New South Wales Bar Association

Responses to Questions on Notice from Standing Committee on Law and Justice Hearing, 17 June 2016 - First Review of the Compulsory Third Party Insurance Scheme

The New South Wales Bar Association again thanks the Standing Committee for the opportunity to have its representatives attend and give evidence during the course of the Committee deliberations.

There were two questions on notice arising from the evidence of the Association's representatives given on 17 June 2016 (Andrew Stone SC and Elizabeth Welsh). We apologise for the delay in addressing those questions – our representatives have been busily engaged in responding to the Government's proposed reforms to the CTP scheme.

Unfortunately, in response to the questions on notice, the Association is unable to provide much by way of further information regarding claims farming or harvesting practices. What little we can say is as follows.

1. Claims Harvesting Provisions

The Hon David Shoebridge MLC asked whether there were legislative provisions somewhere around the rest of the country or in comparable jurisdictions which outlaw claims farming or claims harvesting practices.

Having made further enquiries, the Association is unable to assist with regard to any such legislative provision in Australia. In particular, it does not appear that there are any such provisions in Victoria, although there is a Code of Conduct which lawyers dealing with TAC claims adhere to.

At present, the Costs Regulations applicable to NSW motor accident claims prohibit a legal practitioner from paying a fee to a third party to "*purchase*" information about a claim. Whether that measure is proving effective in reducing claims harvesting, the Association is in no position to say. SIRA should be better positioned to advise in this regard.

Referral fees are banned in NSW. The United Kingdom introduced a ban on referral fees in 2013 in direct response to the emerging problem of claims harvesting.

Queensland has a prohibition on touting at the scene of an accident or at any time (section 67 *Personal Injury Proceedings Act 2002*) and a prohibition against paying or seeking payment for touting (Section 68). Queensland maintains a prohibition on advertising for personal injury services. That is no longer the case in New South Wales or Victoria with the commencement of the *Legal Profession Uniform Law* in 2015. The evolution of claims harvesting was identified in Queensland as early as 2007. Its emergence was then seen as being possibly as a response to advertising restrictions in personal injury claims.

In Ireland, where restrictions on advertising in personal injury actions, the advertising of legal services by non-solicitors is prohibited by Section 5 of the *Solicitors (Amendment) Act 2002* and direct or indirect association with such a person by a solicitor can amount to professional misconduct. These restrictions predate claims harvesting, but operate as a control on the legal profession in that context.

There is widespread regulation of the conduct of legal practitioners in relation to potential claims harvesting the regulations focus on the conduct of the legal practitioner and not the claims harvester.

The Association is aware (on the basis of information provided by SIRA) that some British-based firms sought to circumvent a United Kingdom provision banning payments to claims harvesters by moving the claims harvesting process in-house. Association representatives are not aware of any such practice having occurred within Australia.

2. Accident Information Databases

The Hon Trevor Khan MLC asked about the business practices of claims harvesters (in Australia).

The claims harvesters appear to work off a number of different business models. One is the external model that uses call centres to make random calls to all listed phone numbers in NSW, with a false claim being proposed by way of a set script saying that the caller is aware that someone within the household has been involved in a motor vehicle accident. These calls have included misleading representations.

There is also more targeted cold-calling, which Association members understand (without first-hand evidence, but rather on the basis of hearsay) involves actual knowledge on the part of the caller that there has been an accident.

Claims harvesters may find out the names of potential claimants, on the basis of information obtained from tow-truck operators, smash repair businesses, property damage insurance records or treating medical practitioners. The extent to which money changes hands as a payment for referral is not known by Association members.

Similarly, the extent to which information leaks off a database (such as the computer records of a property damage insurer) is unknown. The extent to which there is supply of information in breach of privacy legislation is also unknown. On the basis of anecdotal reports, there are certainly healthy grounds for suspicion, but the Association has little by way of hard facts.

GENERAL COMMENT

The Bar Association emphasises that there is nothing wrong or improper with somebody being informed of their potential rights to make a claim. If somebody has been genuinely injured in a motor vehicle accident, they are entitled to learn about the claims process and, in appropriate cases, to receive the assistance required in pursuing their rights.

However, the Association does not support random cold-calling, the supply of misleading information or a business model of third party agencies "*selling*" personal information in return for a fee, especially where the business model drags into the CTP system those with negligible injury on the basis that pursuit of a claim will deliver *"free money*".

The Association has suggested mechanisms to remove the economic incentives for claims harvesting to the Government. It is noted that the harvesting predominantly "*captures"* small claims – those who were not otherwise going to pursue a claim.

If there are further issues with which the Association can assist the Standing Committee, then we would be pleased to do so.

28 July 2016