Rob Anderson QC with assistance from Nola Pearce

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Claim farming, or the aggregation of potential claimants for the purpose of commoditising their files, is the new ambulance chase. It is a fluid concept – it can refer to the farming of groups of claims or of individual claims; it can be defined by reference to acceptable and unacceptable means of data collection; it can refer to activity by lawyers or non-lawyers; and is represented by both age old and quite new methods of information collection. Regulatory organisations probably define it as the unethical pursuit of accident victims to encourage them to lodge a claim. The notion that it must be unethical probably is unnecessary. Against what standard would the conduct be judged to be unethical, unless the focus is solely on the activity of the lawyers, whose profession is fairly closely regulated – simply because it is happening on a large scale, or through cold calling, or social media marketing, does that make it unethical. In reality, claims harvesting can be entirely legal, and, unless the person undertaking the activity is bound by a strict ethical standard that prohibits it – it can also be entirely ethical too.

Technology might be delivering more convenient means of collecting and making claims, but the premise remains the same as it has for centuries[1] – clients are found, and actions commenced. Perhaps not much more can be done about it – if we accept there is a problem – absent a fairly comprehensive regulatory prohibition. This is particularly so if it is the moral dilemma that is framing the current debate. Morality is between the lawyer and their conscience after all.

The risks of enabling modern claims farming to flourish are obvious – a substantial increase in the lodging of unmeritorious claims collected by unscrupulous and untrained practices, in large numbers, perhaps even the lodging of an increased number of fraudulent claims, not to mention the impact on the consumer. It is a burden the insurance industry will be required to bear.

Claims farming is perhaps better seen and understood as a sub-category of activity occurring in the broader context of data mining – something that is happening all the time, to all of us.

It can range from the benign to the truly invasive. It involves collecting data from sources including our social media, usually by a data services entity, for sale to an interested buyer. Knowledge is powerful – Cambridge Analytica provides that example – and commercially valuable – particularly when it concerns consumer behaviour. As has been said about Facebook, we (being the consumers) have become the product.

Our online habits are defining us individually and collectively. In September 2018 it was reported that the Australian Defence Force had paid nearly $1.3m over the past 4 years for data that had been mined from our social media accounts, and all of us know that Google is forming its own picture of who we are and what we like, and maybe even what we need, and tailoring the content delivered to our screens accordingly.

[1] As far back as the late seventeenth century there are reports of cases under the old common law action for barratry – an offence, which, coupled with champerty and maintenance, was designed to protect the sanctity of litigation as being between only the persons truly concerned with the action.

Against that background it isn't a huge leap to see where data mining has the potential to creep into the legal profession and particularly its business development sphere.

The basic premise of this current kind of claim farming is that an entity – usually a third party, but in theory it could take place within the law firm itself – mines or purchases data about the things that are happening in people's lives all the time and which are relevant to their practice, such as a motor vehicle collision or a work accident. Equally, it could extend to people's involvement in social media commentary about medical products, or faulty consumer goods. Want to get in contact with people whose cars have Takata airbags, whose Thermomix burned their hands or who simply have been in a recent car accident? – just put a hashtag in front of those words and search on Instagram. If their profile is public, you will have all the information you need to consider whether it is worth contacting them, and critically, the means to do so. A former President of the Queensland Law Society has called it "touting on steroids".

The third party sells that data to the law firm. The exchange either is for the raw contact details of the potential client, or sometimes payment is made only when the firm receives instructions from the client to commence a claim. Either way, the consumer has become the product.

Slater and Gordon was the subject of a claim farming controversy earlier in 2108. In June the ABC reported that it had obtained secret internal documents that it alleged demonstrated Slater and Gordon had been paying a telemarketer almost $1,300 for each client referred to it arising from personal injury and traffic accident claims in Victoria, South Australia and Tasmania. A total of 214 new clients were claimed to be involved, resulting in some $3m in fees for the firm. The report included that Slater and Gordon also had referral agreements with a car rental company known as Compass Claims, who, it was said, referred 549 customers to Slater and Gordon with a $1,100 commission being involved, and with Medibank Private, although there was no suggestion that Medibank received any commission for doing so and the number of referred customers was only 6.

Slater and Gordon denied engaging in claims farming. They said their marketing was compliant with all laws and that they were confident they met the highest ethical standards.

Herein lies the rub. Undoubtedly what was undertaken was compliant with privacy laws and the standards of conduct applicable to law firms. The penalties as we will know are severe in the case of breach. The complaints from the general public generally arise from the manner of the data collection and the persistency of the marketing that sits behind it. Slater and Gordon was not said to be responsible for any of this.

The controversy also was said to involve a West Australian start-up, Health Engine. HealthEngine promotes itself as Australia's largest online health marketplace. Through its web interface or via the smartphone app, it operates to enable people to instantly make appointments to see doctors, dentists, physiotherapists, psychologists and a range of other health professionals. The data is staggering. 1.5 million users every month are connecting with over 13,000 health professionals Australia wide.

The controversy emerged when it was alleged that HealthEngine had partnered with Slater and Gordon to provide personal information to the law firm – it was useful, because the data provided included an answer to a question whether the person was seeking medical assistance as a result of a car accident. The response from HealthEngine was entirely understandable – the sharing of that data was only with the individuals' consent and quite lawful.

In NSW the Law Society President has said that claim farming is generally legal, but can bring the profession into disrepute. In doing so, he has made this interesting point, "We must question whether our professional ethics should permit financial gain where it results from the sale of private information by a third party or at the expense of potential intrusion on a client's privacy, forceful sales tactics or undue influence. Our relationships with our clients are sacrosanct, built on trust and transparency. Clients are often vulnerable and potentially open to oppression, undue influence or disadvantage. Our advice should never be influenced by relationships with third parties".

In consequence, legislative reform is mooted in many of the States – Western Australia, NSW, Victoria and Queensland in particular.

If the concern is with the conduct of the lawyers and, to the extent they are not immune to criticism, with the claims farmers themselves, there will be little that the legislature can do. If, by cold-calling or by the running of an algorithm, a third party is capable of gathering critical information from individuals, with their knowledge and consent, for sale to lawyers to enable a growth in claims, then it is a moral, perhaps ethical issue. HealthEngine provides the example there – it no longer shares information with lawyers because the court of public opinion told them it was wrong, not because it was unlawful.

This article is a summary of the presentation given by Rob Anderson QC at the AILA National Conference in Perth 2018.

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Rob is an experienced and versatile trial and appellate advocate. He provides advice in relation to all commercial matters, with defamation, insurance, professional negligence, property law, land valuation, compulsory acquisition and insolvency as areas of particular focus.

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Rob has previously acted for plaintiffs and defendants (often media defendants). Clients are thus on the front foot, armed with strategic advice based on experience from being on both sides of the coin.

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Nola brings nearly twenty years of experience as a solicitor to her practice as a barrister. She specialises in professional liability and disciplinary proceedings, whilst also acting in respect of contractual and consumer law disputes, insurance, negligence and commissions of inquiry. She has represented the interests of clients in the civil Courts of most State, Territory and Commonwealth jurisdictions, including various disciplinary tribunals, professional bodies, commissions of inquiry and coronial inquests. Her clients have included high-sensitivity professionals such as barristers, judges, solicitors and a range of medical, financial services and construction professionals who note her in-depth experience and personable approach to matters.