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Dear colleagues

MIGA submission – Treasury AFCA review

As a medical and healthcare professional indemnity insurer, MIGA appreciates the opportunity to contribute to Treasury's review of the operation of the Australian Financial Complaints Authority (AFCA).

MIGA's position

Unlike other lines of professional indemnity insurance, medical indemnity insurance (MII) falls under AFCA's jurisdiction as a retail product under the *Corporations Act 2001* (Cth).

MIGA considers classification of MII as a retail product as anachronistic given its extensive Commonwealth regulation and oversight in a comparatively small, sophisticated market.

That said its experience with AFCA has been positive, with quality decision-making, consistency of outcomes and industry engagement.

MIGA does have concerns about

- Comparative cost of MII AFCA disputes
- How matters involving new claims handling obligations and MII regulation more broadly might be dealt with by AFCA, particularly in the longer-term.

It would also welcome further engagement about AFCA's 'fairness project' in the MII context. It acknowledges this has been delayed by the COVID-19 pandemic. It hopes to resume engagement with AFCA on these issues in the near future.

Comparative cost of AFCA MII disputes

MIGA is concerned about the comparative cost to medical indemnity insurers of MII AFCA matters under the current interim funding model.

It is conscious of

- AFCA's need to ensure it is sufficiently financed, in line with the requirements of ASIC's Regulatory Guide 267 - *Oversight of the Australian Financial Complaints Authority*
- The need for a user pays, industry funded model of external dispute resolution.

MIGA also acknowledges the inevitably increased costs associated with the use of AFCA panels. For MII, this includes an Ombudsman, medical practitioner and MII industry expert. They are used in the vast majority of MII matters given their inevitable complexity. They can be of significant value in complex matters.

Even so it remains concerned about potential for funding subsidisation both across and within sectors and lines of insurance.

By way of example

- MIGA was involved in two AFCA matters which were finalised in July 2019 and February 2021 respectively
- Both matters involved an MII panel, similar issues in dispute and a comparable degree of complexity
- The charge to MIGA for the more recent case was 37% greater than for the July 2019 case.

In addition AFCA's criteria for not imposing a user charge, namely to not impose one for a member who has had one or less complaints closed over the previous year, should be amended to not impose a user charge for members who have had one or less complaints within AFCA's jurisdiction over the previous year.

MIGA has had a number of matters which AFCA has closed where it does not have jurisdiction. These matters should not be factored into calculation of the user charge.

Dealing with MII scheme and claims handling issues

There are a number of important MII-specific issues which AFCA has not yet had to deal with in any significant way. They reinforce the need for consideration of relevant legislative requirements and MII-specific circumstances.

MIIs are a highly regulated product. It includes mandatory minimum product standards and a range of Federal Government schemes, including the Premium Support Scheme, Run-Off Cover Scheme, High Cost Claims Scheme, Universal Cover Scheme, Exceptional Claims Scheme and Midwives Insurance Scheme.

To date MIGA is not aware of AFCA having had to deal with disputes focusing on the complexities of MII regulation.

There remains significant potential for such disputes to occur, particularly given a range of changes which were made to MII regulation last year. These include key matters such as scope of cover and risk loading.

The coming months, involving renewal of a large proportion of MII contracts, will provide a significant test for these changes. Although they first came into effect in July last year, the inevitable distractions caused by the COVID-19 pandemic meant they have not been meaningfully tested. This poses the risk of increased, complex AFCA disputes.

From 1 January 2022, new claims handling obligations will apply to MII. There are a broad range of challenges and uncertainties which these obligations will pose, a range of which have been detailed in [MIGA's earlier submission to Treasury](#) on insurance claims handling. These include

- The interaction between MII regulation and claims handling obligations
- How these obligations interact with third party processes (such as courts, tribunals, regulatory / disciplinary bodies and investigative entities)
- Ensuring their obligations of fairness do not become tantamount to an unfair contract terms regime (which MII has been excluded from)
- Involvement of non-medical indemnity insurers in matters
- The oversight of independent experts and external lawyers.

Given these legislative complexities and the requirement for an AFCA decision-maker under cl A.14.2 of the AFCA rules to do what they consider to be "fair in all the circumstances", MIGA sees a need for

- Amending cl A.14.2 so it provides

When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- a) **relevant laws legal principles,**
- b) *applicable industry codes or guidance,*
- c) *good industry practice and*
- d) *previous relevant Determinations of AFCA or Predecessor Schemes*

(this proposed change is consistent with the terminology used in RG 267, cl 127)

- Engagement between AFCA, MIGA and other MII stakeholders on issues involving AFCA determination of MII disputes involving Federal Government regulation and / or claims handling obligations.

In addition, AFCA's 'fairness project' raises significant complexities in the MII dispute context, particularly given MII has been excluded from the unfair contract terms regime commencing for other lines of general insurance next month.

These issues were detailed in [MIGA's submission to Treasury's consultation](#) on extending unfair contract terms to insurance contracts. They include the potential for a wide range of views of what is 'fair' in individual circumstances for a unique line of insurance involving community protection imperatives, bespoke regulatory regimes and sophisticated insureds.

This reinforces the need for targeted consultation with MIGA and other MII stakeholders during the course of AFCA's fairness project.

Next steps

MIGA would welcome the opportunity of meeting with Treasury officials to discuss the issues it raises in its submission, or about AFCA's operation more generally.

If you have any questions or would like to discuss, please contact Timothy Bowen, [REDACTED] / [REDACTED]

Yours sincerely



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