Insurance Council of Australia

7 February 2025

By email: policy@dcj.nsw.gov.au

Dear Sir/Madam,

Claim Farming Practices Prohibition Bill 2025

The Insurance Council of Australia (ICA) welcomes the opportunity to provide feedback to the Department of Communities and Justice (DCJ) in relation to the draft Claim Farming Practices Prohibition Bill 2025 (Draft Bill).

The ICA is the representative body of the general insurance industry. ICA members provide a range of general insurance products including public liability insurance, CTP insurance and workers' compensation insurance.

The ICA supports the introduction of legislation in New South Wales which aims to prohibit the practice of claim farming to personal injury claimants or survivors of abuse. The Draft Bill is a positive step to address the insidious practice of claim farming.

However, we are concerned the limited scope of the Draft Bill, in particular, the exclusion of CTP and workers' compensation from its application, will limit its effectiveness in addressing claim farming and the behaviours of groups that engage in it.

In addition, NSW CTP insurers are very concerned that an exclusion of CTP from the legislation would result in businesses involved in claim farming and undesirable billing practices turning their attention to the CTP scheme. This would lead to increased provider networks seeking to take advantage of the scheme, resulting in increased claims (including potentially unmeritorious claims) and higher premiums for motorists.

Therefore, the ICA recommends the following amendments to enhance the Draft Bill's effectiveness in achieving its goals:

- Expand the scope of the Bill, especially to capture CTP and workers' compensation in its application;
- Include a requirement for legal practitioners to certify the absence of claims farming practices under a relevant Law Practice Certificate;
- Strengthen enforcement mechanisms and available penalties; and
- Remove the limitation period on claim farming prosecutions.

Scope of the Draft Bill

CTP and workers' compensation claims

The scope of the Draft Bill should be expanded to include CTP and workers' compensation.

Section 4 of the Draft Bill provides that the prohibition on claim farming applies to claims for personal injury damages to which the *Civil Liability Act 2002 (NSW)* (CLA) applies, except those claims that are

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"carved out" by section 3B(1)(b)-(h). The carve outs in section 3B(1) include motor accidents and workers' compensation.

The ICA has previously highlighted the need for restrictions on claim farming activities in the NSW CTP scheme. We refer to our earlier submissions to the DCJ (dated 31 May 2024) and to the State Insurance Regulatory Authority (SIRA) (dated 19 July 2024). These are attached to this submission for ease of reference.

Claim farming and undesirable billing practices in personal injury claim matters have been identified as areas of increasing concern in the NSW CTP scheme. They can result in unnecessary or fraudulent claims being made and inappropriate services and treatment being provided, leading to increased claims costs and higher premiums. This affects insurance affordability and exposes vulnerable claimants to additional pressures and poorer outcomes. Insurers have observed that where claim farming activity is suspected, there is a direct correlation with increased treatment needs and the development of psychological injuries.

Claim farming in the NSW CTP scheme is observed by insurers to include the following arrangements:

- Targeted and sophisticated approaches, for example, where claim farmers pay for priority Google searches so that when a customer searches for their insurer, a website or phone number will come up that appears to be their insurer but is not.
- Providers (including those providing medical, rehabilitation, translation and legal services) that operate within a network in a coordinated manner and benefit from referrals within their networks. These networks result in higher claim frequencies and abnormally high fees.
- A third-party coercing or encouraging a potential claimant to make a claim.
- A third-party providing information about a potential claimant to another party, usually a lawyer, in exchange for a commission or payment.
- Claim farmers falsely representing themselves as a representative of the insurer.
- Solicitors contacting potential claimants in circumstances where the claimant has not provided their details to the solicitor.

While there is currently some regulation of claim farming practices in the NSW CTP scheme, it is clearly insufficient to address the problem facing the scheme.

The *Motor Accident Injuries Act 2017* (MAI Act) provides at section 11.11 for the regulation of advertising and the promotion of services. The power is exercised in the Motor Accident Injuries Regulation (MAI Regulation) at clause 41 to place limitations on the payment and receipt of referral fees by legal practitioners.

The limitations on referral fees contained in clause 41 of the MAI Regulation apply solely to solicitors and do not prohibit the sharing of information by service providers on a quid pro quo basis, nor do they prohibit the use of information obtained under such arrangements. In addition, we note that identifying claim farming practises can also be difficult.

Further, insurers are concerned the NSW CTP scheme is at increased risk of claim farming activity due to amendments made to benefit entitlements in 2022. For example, the increase in the availability of weekly benefits for lost earnings and treatment and care payments, recoverable regardless of fault, from 26 weeks to 52 weeks. Further, the removal of a waiting period before a common law claim can be made provides additional incentive to claim farmers to target the scheme.

This means that despite existing regulation, the CTP Scheme remains vulnerable to claim farming practices. These practices add to the cost of the CTP Scheme borne by motor vehicle owners and can cause additional distress to those involved in a motor accident.

Noting the Draft Bill includes prohibitions that will operate more broadly to limit claim farming practices, we submit its application should be extended to include CTP. As demonstrated by the experience in Queensland where claim farming reforms were introduced from 2019, we expect claim farming activities would be curtailed significantly through the introduction of regulatory reform and inclusion in the regime would prevent those operating in the broader liability space from migrating to the CTP scheme.

The ICA would support the expansion of the prohibitions in the Draft Bill to NSW CTP and workers' compensation claims, both for statutory benefits and common law.

We further note that the approach to exclude CTP and workers' compensation claims appears to be contrary to the intention of the Draft Bill to align with other jurisdictions. The background paper to the Draft Bill states that the proposed reforms align with recent reforms developed by Queensland, Western Australia and South Australia.

We are aware that the claim farming related prohibitions and procedural requirements currently operating in Queensland (which apply to CTP and workers' compensation) have been extremely effective in identifying and penalising claims farming practises. The Queensland CTP regulator, the Motor Accident Injury Commission (MAIC), has reported that the introduction of claim farming prohibitions in Queensland from 2019 has resulted in a significant reduction in claim farming activity with 1,300 complaints reported in 2019 and only 27 reported in 2023-24[1].

Other claims

The Draft Bill applies to claims under the CLA and is intended to also cover intentional acts like causing harm or death, as well as physical and sexual abuse. However, we are concerned that it could be interpreted too narrowly, excluding claims which are intended to be included, such as under the Redress Scheme. To avoid this, we suggest DCJ clarify the Draft Bill's scope with a clear definition that includes specific claims which are included and excluded under the Draft Bill.

Tightening of exceptions

We recommend there is tightening of the exceptions in section 5(3) of the Draft Bill to reflect the way claim farming operates in practice. The prohibition on claim farming should be broad enough to cover the breadth of arrangements witnessed by insurers and patterns of overservicing. For example, there are circumstances where no fee is paid but high-risk treatment providers have a relationship with solicitors through a network and display patterns of overservicing (e.g., a solicitor refers a claimant to a doctor for no fee, but the doctor derives a benefit in charging his/her fee for service and engages in undesirable servicing practices).

We submit that the exceptions should refer to the *intention* to receive consideration. At present, section 5(3)(a) provides an exception where 'a potential claimant is contacted and no person expects to receive, and no person receives, consideration because of the contact'. Insurers are concerned that the draft section will not encapsulate the relationship between solicitors and high-risk providers and the potential argument that no consideration is passing between the parties. Another concern is around

[1] Motor Accident Insurance Commission Annual Report 2023-2024, MAIC, MAIC-annual-report-2023-24.pdf

timing and the need to avoid arguments that no consideration was expected to be received which was subsequently received at a later date.

Further, section 5(3)(c), which provides an exception where a law practice contacts a potential claimant that the practice has provided with legal services, does not encapsulate the varied activities insurers have witnessed in the NSW CTP scheme.

We also recommend that the exception in section 7 of the Draft Bill, which provides that a person does not commit an offence by advertising, marketing or promoting a law practice to the public, should be amended to clarify that the exception does not apply where the advertising is deceptive or misleading in order to encourage individuals to file claims.

Advertising restrictions could include:

- Requiring law firms and other entities to advertise using their business names only.
- Banning advertising by third-party intermediaries.

Law Practice Certificates

We recommend that the Draft Bill is amended to require a Law Practice Certificate (LPC) requiring practitioners to proactively declare the absence of claim farming.

We refer to the legislative requirements in Queensland which require solicitors to provide statutory declarations during the claims process, certifying that they have not engaged in claims farming. The LPC must be signed by the supervising principal and verified by statutory declaration. There is no equivalent in the Draft Bill.

Aligning the Draft Bill with this approach would increase accountability by requiring legal practitioners to explicitly address claim farming behaviour, as has proven effective in Queensland.

Strengthening of enforcement measures

We submit that the maximum penalty for one offence of $55,000 is not sufficient to deter claim farmers and should be significantly increased.

We further recommend that the Draft Bill includes provisions similar to sections 78 and 80 of the MAIA to allow the Regulator to apply for a court injunction and to allow extraterritorial application.

Removal of limitation period

We recommend the removal of the two-year limitation period for prosecutions of an offence, noting there is no equivalent provision in Queensland.

Personal injury and abuse claims often take years to surface, and it may take even longer for regulators to detect, investigate, and gather enough evidence to prosecute patterns of wrongdoing. Personal injury claims are long tail claims which usually take several years to resolve. We note the first Queensland claim farming prosecution by MAIC was in February 2023, after the commencement of the laws in 2019.

We recommend aligning the Draft Bill with Queensland's legislation which does not impose a time limitation.

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Credit hire – regulatory reform

Consistent with the ICA's 31 May 2024 submission to the DCJ consultation process, we consider the credit hire and accident management companies (CHC/AMC) to be an area in need of reform, either through the Draft Bill or another mechanism.

CHCs provide replacement vehicles to not-at-fault drivers involved in accidents and seek to recover costs from the at-fault driver or their insurer, typically at much higher, and often exorbitant daily rates in comparison to other vehicle hire companies. AMCs operate similarly but also offer vehicle repair and handle insurance claims for the not-at-fault driver.

CHC/AMCs have a vertical integration model which includes towing companies, smash repairers, hire car providers, recovery agents and legal firms. These entities may be part of the same corporate group or work on referral/network relationships.

From a consumer perspective there are often unexplained financial and personal consequences from engaging with credit hire companies. The detrimental consumer impacts of activities of these businesses observed by ICA members as well as consumer advocates include:

- Drivers being subject to undue pressure, harassment and intimidation both at the scene of an accident and thereafter.
- Uninsured drivers facing inflated demands for hire car and repair charges, often well above the cost of repairs to the damaged vehicle.
- CHC/AMC customers pursued for hire car and repair charges and being liable for legal fees after unsuccessful recovery actions. In some cases, vehicles are held until payments are made.
- Legal proceedings initiated in customers' names without their knowledge.
- Consumers' personal information shared with third parties without consent.

We believe it is important that reforms be developed to address CHC/AMC industry practices and would welcome further engagement on this issue.

ICA recommendations

We submit that by refining definitions, removing limitations, and aligning penalties with serious offenses, the legislation can more effectively deter unethical practices and protect vulnerable claimants.

In summary, we provide the following recommendations for DCJ's consideration:

- Expansion of the scope of the Draft Bill to include CTP and workers' compensation. To enable the CTP changes to take effect, we suggest the following:
    - Inclusion in the savings and transitional provisions of an amendment repealing clause 41 of the MAI Regulation.
    - Alignment of claims farming prohibitions across jurisdictions via an amendment of clause 4 of Part 2 of the Draft Bill to extend its application to MAI Act all claims, that is statutory benefits and common law claims.
- Further consideration of the scope of the Draft Bill to ensure it is broad enough to cover the breadth of the arrangements witnessed and includes all intended claims (e.g., those under the Redress Scheme).

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- Inclusion in the Draft Bill of a requirement for legal practitioners to confirm on each claim that the claim farming prohibitions, set out in clauses 5 and 6 have been complied with, similar to the regime operating in Queensland.
- Strengthening of enforcement measures, such as increasing the maximum penalty and allowing the regulator to apply for a court injunction and allow extraterritorial application.
- Removal of the limitation period.
- Consideration of regulatory reform to address concerns about credit hire.
- Requiring those engaging prospective clients to identify themselves (as a solicitor, medical provider, claims management entity etc) and to state whether they are or are not working with an insurer.

In conclusion, we commend DCJ's efforts to address claim farming through the Draft Bill. Aligning with proven measures in Queensland, particularly around the application to CTP and workers' compensation, legal practitioner accountability and broader enforcement provisions, would strengthen the Draft Bill's impact.

We trust our response is useful and encourage DCJ to consider these recommendations to ensure the Draft Bill delivers its intended outcomes. Please do not hesitate to contact [redacted].

Yours sincerely

Leisha Watson
Director, Regulatory and Consumer Policy