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Manager, Insurance and Financial Services Unit
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The Treasury

Via email – claimshandling@treasury.gov.au

MIGA submission – Insurance Claims Handling

MIGA appreciates the opportunity to contribute to Treasury's consultation on Insurance Claims Handling.

A copy of its Submission is enclosed.

MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting and educating medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. With over 33,000 members and a national footprint, MIGA has represented the medical profession for 119 years and the broader healthcare profession for 16 years.

You can contact Timothy Bowen, telephone 1800 839 280 or email timothy.bowen@miga.com.au, if you have any questions about MIGA's Submission.

Yours sincerely



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MIGA Submission

The Treasury

Insurance Claims Handling

March 2019

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MIGA Submission – Treasury Insurance Claims Handling

Executive Summary – MIGA’s position

1. MIGA’s position is
 - Exemption from the definition of ‘financial service’ should continue for claims handling in medical indemnity insurance
 - Any removal of the exemption should be limited to other lines of retail general insurance, and not extend to general insurance more broadly, in line with one of the options Treasury puts forward.
2. MIGA’s opposition is based on
 - The unique nature of medical indemnity insurance, including
 - o An existing bespoke regulatory regime, which itself is currently under review and significant changes are under consideration
 - o The degree of interaction between the Federal Government and medical indemnity insurers under law and individual contracts involving various Government support schemes, which have consequent obligations on insurers
 - o The broader nature of service offering by medical defence organisations, going beyond insurance cover
 - Significant differences between medical indemnity and other non-retail general insurance on the one hand, and personal retail lines of insurance on the other
 - Proposals for removal of the claims handling exemption arising out of concerns emerging in first party insurance contexts, not third party insurance, the latter of which reflects medical indemnity and other healthcare professional indemnity insurance products provided by both MIGA and other medical and professional indemnity insurers
 - It seeing a real risk of both compromising consumer protection and unintended consequences by removing the claims handling exemption for medical indemnity and other non-retail general insurance, given the nature of cover offered, characteristics of insureds, potential conflicts with existing regulatory regimes and contractual obligations, and unique issues in the conduct of matters for insureds.
3. If the claims handling exemption was to be removed for medical indemnity insurance and non-retail general insurance, MIGA considers
 - Financial services obligations in claims handling should be limited to the ‘higher level’ obligations, such as ensuring efficiency, honesty and fairness, adequate conflict of interest arrangements, adequate resourcing, competency and training and appropriate dispute resolution systems
 - They should not include the full range of financial services obligations, including licensing
 - There needs to be reasonable and practical limitations on how far these obligations extend to third party providers whom an insurer engages
 - Removal of the exemption should be delayed pending completion of medical indemnity insurance reforms, and be subject to sector-specific consultation with MIGA and other medical and professional indemnity insurers to deal with the complexities arising in those environments, which are detailed below.

MIGA’s interest

4. MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting and educating medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. With over 33,000 members and a national footprint, MIGA has represented the medical profession for 119 years and the broader healthcare profession for 16 years.
5. It contributes to industry engagement on insurance regulatory issues, including ongoing development of medical indemnity insurance reforms and other general insurance reform proposals, most recently Treasury’s consultation on disclosure in general insurance.

Unique nature of medical indemnity insurance

MIGA position at a glance

Given the unique nature of medical indemnity insurance, with bespoke regulation and a range of services offered beyond insurance, MIGA considers that the claims handling exemption for this line of insurance should continue.

(a) *Bespoke regulation*

6. Medical indemnity is unique among professional indemnity insurance in being regulated as a retail general insurance product.¹
7. Unlike other lines of general insurance, medical indemnity insurance is subject to an additional range of requirements and regulation, both through legislation and a Federal Government contract.² This includes significant disclosure obligations that arise from a range of government schemes, such as the Premium Support Scheme, Run-Off Cover Scheme, High Cost Claims Scheme, Universal Cover / Insurer of Last Resort Scheme and Exceptional Claims Scheme.
8. Treasury's decision to exclude medical indemnity insurance from proposed general insurance product design and distribution powers, and ASIC intervention powers, is we believe a recognition of the unique nature of this line of insurance. Imposing additional obligations adds additional complexity and potential confusion.
9. In addition, changes to the current legislative framework for medical indemnity are still to be finalised, particularly around the Premium Support and Universal Cover obligations. Accordingly, we believe it would be premature to consider any changes to disclosure obligations for this line of insurance.

(b) *Diversity of service offering*

10. Medical defence organisations such as MIGA provide a broader offering than medical and professional indemnity insurance.
11. MIGA provides medical and professional indemnity insurance through Medical Insurance Australia Pty Ltd, which is a wholly owned subsidiary of the doctor owned mutual not-for-profit MDASA Ltd. MIGA comprises of these two organisations, which provides a range of membership services and benefits to doctors. Relevantly to claims handling processes, this includes medico-legal advice, risk management and education.
12. Assistance to MIGA members and insureds does not necessarily involve clear distinctions between claims handling, legal services and other services. The issues it deals with for its insureds are not just the conduct of matters requiring insurance cover, but rather a range of matters around doctors in practice.
13. Consequently introducing new financial services obligations on claims handling by medical defence organisations could potentially affect or even compromise broader service offerings to their members and insureds.

¹ Section 761G, *Corporations Act 2001* (Cth); Regulation 7.1.17A, *Corporations Regulations 2001* (Cth)

² Legislation includes the *Medical Indemnity Act 2002* (Cth) and *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Cth). Contracts include the Premium Support Scheme contracts, entered into between various medical indemnity insurers, including MIGA, and the Commonwealth

Claims handling concerns driven by first party insurance issues

MIGA position at a glance

MIGA sees the arguments for removing the claims handling exemption as arising out of issues in the provision of first party insurance, and a compelling case for the exemption being removed for third party insurance has not been made.

14. Medical indemnity and other professional indemnity insurance which MIGA provides focuses on third party risks.
15. MIGA provides cover for liabilities to third parties and expenses involved in other third party based processes, such as disciplinary / regulatory matters, investigations and employment / workplace / professional college or association disputes.
16. The concerns identified by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**the Royal Commission**) arose in first party insurance contexts, involving personal lines or life insurance. These concerns focused on how an insurer interacts with its insured in deciding to provide insurance payments to them for various defined events.
17. By contrast the focus in medical and professional indemnity insurance is on assisting insureds respond to third party liabilities and processes.
18. Attempting to deal with issues arising in a first party insurance context do not easily fit into a third party insurance context.
19. By way of example
 - In a first party insurance claim, settlement payments and costs focus on the amount payable by the insurer to the insured
 - In a third party liability claim, once a decision to provide insurance cover is made, the question of settlement payments and costs is essentially one between an insurer and a third party, subject to the payment of any excesses under an insurance policy
 - Accordingly issues around settlement payments and costs do not affect the insured and their interests in the same way as in a third party claim.

Conflicts between processes

MIGA position at a glance

MIGA considers removal of the claims handling exemption will could cause particular problems in the medical and professional indemnity contexts where there can be a range of processes arising out of the same insured circumstances, posing significant risks of uncertainty and potential conflict.

20. MIGA is concerned about the potential for conflict in application of financial services obligations where it is assisting its insureds with multiple processes, not just a third party liability claim.
21. Commonly MIGA will handle a matter for an insured involving both a third party liability claim and one or more of the following matters arising out of the same insured circumstances
 - A disciplinary process, such as the Medical Board of Australia / Australian Health Practitioner Regulation Agency, or state and territory health complaints entities
 - Other regulatory process, such as Medicare or privacy matters
 - Investigatory processes, such as coronial investigations and inquests or criminal investigations and proceedings
 - Employment, workplace and professional college / association disputes, including issues such as suspension, dismissal or imposition of conditions on practice and / or training
 - General medico-legal advice in relation to the provision of health care treatment, advice or service.
22. By contrast with third party liability claims, where an insurer will provide cover for liability, these other matters do not usually involve civil liability, but are generally limited to an insurer covering an insured's legal expenses and any legal costs of other parties they are ordered or otherwise agree to pay.
23. The nature of these matters are quite different. Whether claims handling obligations would extend to the disciplinary, regulatory or employment / workplace context is open to question. However, this uncertainty means that MIGA claims handling staff may be placed in positions of conflict between financial services obligations to one aspect of an insured matter, and other counter-veiling considerations in relation to the remaining aspects.

Complexities for internal claims handling

MIGA position at a glance

MIGA sees removal of the claims handling exemption for medical and professional indemnity insurance as posing particular challenges in determining what is claims handling and what is not, and what is excluded legal advice and what is not.

24. In the medical and professional indemnity insurance contexts, the proposed removal of the claims handling exemption causes significant complexities in internal claims handling.
25. As Treasury recognises in its consultation paper, there are many claims handling activities which are unlikely to meet the definition of a 'financial service' under the *Corporations Act 2001* (Cth).
26. In addition, advice given by a lawyer in their professional capacity about matters of law, legal interpretation or the application of the law to any facts, and any other advice in the ordinary course of activities as a lawyer which is reasonably regarded as a necessary part of those activities is exempt from being considered financial product advice which would attract financial services obligations.³
27. Accordingly MIGA's in-house lawyers, who provide a range of services that include legal advice, claims handling and other services, would be faced with considerable uncertainties about what parts of their roles are regulated by financial services obligations, and what parts are not. In addition, they already have existing duties to Courts and their own system of professional regulation.
28. In a medical indemnity context the line between legal advice (as excluded from being a financial service) and non-legal advice and services provided by lawyers is not always clear. Key examples of this include interpretation of policy terms, claim investigation, assessment of the quantum of damages claims and claim strategy, including advice on settlement of a third party claim. Each of these could include legal advice and / or a financial service.
29. An example of potential uncertainty and conflict around the distinction between legal advice and claims handling arises in relation to the use of mediation to explore resolution of a third party liability claim. Commonly, insured doctors are not present at mediation, generally because it is considered in their best interests not to be and / or the plaintiff / claimant does not want them to be present.⁴ It is unclear whether imposition of financial services obligations would presume the need for an insured's presence at mediation. This could have a significant, potentially adverse impact on the conduct of mediations and resolution of claims, which could well compromise an insured's own interests.

³ Section 766B of the *Corporations Act 2001* (Cth)

⁴ For further information on the reasons why a doctor or other health practitioner may not be present at mediation, see T Bowen and A Saxton, 'Is there any role for health care professionals at the mediation of clinical negligence claims?' (2009) 16 JLM 858 – see www.ncbi.nlm.nih.gov/pubmed/19554864 or copy available on request

Uncertainties in use of third party providers

MIGA position at a glance

MIGA opposes removal of the claims handling exemption for medical and professional indemnity insurance where it could cause significant problems for the use of third party providers, impeding existing operational models and ability to provide appropriate service and assistance to members and insureds.

30. MIGA is concerned that removal of the claims handling exemption could cause significant problems for the use of third parties in claims handling process, including
- External lawyers
 - Expert witnesses
 - Investigators and surveillance providers
 - Advisory / claims committee panellists
 - Educational providers.
31. External lawyers are in a similar position to in-house lawyers, where aspects of their roles would be considered as legal advice excluded from being a financial service, and other aspects could be considered a financial service. MIGA considers external lawyers are already sufficiently regulated by their overriding duties to Courts and by professional regulators. To impose additional financial services obligations would raise significant issues of potential conflicts and practicality. There would also be significant compliance costs associated with ensuring financial services obligation compliance, even where involving only 'higher level' obligations and excluding licensing.
32. For expert witnesses, MIGA notes the interpretation in Treasury's consultation paper that doctors who contribute to 'assessments' are unlikely to be considered as providing a financial service. However, it is concerned about residual uncertainty in this, particularly where doctors and other health practitioners provide opinions which are part of assessments of quantum of a liability claim, or whether to resolve a liability claim (i.e. an opinion on whether there has been a breach of duty of care). Given an independent expert's overriding duty to the court in third party claim contexts, imposing financial services obligations on them is inappropriate.
33. Turning to investigators and surveillance providers, MIGA notes investigators are considered by the consultation paper to warrant imposition of financial services obligations as representatives of an insurer. However, it believes there is a clear difference in their roles between first and third party insurance contexts. For example
- In the first party context, an investigator or surveillance provider has arguably greater influence on the relationship between insurer and insured, and an insured's rights under a policy of insurance
 - In the third party context, once insurance cover has been confirmed the focus of an investigator or surveillance provider is more often than not on the third party claimant, not the insured's rights under their policy of insurance.
- This supports a different treatment of investigators and surveillance agents in a third party context, closer to the position of external lawyers and expert witnesses, and suggests financial services obligations on them are not required.
34. In the course of handling matters for insureds, MIGA may make use of doctors or other professional advisors to provide input on the conduct of matters, and the professional practice of an insured more broadly. This may be via an advisory / claims / risk management committee structure, or direct engagement in certain matters, such as mentors / supervisors / educators for insureds. Whilst MIGA questions whether these would be considered financial services, given the uncertainties around what is claims handling it believes it necessary to clarify that such services should not fall within any claims handling obligations.

A limited claims handling exemption removal

MIGA position at a glance

If the claims handling exemption was to be removed across general insurance lines, MIGA believes

- It should be limited to 'higher' level obligations
- It should be delayed pending completion of medical indemnity reforms and sector-specific consultation with medical and professional indemnity insurers.

35. If the removal of the claims handling exemption was to extend to medical and professional indemnity insurance, as appears to be contemplated in Treasury's consultation paper MIGA considers only that the 'higher level' obligations under s 912A of the *Corporations Act 2001* (Cth) around claims handling should apply, namely
- Ensuring the management of claims handling services are provided efficiently, honestly and fairly
 - Have in place adequate arrangements for the management of conflicts of interest in claims handling
 - Have available adequate claims handling resources
 - Maintain competence in claims handling
 - Ensuring claims handling staff are adequately trained
 - Appropriate internal dispute resolution system
 - Membership of the AFCA scheme.
36. Broader financial services obligations, including those around training in financial services products and need for financial services licenses or authorised representation for third parties engaged by insurers, should not apply.
37. For the reasons set out above, a clear distinction should be drawn between those persons and entities outside insurers who are essentially making decisions or 'fulfilling' aspects of insurance claims on behalf of the insurer, usually in first party insurance contexts, and those who conduct discrete matters in third party claims, such as external lawyers, expert witnesses, investigators and surveillance agents. Financial services obligations should not be imposed on the latter, as an insurer remains responsible for handling of the claim.
38. The content and operation of such obligations would require further guidance, probably best through an ASIC regulatory guide, developed in consultation with medical indemnity stakeholders such as MIGA.
39. In any event, such a reform for medical indemnity insurance could not be appropriately considered until after ongoing medical indemnity reforms have been finalised and given time to take effect. This should be followed by detailed analysis on how removal of the claims handling exemption would interact with the medical indemnity regime, and professional indemnity insurance more broadly, and consultation with key stakeholders such as MIGA on issues arising.