the claim, for example, into the *Motor Accident Insurance Act 1994* (MAIA) or the *Personal Injuries Proceedings Act 2002* (PIPA) may better capture those running Queensland claims.

We also submit that the penalty for not complying with the proposed section should not be criminal, but rather sound in cost penalties. This is the case with similar failures in costs disclosure.

**Proposed section 67B of the PIPA**

We acknowledge the deficiencies in stifling claim farming under the current provisions of the PIPA. While we agree with the intent behind the drafting of this proposed section, we believe there are flaws in construction. For example, the wording in sub-section four is ambiguous. The Society does not wish to see the erosion of the normal relationship building and referrals that underpin a successful legal practice. The wording in that subsection could prevent the normal course of building a relationship or even answering a genuine enquiry.

**MAI Act certification**

The Society's earlier submission expressed support for a claimant and legal practitioner certifying that the subject claim did not originate from a claim farmer. This remains our position. We are also generally supportive of the wording in the statutory declaration proposed in the report. We suggest that in paragraph 7, or somewhere else in the document, there should be a confirmation about whether the claim has been transferred between lawyers/law practices and whether sufficient enquiries were made at that time as to the origin of the claim, and what that origin was.

As to who provides this declaration and when, we maintain our view that both the claimant and lawyer need to do so and we say that this needs to occur at the commencement of the claim and at the time of resolution. Our rationale is expressed below.

We are also mindful that law practices and lawyers who run claims procured by a claim farmer often do so via Claims Management Companies/Consultancies (CMC). Therefore, either the declaration will need to be completed by the law practice/lawyer and the CMC or, practice's/lawyer's declaration will need to confirm the involvement of a CMC and how it obtained the claim.

We are also of the view that those who are illegally engaging in this practice will not be sufficiently deterred by the threat of penalty attaching swearing a false statutory declaration. Therefore, we believe there needs to be a financial penalty. We propose that if a lawyer/law practice fails to provide the statutory declarations (four in total), or, if one or more of these confirm the claim did emanate from a claim farmer, then that lawyer/law practice is not entitled to charge the client for their professional fees or any outlays paid, or to be paid.

In this case, the insurer would pay the statutory and other refunds. The remainder of the settlement or award of damages is to be paid to the client. The party-party costs (if any) could be paid by the insurer to MAIC or another entity tasked with investigating and prosecuting claim farming offences.
If there is a dispute between claimant and lawyer, then there will need to be a determination by either a court or a delegated entity. In this case, the statutory refunds can be paid but the balance of the damages and costs will be held until the dispute is resolved.

We believe this approach will be effective in prohibiting those lawyers and firms, who pay claim farmers, from profiting from these claims and thus lead to a decrease in the demand for claim farmers. The additional evidence from the claimant will assist in this cause; however, we repeat our previous submission that it is not our intention to target claimants in any way.

In our opinion, the documents should be provided at the time a Notice of Accident Claim form is lodged and be a condition of compliance. We agree with the report that these should be approved forms by MAIC. The statutory declarations would therefore remain with the insurer at first instance.

The statutory declarations at the time of settlement or judgment will also be provided to the insurer and will form part of their normal checklist before releasing the money to the lawyer’s trust account.

**Powers of investigation**

The Society is supportive of further investigative powers being given to the Commissioner (or other appropriate person or entity) providing that additional resources are also provided. We note however, that claim farming may not now, or in the future, be limited to CTP claims. It may be prudent to vest these additional powers in a person or entity who can investigate matters across all personal injuries schemes.

**Costs**

We do not support the proposal to increase the costs thresholds in section 55F of the MAIA. As noted in the report, such thresholds are already increased in accordance with section 100A and it is our view that increasing the amount of costs recoverable by a party may only induce claim farmers further.

Finally, we believe there is benefit in greater education of the public about claim farming, whether this is achieved through MAIC or the government more broadly. The Society will also take steps to further educate our members.

If you wish to discuss any of the issues raised in this correspondence, please contact Kate Brodnik, Policy Solicitor, on 3842 5861 or k.brodnik@qls.com.au.

Yours faithfully

[Signature]

Christine Smyth
President