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Director
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Dear colleagues

MIGA submission – Australian Consumer Law guarantees

As a medical defence organisation and professional indemnity insurer MIGA appreciates the opportunity to contribute to Treasury's consultation on improving consumer guarantees.

MIGA's position

MIGA sees significant issues with a civil prohibition on failing to provide a consumer guarantee remedy in the context of healthcare services.

If a whole of economy civil prohibition is to be enacted there should be an exclusion for healthcare services provided by an individual or organisation.

MIGA's interest

MIGA has over 36,000 members and clients across the country practising in a wide range of healthcare settings.

It advises and assists doctors, healthcare organisations and privately practising midwives in a range of civil, disciplinary, investigative and administrative processes involving healthcare.

Requiring healthcare consumer guarantee remedies is problematic

It is not unusual to see allegations of breach of consumer guarantees under ss 60 and 61 of the Australian Consumer Law being made in civil cases against healthcare providers.

Inevitably these cases are complex. They cover a diverse range of healthcare situations, including issues around

- Missed / delayed diagnosis of serious conditions
- Appropriateness of treatment options offered
- Sufficiency of pre-treatment warnings of possible adverse outcomes
- Adequacy of operative technique
- Reasonableness of post-operative management.

Assessment of whether there has been a want of care and skill or lack of fitness for purpose is rarely a straightforward exercise. An adverse outcome does not equate with a want of care or inappropriate clinical decision-making. Recognised complications are inherent in healthcare.

Determining whether healthcare was provided with due care and skill or if it was fit for purpose often hinges on resolving competing views from independent expert witnesses.

Requiring offer of a consumer remedy in those circumstances is tantamount to displacing legal tests of reasonableness with a strict liability model.

There is no lack of adequate dispute resolution mechanisms or remedies for healthcare consumers given the existence of

- Professional obligations on healthcare providers, such as under cl 4.12 of the Medical Board [Good Medical Practice Code of Conduct](#), to work with patients to resolve their complaints
- State and territory healthcare complaints bodies which assess healthcare complaints and provide resolution mechanisms
- Ready access for healthcare consumers to legal advice and civil actions through 'no win no fee' funding arrangements, and protections for consumers against adverse costs orders via insurance or litigation funding.

If a civil prohibition on failing to provide a consumer guarantee remedy was enacted for healthcare services there are significant risks of

- Healthcare providers being uncertain about when they are required to provide a remedy following a patient complaint and concerned about their potential exposure to civil penalties if they get it wrong
- Consumers using the spectre of civil penalties to try and compel providers to offer remedies in circumstances where the provider feel it is unjustified
- Consequent increases in complaints by consumers to providers about healthcare they received, particularly requesting refunds and other financial remedies
- Conflicting obligations between a provider offering a remedy on the one hand, and meeting requirements in insurance policies not to admit liability or otherwise prejudice an insurer's position on the other
- Offer of a remedy being used in a subsequent civil claim as an admission of liability by a provider where there are insufficient legislative protections for apologies
- Ability of providers to obtain, and insurers to offer, insurance cover for healthcare matters at reasonable and sustainable rates being adversely impacted.

Accordingly an exclusion for healthcare services from any civil prohibition on failing to provide a consumer guarantee remedy is an imperative.

Next steps

MIGA looks forward to engaging further with Treasury on progress of this work.

If you have any questions or would like to discuss, please contact Timothy Bowen, 02 8905 3476 / timothy.bowen@miga.com.au.

Yours sincerely



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