



# Précis Paper

## Claims Farming

A detailed examination of the practice of claims farming in the area of personal injury: what it is, how it works, the problems associated with it, and what can be done to address it.

### **Discussion Includes**

- How does the Office of the Legal Services Commissioner of NSW deal with complaints against lawyers?
- What happens if criminal activity is discovered in the course of an investigation into a complaint?
- What proportion of complaints dealt with by the Office of the Legal Services Commissioner relate to personal injury matters?
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- How does claims farming work?
- Is claims farming an illegal or unethical activity, or is it a case of people accessing justice?
- Illegality
- Unethicality
- Taking action against claims farming
- The undermining by claims farming of trust in the lawyer-client relationship

# Précis Paper

## Claims Farming

1. In this edition of BenchTV, Raj Kanhai (Principal, Finity Consulting, NSW), Geoff Atkins (Principal, Finity Consulting, NSW), and John McKenzie (Legal Services Commissioner, Office of the Legal Services Commissioner, NSW) provide a detailed examination of the practice of claims farming in the area of personal injury: what it is, how it works, the problems associated with it, and what can be done to address it.

How does the Office of the Legal Services Commissioner of NSW deal with complaints against lawyers?

2. The Office of the Legal Services Commissioner of NSW handles all complaints against lawyers in the State. The complaints-handling process begins when the Commissioner receives a formal complaint, in writing, in either letter or email form. The Commissioner can assist people with lodging a complaint if they are unable to do so themselves.
3. Once a complaint is received, the Legal Services Commissioner assesses it to determine its seriousness. Once assessed, a complaint may go one of two ways:
  - i. If the complaint is of a less serious nature, it is a consumer classification matter. The Commissioner tries to deal with these as quickly and informally as possible, usually negotiating a reduction in the respondent lawyer's fees, an apology from the lawyer for rudeness, a promise of no further delay, etc.
  - ii. If the complaint is of a more serious nature, it is a disciplinary matter. If the Commissioner determines that there is sufficient evidence to proceed to a formal disciplinary finding, the Commissioner will institute proceedings against the respondent lawyer in the NSW Civil and Administrative Tribunal (NCAT). If the NCAT agrees with the case put forward by the Commissioner, the lawyer has the opportunity of appealing the NCAT's finding to the NSW Supreme Court or Court of Appeal. A surprising number of lawyers who have adverse findings against them avail themselves of this avenue of appeal.

What happens if criminal activity is discovered in the course of an investigation into a complaint?

4. If, during the course of an investigation into a complaint, the Legal Services Commissioner comes across activity that is possibly criminal, the matter is immediately referred to the police. If a criminal investigation, and ultimately, prosecution become necessary, the Commissioner is duty-bound by procedural and administrative law to suspend any disciplinary proceedings while any criminal investigation, and, if necessary, prosecution, are taking place. The Commissioner's disciplinary proceedings can easily be reinstituted at the

end of the criminal prosecution. If, in the prosecution, there is a finding of guilt on a serious matter, the Commissioner can rely on this as a ground for asking the lawyer to leave the legal profession.

What proportion of complaints dealt with by the Office of the Legal Services Commissioner relate to personal injury matters?

5. Personal injury matters make up 12%-15% of the complaints received by the Office of the Legal Services Commissioner. These include matters ranging from workers' compensation cases and motor vehicle accidents, to simple cases of slipping on a banana peel in the supermarket. A number of these complaints only arise after a settled negotiation, or after a court determination, where the client has not received the amount of compensation they were seeking, or, in retrospect, the amount of compensation they believe they should have received.
6. Sometimes there is no basis to the client's complaint to the Commissioner other than a belief that they did not get enough money, in which case there is nothing the Commissioner can do. However, there may be situations where the client complains that the lawyer has taken a larger cut than the client thought would have been the case, or that the lawyer did not disclose their costs to the client, or that the lawyer failed to let the client know, at the beginning of a negotiation for a settlement, what their costs were at that stage – these would be consumer classification matters. In situations where there are some real allegations of conflict of interest, such as where it might be thought by the complainant that the lawyer deliberately misled them, or persuaded them to take a particular path in a case solely for the benefit of the lawyer and/or their associates – these would be serious disciplinary matters, if proven.

Has the Legal Services Commissioner come across claims farming in his current role?

7. The Legal Services Commissioner has not yet had an outright complaint of an actual allegation of claims farming.
8. The Commissioner keeps a close eye on the media, as claims farming has received media attention. He also makes many presentations on the issue to professional bodies, regional law societies, firms, other groups of lawyers, and likes to talk, discuss, and debate issues of the day with legal practitioners when he is amongst them. In these conversations, the Commissioner has come across practitioners who have told him of their fears that other people are engaged in claims farming, and that they hear stories, in response to which the Commissioner tells them to present him with the evidence and they can try to do something about it, but that has yet to happen.

#### What is the situation with claims farming interstate?

9. The Legal Services Commissioner has monthly teleconferences with all of the legal regulators in other jurisdictions. The Commissioner's counterparts in Western Australia have given him feedback that some of the NSW lawyers the Commissioner has heard about in his above conversations with legal practitioners have started operations on an agency basis in Western Australia. They are doing this by establishing local offices in Western Australia, as well as, it is suggested, engaging in the practice of claims farming.
10. Because claims farming is a covert activity by its very nature, very little facts are known. However, some statistics are available, which are derived from complaints made to the ACCC pertaining to compensation. Last year, the ACCC fielded about 8,000 compensation-related complaints from individuals. These complaints began in NSW, but NSW-based complaints subsequently began to drop, with a growth in complaints in Queensland, Western Australia, and South Australia. This pattern indicates that claims farming is a very agile business model that does not respect state boundaries. Incidentally, there are very few complaints from Victoria, Tasmania, and the Northern Territory, where there is no motor accident lump sum compensation available.

#### Correlation between claims farming and NSW legislative changes in CTP

11. The NSW legislative changes in CTP (which is restricted benefits and removed many of the benefits existing at common law) have made it less lucrative for lawyers dealing with smaller personal injury claims. Conversely, at the same time there has been an increase in claims in States such as Western Australia and South Australia in particular.
12. There are some fairly strict legal costs restrictions in Queensland for small personal injury matters, which apply only to Queensland lawyers. As NSW lawyers are not subject to these restrictions on costs, NSW lawyers are often heard to be running Queensland cases.

#### How does claims farming work?

13. The essence of claims farming is generating leads for potential personal injury claims. A lead could be warm, such as, for example, where one is aware that a particular person was in a car accident last week and the ambulance visited, or a lead could be cold, for example, where one makes a phone call to a person on the premise that someone in that person's household had an accident.

14. The ABC recently ran an investigation into claims farming and found that some referrals for potential personal injury claims were taking place through phone applications – medical booking applications, for example. Beyond this, a Victorian call centre has been implicated in claims farming, and it is known that there are overseas call centres engaging in the practice as well. There is also speculation that insurance companies and perhaps even motor vehicle repairers may be referring potential personal injury claims to lawyers.
15. It is believed that most people generating leads as described above will eventually speak to someone who was genuinely in an accident, however, there may be those who have not been in an accident at all who will try to take advantage of the situation if they learn that there is money to be made.
16. The networks for claims farming are cast very widely. Therefore, anybody who has information about the name and contact details of a person who appears to have been in a motor vehicle accident will be seen as having claims farming potential. It has been heard that ambulance drivers, tow truck drivers, emergency ward staff, policemen, and employees of insurance companies have participated in claims farming in this manner. There seems to be no boundary as to the types of people who are prepared to engage in this industry for a bit of extra money.
17. Central to the claims farming industry is the “wholesaler”, or the farming operation itself – that is, the people who cleanse the information obtained as outlined in the above paragraphs, package it up, and find a way to provide it to a responsive law firm in exchange for money. This is where the source of the money obtained from claim farming lies.
18. As claims farming is a business model that can be easily copied, it is not exactly known how many individual entrepreneurs are running claims farming operations.

Is claims farming an illegal or unethical activity, or is it a case of people accessing justice?

19. It is clear that there is some seriously organised crime in some parts of claims farming, however, it is not known for certain if the practice itself is illegal.
20. Claims farming lends itself to the question: is the practice like advertising in any other format? There are not many restrictions on advertising, particularly in the digital age in which we live – we give our information and our consent to various organisations, based on which they contact us and offer their services.

21. The practice also gives rise to the question of whether it is unethical – does it breach any professional and conduct rules for solicitors? There has been some discussion about this, where solicitors have condemned the practice.
22. However, there is a counter-argument that claims farming is not a bad thing, and that it really provides people with access to justice and information about their rights.

### Illegality

23. In NSW, the paying of any referral fee to obtain a client's case, in any motor vehicle accident compensation matter, is strictly prohibited by legislation. This prohibition covers not only the lawyer himself or herself, but also any close associate of the lawyer. This includes the lawyer's: employer, employee(s), partner(s), agent, and, interestingly, family member(s). If a lawyer or an associate of theirs as described pays a referral fee to secure a client, this will be dealt with very seriously by the Office of the Legal Services Commissioner and other relevant State authorities.
24. In light of increasing concern about claims farming, several of the other jurisdictions that do not have this absolute legislative prohibition on referral fees, but which do have similar schemes of lump sum compensation in motor vehicle accidents, are actively looking at replicating the above NSW legislation in their own States.

### Unethicity

25. For anything other than injuries occasioned in motor vehicle claims in NSW, and in States without a legislative prohibition on referral fees, the discussion on claims farming moves from illegality to unethicity. Is claims farming unethical? Does it constitute a breach of the very serious professional and conduct rules, which all solicitors and barristers in Australia are bound by? This is a complex discussion which raises some significant issues. As a general statement, there is no outright prohibition on referral fees. In some respects, they are thought to be quite good, in that lawyers might be able to provide referral fees to architects, for example, to be complementary to the legal services they are providing to a client in relation to a building case.
26. However, in relation to people who have been injured in an accident, for them to be receiving unprompted calls telling them that it is in their best interests to contact a particular legal firm because only that firm will be able to do justice for them, can seriously contravene the disciplinary rules binding the legal profession. In this instance, there are two specific rules of importance that claim farming quite conceivably offends, depending on how it is done: rules 12 and 34.2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*. The

issue turns on the fact that the relationship between lawyer and client is one of influence, and this gives rise to a possible presumption of undue influence if the circumstances are ripe for this inference to be reasonably drawn. For example, if someone is still in a hospital bed after having been in an accident, and feeling particularly vulnerable, they may feel harassed and oppressed by the contact from the referrer, and in an attempt to rid themselves of what they feel is an annoyance, may agree to the referrer giving them the details of the law firm. In such a situation, if it can be proven in the chain of causation that the lawyer caused the contact, unprompted, to occur, and even worse, is paying money for that contact to occur, they may be facing serious disciplinary action from the Legal Services Commissioner.

#### Taking action against claims farming

27. One of the barriers that has always been identified to taking action against claims farming is that the laws and schemes in which the practice operates (CTP, workers' compensation, public liability, motor vehicle property damage accidents) are all State-based. Trying to address the practice with a more siloed, State-based approach will always be more difficult and more limited than if, somehow, a broader-based response could be created.
28. In dealing with claims farming, it is important for the Office of the Legal Services Commissioner and professional bodies to emphasise that the practice is a stain on the reputation of the legal profession – the fact that it is being openly spoken about and reported that lawyers might not only be engaging in the practice, but may in fact be the manipulators of it.
29. The Legal Services Commissioner is of the opinion that more public information should be put out in the open, so that people who feel upset and oppressed upon receiving a call from a referrer know that there are potential avenues through which to make a complaint. This may have the further benefit of alleviating the experience for people going through similar situations in the future.
30. Although there may be a few individual entrepreneurial lawyers instigating claims farming, in Geoff Atkins' view, these would not be in the majority. Geoff Atkins believes that most of the instigators of the practice are most likely either offshore, or local crime organisations that have learnt how to implement the claims farming business model.
31. The point at which claims farming can most readily be stopped is the local lawyer, as they are the weak point in the chain of claims farming because: they are locally-based; they are in a very regulated profession with high expectations and serious governing rules; and, they are the source of money in the claims farming industry. While it might seem unfair to place the focus on the local lawyers rather than on others further up the chain who may have a

greater degree of culpability, concentrating on the local lawyer is the best way of stamping out claims farming.

32. The Law Society of NSW has recently come out with a very strong statement against claims farming. Though there was a small (anonymous) segment of the legal profession which disapproved of the Law Society's stance, there was overwhelming support for it as well. However, there will always be lawyers who will perceive claims farming as a legitimate, entrepreneurial activity.

#### The undermining by claims farming of trust in the lawyer-client relationship

33. The Legal Services Commissioner is keen to see much more emphasis placed on the importance of trust in the lawyer-client relationship. The trust that is fundamental to this fiduciary relationship is the foundation of many of the duties by which lawyers are bound, and is the subject of a great deal of interesting and well-thought-out law. A strong argument can be made that the practice of claims farming flies in the face of this notion of trust.



## **BIOGRAPHY**

### Raj Kanhai

Principal, Finity Consulting Pty Ltd, Sydney

Raj is a Principal of Finity Consulting Pty Ltd and leader of the CTP practice. He is a lawyer and senior insurance claims manager, and specialises in the management of long tail claims liabilities, including policy design, benchmarking, and performance improvement. Raj works closely with some of Australia's and New Zealand's leading insurers, regulators, and businesses.

### Geoff Atkins

Principal, Finity Consulting Pty Ltd, Sydney

Geoff Atkins is a Principal of Finity Consulting Pty Ltd, and has been consulting in general insurance since 1984. Geoff is an actuary and his experience covers a wide range of insurance issues in both the public and private sectors. He has been an adviser to many insurance and reinsurance companies, and also to a number of CTP and workers' compensation schemes in Australia and New Zealand.

### John McKenzie

Legal Services Commissioner, Office of the Legal Services Commissioner, NSW

John is a respected senior criminal lawyer with more than 36 years' experience, particularly for Aboriginal people. Prior to taking up the position of Legal Services Commissioner in early 2015, John was the Chief Legal Officer of the Aboriginal Legal Service (NSW/ACT) for nine years. John has held senior positions in Legal Aid NSW and has worked in a suburban, generalist law practice. He was principal solicitor at the Royal Commission into Aboriginal Deaths in Custody between 1987 and 1991, and in the years that followed he remained committed to ensuring its recommendations were implemented.

## **BIBLIOGRAPHY**

### Legislation

*Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*