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Australian Law Reform Commission

Via online submission

Dear A/Prof Godwin

MIGA submission – ALRC Financial Services Legislation Interim Report A

As a medical indemnity and healthcare professional indemnity insurer MIGA appreciates the opportunity to contribute to respond to the ALRC's Financial Services Legislation Interim Report A.

MIGA's position

MIGA is concerned that the Interim Report's proposals

- Create significant uncertainty around AFSL obligations for medical indemnity insurance (**MII**) as a retail general insurance product
- Inappropriately re-classify most professional indemnity insurance (**PII**) products as retail products.

There is merit in exploring potential modifications to disclosure obligations for MII, but this must be on a product specific basis.

Given the considerable redrawing of financial services obligations contemplated by the Interim Report, many of which are neither helpful nor warranted for MII, both this and other recent developments call into question the utility of MII classification as a retail product and support its reclassification as a wholesale product.

Uniqueness of medical indemnity insurance

MII is the only PII product classified as a retail insurance product. This is an anachronism.

It was classified as a retail product almost 20 years ago, when medical practitioners were first required to have MII cover. Previously they had generally relied on discretionary assistance and benefits through membership of medical defence organisations to respond to medical negligence claims.

Over time the medical profession has evolved into a sophisticated PII market, comparable to other PII markets where retail insurance requirements appropriately do not apply.

MII's unique features amongst retail general insurance products include

- **A high degree of regulation**
  - Specific Federal Government legislation for the sector – this includes the *Medical Indemnity Act 2002* (Cth) and *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Cth)
  - The degree of MII regulation parallels compulsory third party or workers' compensation insurance, but neither of those lines of insurance have retail obligations.
- **A small, sophisticated consumer market**
  - Mandatory PII requirements for medical practitioners have been in place for many years - see s 129, *Health Practitioner Regulation (National Law)*
  - Medical practitioners are a relatively small group of consumers with clear and comparable insurance needs
  - There is significant engagement by professional groups with MII issues.

- **Clearly defined, broadly consistent product offering**
  - Mandatory minimum product standards meaning there is significant consistency in the scope of products offered by MII providers
  - This is very different to other retail general insurance products, usually offered by a larger pool of insurers across the Australian population, which can vary considerably in the coverage they offer.
- **Very different kind of provider and product**
  - MII provides protection to medical practitioners in relation to
    - Claims by third parties arising from actual or alleged negligence or misconduct
    - Professional regulatory matters, investigations and administrative processes
  - By contrast other lines of retail insurance focus on 'consumer' (i.e. non-professional / non-business) insurance covering first party risks, not a broad range of third party liabilities and processes
  - Although MII is very similar to other types of PII, they are considered wholesale products
  - MII is the only PII retail product. Medical practitioners are less than 20% of registered health practitioners who all have mandatory PII requirements, but they are the only practitioners who are classified as retail clients under the *Corporations Act 2001* (Cth).

The unique nature of MII has been recognised by its exclusion from

- New obligations relating to product design and distribution, hawking and disclosure
- Extension of the unfair contract terms regime to insurance.

MII is a clear example of where changes can be made to simplify and rationalise the law, as contemplated in the Inquiry's terms of reference, to ensure clarity, coherence and effectiveness.

Where a product no longer has a retail character, and has already been excluded from many retail obligations, there is little merit or utility in preserving an anachronistic classification.

Any necessary sector-specific obligations could still be provided for on a bespoke basis for MII as appropriate.

There is no reason why issues posed for MII by the Interim Report's proposals (as set out below) could not be dealt with through its declassification as a retail general insurance product, bringing it into line with other healthcare PII products.

Redefining efficiency obligations – Proposal A20(b)

It is questionable whether the proposal to replace the term 'efficiently' with 'professionally' in s 912A of the *Corporations Act* creates an appropriate expectation in MII contexts. It also poses significant risks of a range of unforeseen complications.

The merits of selecting certain court interpretations of the term 'efficiency' over its ordinary meaning are unconvincing.

Any obscurity in what the term 'efficiently' means derives from court interpretations which differ from the ordinary meaning, rather than obscurity in the ordinary meaning of the term itself.

Regulatory guidance appears to interpret 'efficiently' in a way consistent with its ordinary meaning. For example, p 13 of ASIC Information Sheet 253 on claims handling and settling indicates that providing financial services "*efficiently, honestly and fairly*" means handling and settling claims

- In a timely way
- In the least onerous and intrusive way possible
- Fairly and transparently
- In a way that supports consumers, particularly ones who are experiencing vulnerability or financial hardship.

This does not include the elements of competency contemplated by certain courts.

Whilst s 760A of the *Corporations Act* provides an object of promoting "*fairness, honesty and professionalism*" by those who provide financial services, it also provides an object of facilitating "*efficiency, flexibility and*

innovation" in providing products and services. This suggests the potential for a deliberate choice of the term 'efficiency' rather than 'professionally' in the existing s 912A.

Replacing 'efficiently' with 'professionally' offers considerable uncertainty about the obligations of an MII provider. The limits of who is a 'professional' and what constitutes acting 'professionally' are inherently open to debate.

Employees and staff of an insurer can come from a wide range of backgrounds and offer a broad range of skills. Measuring their acts or omissions by reference to a profession or established discipline would be inherently challenging. It could unintentionally create expectations of certain qualifications in order to provide financial services.

In particular MIGA is concerned that where MII is a PII product there could somehow be an expectation of using certain types or levels of 'professional' to discharge its obligations. For example would the nature of a professionalism expectation require involvement of

- Professional advisors with extensive experience in MII to give financial advice?
- Medical practitioners to assess 'clinical' issues relating to scope of cover and responding to claims?
- Lawyers to advise on policy coverage terms in the context of complex interactions between the Federal Government's MII framework and *Corporations Act* obligations?

Accordingly replacing an obligation of 'efficiently' with 'professionally' could change significantly how MII cover is provided, increasing costs to consumers where there is no need for it.

Replacing 'efficiently' with 'competently' may not pose the same issues, but would still require careful consideration to ensure it did not create new, unduly onerous obligations, particularly in an MII context.

Removing prescribed AFSL requirements – Proposal A21

Removing prescriptive requirements for managing conflicts of interest, competence, training and risk management, replacing them with the obligation to act 'professionally', will leave considerable uncertainty around how to meet these obligations in an MII context, given it is the only PII product classified as retail.

In reality this is replacing clear obligations with a broader, nebulous one. There is no evidence of any need for this in an MII context.

Fleshing out a higher level obligation of 'professionalism' with ASIC regulatory guidance would be insufficient given its inherent limitations and where such guidance is unlikely to be MII specific.

Fairness examples – Proposal A20(c)

Including indicative examples of conduct likely to be unfair of breaches of s 912A of the *Corporations Act* poses specific problems for MII where it is exempt from the unfair contract terms regime (s 12BL, *Australian Securities and Investments Commission Act 2001* (Cth)).

Use of such indicative examples opens up the prospect of a 'back door' to challenge a range of MII policy terms and obligations on the grounds of 'fairness', particularly given recognition in paragraph 13.89 of the Interim Report that "*there is ample room for disagreement as to what 'fairness' actually entails*".

To use broad examples relating to vulnerability, affecting the interests of others or lack of reciprocity would leave wide scope to argue for breaches of s 912A of the *Corporations Act* on fairness grounds, particularly given the complex interactions between each of MII policies and claims conduct with MII regulatory obligations.

Removing the safe harbour defence for personal advice – Question A24

Removal of the 'safe harbour' defence for acting in the best interests of a retail client when providing personal advice would introduce considerable uncertainties and complexities.

It could also mean insurers such as MIGA that provide personal advice cease doing so.

The Royal Commission's suggested consideration of recasting the best interests duty and removal of the safe harbour defence for personal advice did not arise in the MII context, or even in a general insurance context more broadly.

Currently s 961B(4) of the *Corporations Act* limits the steps required to discharge the best interests duty in an insurance context. Removal of the safe harbour defence, replacing it with a range of indicative behaviours of compliance, would mean that providers of personal advice in MII would face a greater disparity between current and new obligations than would other financial services advisors. This is inappropriate for a product about which no concerns have been raised.

Retail client scope – Question A16

In response to Question A16, relating to the removal of exemptions for wholesale general insurance products from classification as a retail product, MIGA strongly opposes this option.

Broadening the definition of retail products to include all PII products is unnecessary and unwarranted.

MIGA strongly recommends that a distinction between retail and wholesale products, at least in the context of PII, be maintained.

If the definition of a retail client is reformulated, PII is a necessary exemption from retail classification.

Removal of this distinction would not maintain the existing policy boundaries for the definition of 'retail client', as paragraph 12.38 of the Interim Report indicates the ALRC seeks to do.

There is no evidence of any need for such an expansion for PII, nor anything to suggest it would be of meaningful benefit to PII consumers.

From the Interim Report it appears that suggestions of removing the wholesale product exemption have arisen outside the PII market. Economy-wide reforms are inappropriate where there are market sectors where there is no justification for them.

By defining general insurance products as being acquired as retail products unless acquired in connection with a business that is not small business, the retail classification is being re-written beyond personal, domestic, household and other consumer settings. Retail classification would then be extended across a wide range of professional services and other business activities, including PII.

For healthcare, this would expand wholesale classification to the vast majority of healthcare settings outside large hospitals.

Such an expansion would also be at odds with the retail-type obligations imposed on "*consumer insurance contracts*" under the *Insurance Contracts Act 1984* (Cth). These are limited to insurance which is wholly or predominantly for personal, domestic or household purposes. This does not extend to business purposes, as contemplated by Question A16.

No issues emerged nor were any recommendations made in the context of the Financial Services Royal Commission around expanding the scope of retail product classification. No suggestions were made of a need for greater protections of any PII consumers. Insurance issues examined by the Royal Commission had nothing to do with PII regulation.

Accordingly the indication in para 12.11 of the Interim Report that the result of Royal Commission reforms meant retail vs wholesale classification is of greater consequence now than it was 20 years ago does not apply to PII. The concerns explored in this paragraph are directed to issues which do not arise in a PII context.

More broadly ongoing concerns around availability and affordability of PII in certain sectors of the economy may be exacerbated by reclassification of all PII as retail general insurance products, particularly given the very significant costs of changeover and ongoing compliance which would be involved.

Modifying disclosure requirements – Proposal A8

From an MII perspective MIGA joins with the general consensus outlined in paragraph 9.77 of the Interim Report that "*existing disclosure requirements have limitations, do not facilitate consumer understanding, and*

are a source of significant compliance costs". It also agrees with widely held observations and analysis noted in paragraph 9.79 that "*disclosure provisions likely contain significant unnecessary complexity*".

There is merit in exploring Proposal A8 in the Interim Report - an outcomes-based standard of disclosure - for MII. This must be on the basis of ensuring outcomes which deal with the uniqueness and needs of MII.

MIGA is concerned that the current disclosure regime, applying in the same way across all retail general insurance products, does not focus on the information needed for a medical practitioner to make a decision about a MII product purchase.

The current regime promotes a legalistic, detail heavy approach. This inevitably creates lengthy, complex disclosure documents. Their utility to medical practitioners purchasing MII is doubtful. Length and complexity can be a significant deterrent to busy practitioners using disclosure documents in any meaningful way.

The nature of the MII market warrants a bespoke approach, focused on ensuring how a medical practitioner can make the most suitable insurance purchase for them of a product they legally required to have from a small selection of insurers offering broadly similar cover.

In addition MII's exemption from recently introduced product design and distribution obligations support a new approach to MII disclosure obligations.

Whilst supporting work on modifying disclosure obligations, MIGA is concerned that too much emphasis on high level approaches without product specific clarity would achieve little, if at all, for MII. It could well lead to even more unhelpful, voluminous information being provided to medical practitioners given uncertainty on what disclosure obligations would involve. Without more clarity and guidance for MII, this could pose significant problems for both practitioners and insurers.

For example the approach suggested in para 9.127 of "*a requirement to take reasonable steps designed to ensure that a reasonable consumer … would understand the key risks, costs, and benefits of the product*" is nowhere near enough to provide an appropriate MII disclosure regime. Mere inclusion of discretionary factors of product complexity and market understanding do little to offer further clarity for MII.

An appropriate approach for MII disclosure could involve higher level obligations, support by tailored requirements, prescribed detail and guidance specific for MII. The latter would be particularly crucial to ensure that a focus on intent, flexibility and innovation over prescription does not lead to little or no improvement through uncertainty about what insurers are required to do.

Ultimately there can be no appropriate disclosure regime for MII which is not product specific.

Next steps

MIGA would welcome the opportunity of meeting with the ALRC or otherwise engaging on the issues raised in this submission.

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

Yours sincerely

[redacted]

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