

EXPLANATORY MEMORANDUM

Insurance Legislation Amendment (Motor Vehicle Claims Harvesting) Bill 2023

Introduction

The purpose of this Bill is to limit claims harvesting activity to protect consumers and reduce the negative effects of claims harvesting on the WA community.

This Bill achieves this by making amendments to the *Motor Vehicle (Third Party Insurance) Act 1943* and the *Insurance Commission of Western Australia Act 1986*.

Part 1 – Preliminary

Clause 1 Short Title

This clause formally names the Act.

Clause 2 Commencement

This clause provides for the commencement of the Act:

- (a) Part 1 – on the day on which this Act receives the Royal Assent; and
- (b) The rest of the Act – on the day after that day.

Part 2 – *Motor Vehicle (Third Party Insurance) Act* amended

Clause 3 Act amended

This clause provides that Part 2 amends the *Motor Vehicle (Third Party Insurance) Act 1943* (“MV(TPI) Act”).

Clause 4 Part 1 heading inserted

This clause provides that the heading **Part 1 – Preliminary** is inserted before section 1 of the MV(TPI) Act.

Clause 5 Section 3 amended

This clause defines certain terms used in the Bill:

- i. **approved form** means a form approved by the Commission under section 32(1);
- ii. **drug** has the meaning given in *the Road Traffic Act 1974* section 65;
- iii. **law practice** has the meaning given in the *Legal Profession Uniform Law (WA)* section 6(1);
- iv. **principal**, of a law practice, has the meaning given in the *Legal Profession Uniform Law (WA)* section 6(1); and
- v. **supervising principal**, of a law practice in relation to a claim, means the principal of the law practice who has the primary responsibility for the conduct of the claim.

Clause 6 Part 2 heading inserted

This clause provides that the heading **Part 2 – Awards of damages** is inserted after section 3 of the MV(TPI) Act.

- Clause 7 Part 3 heading inserted**
This clause provides that the heading **Part 3 – Workers’ compensation** is inserted after section 3FB of the MV(TPI) Act.
- Clause 8 Part 4 heading inserted**
This clause provides that the heading **Part 4 – Administrative and insurance matters** is inserted after section 3G of the MV(TPI) Act.
- Clause 9 Section 6 amended**
This clause provides for “the schedule” to be called “Schedule 1”. This amendment is to follow current drafting practice.
- Clause 10 Part 5 inserted**
This clause provides that **Part 5 – Claims harvesting safeguards** be inserted into the MV(TPI) Act.

25A(1) – Terms used

This clause defines certain terms used in Part 5, such as, but not limited to:

- i. **associate**, of a law practice, has the meaning given in the *Legal Profession Uniform Law (WA)* section 6(1);
- ii. **claim** means a claim (whether or not made) for damages in respect of the death of, or bodily injury to, a person directly caused by, or by the driving of, a motor vehicle;
- iii. **claimant** means a person by whom, or on whose behalf, a claim is made;
- iv. **consideration** means a fee or other benefit;
- v. **legal services** means work done, or business transacted, in the ordinary course of legal practice.

For all definitions referring to the *Legal Profession Uniform Law (WA)*, the *Legal Profession Uniform Law Application Act 2014 (Victoria)* Schedule 1, section 6(1) applies by virtue of the *Legal Profession Uniform Law Application Act 2022*, section 6.

25A(2) clarifies when a claim is made for the purposes of Part 5 of the MV(TPI) Act.

25B – Extraterritorial application

This clause provides that Part 5 of the MV(TPI) Act applies within the State and, except for section 25G, outside the State to the full extent of the extraterritorial legislative power of the State.

Division 2 – Prohibition on referring claims and contacting to solicit, induce or refer claims

25C – Giving or receiving consideration for claims referrals

This clause defines certain terms used in Division 2, such as, but not limited to:

- i) ***claim referral***, in relation to a payer and a payee –
- (a) means a referral of a potential claimant by the payee or someone else —
- (i) to the payer for the purpose of the payer providing a service for the potential claimant in relation to a claim of the potential claimant; or
- (ii) to the payer or someone else for the purpose of a person, other than the payer, providing a service for the potential claimant in relation to a claim of the potential claimant; but
- (b) does not include the advertisement or promotion of a service or person that results in a potential claimant using the service or person if the advertisement or promotion is made to the public or a group of persons;

Examples for this definition of advertisement or promotion satisfying paragraph (b) include —

- an advertisement of services provided by a law practice on the website or in the newsletter of a sporting association or charity; and
- the distribution to members of an industrial organisation of promotional stationery or clothing that displays a law practice's logo.

This clause makes it an offence to pay or receive consideration for claims referrals with a penalty of \$10,000. The fine is well in excess of the existing general penalty of \$400 in the MV(TPI) Act, but lower than other jurisdictions for similar offences.

The clause also sets out circumstances in which there will not be a breach if a claim referral is made. For example, the offence provision does not apply to the referral of claimants resulting from the sale of a law practice.

The introduction of an offence to give or receive consideration for claim referrals is intended to dissuade law firms from engaging in this activity.

25D – Approach or contact for the purpose of making claims or referrals

This section is intended to reduce the engagement of third parties or other parties becoming involved in claims harvesting via an intermediary, and therefore is expected to reduce claims harvesting activities.

25D(1) – This clause provides definitions of terms referred to in section 25D.

25D(2) – This clause introduces a new offence prohibiting persons from personally approaching or contacting a potential claimant and either

soliciting or inducing the potential claimant to make a claim or referring the potential claimant to a third person or persons to provide a service in relation to a claim of the potential claimant.

This clause also prohibits a person from arranging for someone else (a fourth person) to personally approach or contact the potential claimant to solicit or induce the potential claimant to make a claim or to refer the potential claimant to a third person or persons to provide a service in relation to the claim of the potential claimant.

25D(3) – Provides that a person is taken to have approached or contacted a potential claimant if the person specifically contacts the potential claimant, whether in person or by mail, telephone, email or another form of electronic communication. It also sets out when a person is taken to have referred a potential claimant to a third person or persons.

25D(4) – Provides that subsection (2) does not apply if the initiator or other (fourth) person do not expect or intend to receive and do not receive consideration because of the approach or contact, and do not ask for someone else to receive, or agree to someone else receiving, consideration because of the approach or contact. It also provides that subsection (2) does not apply if the initiator or fourth person is a law practice or lawyer that is supplying, or has previously supplied, the potential claimant with legal services, and reasonably believes the potential claimant will not object to the approach or contact.

25D(5) – Provides that subsection (2) applies regardless of whether the potential claimant is entitled to make a claim, or had already decided to make a claim or a claim has already been made.

25E – Responsibility for acts or omissions of representatives

This clause renders an executive officer liable for a breach by their representative of the offences in section 25C and section 25D to ensure that executive officers are responsible for their employees confirming they are not engaging in claims harvesting.

25E(1) – This clause provides definitions of terms referred to in section 25E.

25E(2) – Provides that this section applies to proceedings for an offence against section 25C(2) or (3) or 25D(2).

25E(3) – Provides that if it is relevant to prove a person's state of mind about a particular act or omission, it is enough to show the act was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority and the representative had the state of mind.

25E(4) – Provides that an act or omission by an authorised representative of a person within the scope of the representative's actual

or apparent authority is taken to have been done or omitted to be done also by the person, unless the person proves they could not, by the exercise of reasonable precautions and proper diligence, have prevented the act or omission.

25F – Additional consequences for law practice

This clause prevents a law practice whose representative breaches the offence provisions from charging legal costs in relation to the claim and requires the refund of legal costs to the person from whom they were received if they have breached and are convicted of an offence against sections 25C(2) or (3) or 25D(2) in relation to a claim. This is intended to further disincentivise claims harvesting activities.

25G – Injunction to prevent or restrain contravention of sections 25C or 25D

25G(1) - This clause provides definitions of terms referred to in section 25G.

The remainder of this clause empowers the Insurance Commission to apply for an injunction to restrain a person in Western Australia or elsewhere who is reasonably suspected of committing claims harvesting offences from continuing to engage in such conduct.

Division 3 – Procedural matters for law practices

Sections 25H to 25M

These clauses oblige the supervising principal of a law firm:

- (a) to certify under statutory declaration that the principal and their associates have not:
- given or received referral fees for the claim under consideration in contravention of section 25C; or
 - solicited or induced a person to make the claim in contravention of section 25D; and
- (b) to give such a certificate to the Insurance Commission within one month of being retained by the claimant and again within seven days of judgement or settlement of the claim.

The compliance certificate requirement is fundamental to the curtailment of claims harvesting as it removes the incentive (payment of referral fees) for the referral of claims.

25H – Terms used

This clause defines compliance certificate and claimant as used in Division 3.

25I – Compliance Certificate

This clause provides the contents of the compliance certificate required to be filed by a law practice and provides that the certificate must:

- i. be a statutory declaration in the approved form;

- ii. state that the supervising principal and each associate has not been involved in claim referrals for consideration;
- iii. be made by the supervising principal of the law practice.

This clause does not require or permit the supervising principal of a law practice to give information about communication with a claimant that is subject to legal professional privilege.

25J – Compliance certificate required if law practice retained

This clause requires the supervising principal of a law practice retained to act for a claimant to complete a compliance certificate and give it to the Commission within 1 month after the day in which the claimant retains the law practice.

The penalty for a breach of this provision is a fine of \$10,000. This is aimed at capturing law practices involved in claims harvesting activities.

25K – Compliance certificate required on settlement or judgement

This clause provides that once the claimant or the Commission accepts an offer or counter offer of settlement in relation to a claim or judgement is given on a claim, the supervising principal of a law practice retained by the claimant to act in relation to the claimant's claim is required to give a compliance certificate to the Commission and the claimant within seven (7) days. A law practice is not entitled to charge or recover any legal costs (as defined) unless they have given the compliance certificate to the Commission and to the claimant.

The penalty for a breach of this provision is a fine of \$10,000.

25L – Compliance certificate required if referral by sale of law practice

When a law practice is sold to a new practice, the supervising principal for the original practice must give a compliance certificate to the new practice as soon as practicable. If the new practice does not receive a certificate from the original practice they must notify the Commission.

This clause prevents the creations of firms to be used in claims harvesting and selling the firm and the harvested files to new practices.

The penalty for a breach of this provision is a fine of \$10,000.

25M – Alternative to supervising principal completing compliance certificate or notice

This clause provides that if a supervising principal cannot complete the compliance certificate, another principal of the law practice or a lawyer of the law practice nominated by the principal may complete the certificate.

Section 25N – False or misleading compliance certificate

This clause makes it an offence to provide false or misleading material when complying with sections 25J(2), 25K(2), 25L(2) or 25M(2). The penalty for a breach of this provision is \$10,000.

Clause 11 Part 6 heading inserted

This clause provides that the heading **Part 6 – Other safeguards** is inserted before section 26 of the MV(TPI) Act.

Clause 12 Section 27 amended

Section 27 of the MV(TPI) Act prohibits persons other than a solicitor or barrister carrying on their profession, from soliciting instructions from persons claiming. This clause amends section 27 by adding a penalty for a breach of this section of \$10,000.

Clause 13 Section 27B deleted

This clause deletes section 27B of the MV(TPI) Act which created an offence around the provision of false or misleading information in compliance with a requirement under the MV(TPI) Act. A broader offence for providing false or misleading information to the Insurance Commission is now included in consequential amendments to the *Insurance Commission of Western Australia Act 1986*.

Clause 14 Section 28 amended

This clause amends section 28 to reflect current drafting practice.

Clause 15 Part 7 heading inserted

This clause provides that the heading **Part 7 – General procedural matters** is inserted after section 28 of the MV(TPI) Act.

Clause 16 Sections 29 and 29A replaced

This clause replaces sections 29 and 29A from the MV(TPI) Act and inserts:

28A – Terms used

This clause defines terms used in Part 7.

29 – Notice of claim and other requirements for commencing or maintaining action

This clause amends the existing section 29 of the MV(TPI) Act and provides that a claimant cannot commence an action or proceeding for damages against either an insured person or the Commission unless:

- I. they have given to the Commission, as soon as practicable after an accident, notice in writing prescribed by the regulations of the person's intention to make the claim; and
- II. if the Commission has, by giving a written notice, asked a claimant to provide additional information about the claim and the circumstances out of which it arises, the claimant has, within 1 month after the date of such a request, provided the information to the Commission; and

- III. unless a pre-action conference has been dispensed with by agreement under section 29B(4), the claimant has complied with all of the requirements of sections 29B(2), 29D(3) and 29E(2) in connection with the claim; and
- IV. they have complied with section 29F(1) and (3) in connection with the claim; and
- V. they have commenced the action in accordance with section 29H(2) or (3).

29A – Court may grant leave to proceed

This clause provides the circumstances in which the court may permit a claim to proceed if the claimant fails to comply with a procedural requirement or the notice of claim purportedly given under section 29(1)(a) is defective.

Sections 29B to 29I require that before a claimant can commence an action for damages in court there must be a pre-action conference of the parties in order for them to negotiate in good faith to try to settle the claim.

The parties will be required to disclose to each other all relevant documents for the purposes of enabling settlement and the legal representatives will need to provide a certificate of readiness confirming, inter alia, they are ready to settle the claim.

29B – Pre-action conference

This clause defines 'relevant day' and sets out how and when a pre-action conference can be held.

To assist in the early resolution of claims, it provides the claimant and the Commission with an opportunity to meaningfully negotiate settlement of a claim in good faith, prior to the matter being litigated through the Courts.

Any party may call the pre-action conference at a time and place agreed by the parties and the parties may for good reason dispense with the pre-action conference by agreement.

On application by a party made after the relevant day, a court may make an order fixing the time and place for the pre-action conference or adjourning the application for an indefinite period or a period the court considers appropriate.

Pre-action conferences are expected to significantly reduce the number of writs issued each year in relation to motor vehicle accidents and to reduce legal costs for both claimants and the Insurance Commission.

29C – Claim barred for failure to attend pre-action conference

This clause provides that a claimant's failure to attend a pre-action conference without reasonable cause may result in a claim being barred.

29D – Procedure before pre-action conference

This clause provides the procedure to be followed before the pre-action conference including the documents required in the process.

29D(1) – Defines relevant documents for the purposes of pre-action conferences.

29D(2) – Provides that for legally represented parties, a document is in the party's custody or control if it is in the custody or control of the party's lawyer.

29D(3) – Provides what each party must give the other party at least 7 days before the pre-action conference including:

- i. if the party is a claimant – a statement by the party in the approved form giving particulars of the heads of damages claimed, and supporting documents;
- ii. a copy of any relevant document not yet given to that other party;
- iii. if the party has legal representation — a certificate of readiness signed by the party's lawyer stating that:
 - a. the party is in all respects ready to settle the claim at the conference;
 - b. all documents have been given to each other party as required;
 - c. the party's lawyer has given the party a costs statement detailing the legal costs payable by the party to the party's lawyer up to the completion of the conference and an estimate of the party's likely legal costs if the claim settles at or after the pre-action conference or proceeds to trial, including a statement of the consequences to the party, in terms of costs, in each case.

If a claimant is not legally represented they need to provide a statement verifying all documents have been given to the Commission, as well as a statement in the approved form giving particulars of the heads of damages claimed, and supporting documents.

29E – Procedure for the pre-action conference

This clause sets out who can attend the pre-action conference, how the conference may be conducted and how to determine the time and place of the conference.

29F – Parties must exchange pre-action offers if a claim is not settled at pre-action conference or conference dispensed with

This clause provides that where parties are unable to settle a claim at a pre-action conference or the pre-action conference is dispensed with, each party will need to exchange written final offers. If a claimant commences an action in court based on the claim, each party is required to file with the court sealed envelopes detailing each party's final offer. In making a determination about costs, the court (including a registrar or

taxing officer of the court) must have regard to the matters set out in section 29G.

29G – Matters relevant to costs

This clause sets out the matters to which a court must have regard in determining costs in relation to a claim, including when costs are to be awarded to a claimant or to the Commission and what happens if a 'new matter' arises after pre-action offers are exchanged.

29H – Time for commencing litigation

This clause provides that a claimant may commence an action in a court 28 days after the pre-action offers end date or within a further period agreed to by the parties or fixed by order of the court. If proceedings are not issued within the time fixed by this provision, the claim is barred.

29I – Alteration of period of limitation

This clause enables the limitation period of a claim to be extended if certain criteria, including the giving of a notice of claim, are met. This clause sets out the criteria to be considered when altering the limitation period.

Clause 17 Part 8 heading inserted

This clause provides that the heading **Part 8 – Miscellaneous matters** is inserted after section 30 of the MV(TPI) Act.

Clause 18 Section 32 inserted

This clause provides that before section 33 of the MV(TPI) Act section 32 – **Approved forms** be added.

This clause provides that the Commission may approve forms for use under the MV(TPI) Act and must publish the approved forms on its website.

Clause 19 Section 35 inserted

This clause provides that after section 34 of the MV(TPI) Act section 35 – **Transitional provision for Insurance Legislation Amendment (Motor Vehicle Claims Harvesting) Act 2023** is inserted.

Section 35(1) defines terms used in section 35 and in the remainder of the section deals with transitional provisions for compliance with certificates and pre-action conferences.

The effect of the transitional provisions is that:

- if a law practice is retained by a potential claimant or claimant before the commencement day in relation to the potential claimant's or claimant's claim and, immediately before commencement day, the claim has not been finalised, then despite section 25I(1)(b), a compliance certificate for the claim required to be given under section 25J(2), 25K(2) or 25L(2) must state the matters mentioned in section

25I(2) and (3) only in relation to conduct on and after commencement day;

- Part 7 (as amended by the Amending Act) and Part 9 apply in relation to a claim only if a notice of the claim is given, or purportedly given, under section 29(1)(a) in relation to the claim on or after commencement day; and
- Schedule 1 (as amended by the Amending Act) applies only in relation to a policy of insurance issued on or after commencement day.

Clause 20 Schedule amended

This clause amends the title “Schedule” and renames it **Schedule 1 – Form of insurance policy**.

This clause makes the text under the heading **WARRANTIES** gender neutral and inserts:

(c) driven by or in charge of the owner or any other person who is

—

- (i) unlicensed to drive; or
- (ii) under the influence of intoxicating liquor; or
- (iii) impaired by drugs.

The effect of the new warranty (c)(iii) is to extend the warranties to provide the Insurance Commission with a right of recovery where a driver is impaired by drugs.

Part 3 – Insurance Commission of Western Australia Act 1986 amended

Clause 21 Act amended

This clause provides that Part 3 amends the *Insurance Commission of Western Australia Act 1968* (“ICWA Act”).

Clause 22 Part 3 inserted

This clause provides that the heading **Part 3 – Enforcement of Motor Vehicle (Third Party Insurance) Act 1943 Part 5 or false or misleading information provisions** is inserted after section 32 of the ICWA Act.

Subsection (1) defines the terms used within the section.

Further, Part 3 ensures that breaches of claims harvesting laws can be properly investigated, and facilitates the appointment of a lawyer, accountant or other appropriately qualified person to be an investigator and:

- requires persons, reasonably suspected of breaching claims harvesting provisions, to appear and to answer questions under oath or affirmation; and
- requires such persons to produce documents.

33 – Terms used

This clause provides definition of terms used within Part 3 of the ICWA Act, including but not limited to associated person and investigated person.

34 – Application of this Part

This clause provides that Part 3 applies to the investigations of contravention of relevant provisions outside the State to the full extent of the extraterritorial legislative power of the Parliament.

35 – Appointment of an investigator

This clause defines who may be appointed by the Commission as an investigator, which includes a lawyer, a qualified accountant, or another person the Commission considered to be appropriately qualified.

It further requires the Commission to appoint investigators by written instrument, which must state the terms of the appointment and the matters into which the investigation is to be made.

This clause applies if the Commission:

- (a) reasonably suspects a person may have contravened a relevant provision; and
- (b) considers it desirable in the public interest to appoint an investigator to investigate the affairs of the person that may be relevant in relation to the suspected contravention.

36 – Powers of investigator

This clause provides that an investigator may, by written notice, request an investigated person or an associated person for an investigated person to produce documents and assist with the investigation.

37 – Delegation of powers by investigator

This clause permits an investigator to delegate certain of their powers.

38 – Documents produced to investigator

This clause provides that a document provided to an investigator may be kept for the period that the investigator reasonably considers necessary for the investigation. The investigator must allow a person who would be entitled to inspect the document if it were not being kept by the investigator to inspect the document at all reasonable times and allow the document owner to make and keep and copy of the document.

39 – Compliance with requirements of investigator

This clause sets out the investigated person's obligations under the ICWA Act. This is to ensure that the investigator is able to carry out their duties under the ICWA Act. The clause provides a penalty of \$10,000 for failures to comply.

40 – Failure of person to comply with lawful requirement of investigator

This clause provides that if the investigated person or associated person for an investigated person does not comply with a lawful requirement of the investigator, the investigator may apply to the court for intervention and assistance.

41 – Recording of examination

This clause enables the investigator to make a recording of examinations and make it available to the person who the recording is related to if they request it in writing.

This clause also allows the recording to be used in legal proceedings.

41A – Report of investigator

This clause provides that the investigator may, and if directed by the Commission must, make interim reports. It also requires the investigator to make a final report to the Commission on the completion or termination of an investigation.

41B – Admission of investigator's report in evidence

This clause provides that a copy of an investigator's report is admissible in legal proceedings. However nothing in this clause will diminish the protection given to witnesses by law.

41C – Documents taken during investigations

This clause require that investigators, at the end of an investigation, give the Commission any documents the investigator has taken possession of. The Commission is to determine how the documents can be stored and inspected.

The owner of a document can make and keep a copy of the document.

41D – Other offences about investigations

This clause prohibits a person from concealing destroying, mutilating or altering a document of or about an investigated person, with a penalty of \$10,000. It is a defence for the accused to prove they did not act with intent to defeat the purposes of this Part or to delay or obstruct the carrying out of an investigation.

41E – Confidentiality of information

This clause defines confidential information to mean information that has become known to an investigator in the course of performing the investigator's functions for this Part.

Further it prohibits investigators from disclosing confidential information, with a penalty of \$10,000.

41F – Legal Practice Board information sharing

This clause enables the Legal Practice Board and the Commission to share information for the purposes of performing their functions under the MV(TPI) Act and the *Legal Profession Uniform Law Application Act 2022*.

41G – Commissioner for Consumer Protection investigation and information sharing

This clause enables the Commission to request the Commissioner for Consumer Protection to conduct an investigation into whether a person regulated by the Commission for Consumer Protection has contravened the MV(TPI) Act. This clause ensures that the relevant organisation is carrying out the investigation pursuant to their powers.

Information may be shared by the Commission and Commissioner for Consumer Protection for the purposes of performing their functions under the ICWA Act, the MV(TPI) Act and the *Fair Trading Act 2010*.

41H – Agreements with Transport Director General and information sharing

This clause enables the Commission to request the Transport Director General to assist with investigating the affairs of a person connected with tow truck operations or storage yard operations that may be relevant in relation to suspected contraventions of the MV(TPI) Act.

Information may be shared by the Commission and Transport Director General for the purposes of an agreement or for the purposes of the Commission performing its functions under the ICWA Act or the MV(TPI) Act.

41I – Information sharing with other jurisdictions

This clause defines the terms corresponding entity and corresponding law.

Additionally it provides that the Commission and a corresponding entity may share information for the purpose of performing their functions under the ICWA Act, the MV(TPI) Act and the corresponding law for the entity.

Clause 23 Section 44A inserted

This clause provides that section **44A – False or misleading information provided to Commission** be inserted after section 44 of the ICWA Act.

This clause provides that, in relation to a statement made or document given to the Commission in connection with the ICWA Act, the *Motor Vehicle (Catastrophic Injuries) Act 2016*, the MV(TPI) Act or the *Workers'*

Compensation and Injury Management Act 1981, a person must not state anything that the person knows is false or misleading in a material particular and must not give a document that the person knows is false or misleading in a material particular. The penalty for these offences is \$10,000.

