13 October 2017

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Dear Ms Medwin

First Principles Review of the Indemnity Insurance Fund

MIGA welcomes the opportunity to make a Submission to the Department of Health (the Department) in response to the First Principles Review (FPR) of the Indemnity Insurance Fund (IIF).

The FPR provides an excellent opportunity to review the ongoing need for the IIF and to ensure that the policy objectives continue to be appropriate notwithstanding changes in market conditions in recent years.

Since their introduction, to address the medical indemnity insurance crisis in the early 2000s, the Schemes that comprise the IIF have been critical in maintaining a stable and secure medical indemnity market, ensuring access by medical practitioners to affordable indemnity cover and the delivery of affordable health care for the community. They have served the profession and the community well.

A copy of MIGA's Submission is enclosed.

The Submission outlines MIGA's position and recommendations in relation to the High Cost Claims Scheme (HCCS), the Exceptional Claims Scheme (ECS), the Premium Support Scheme (PSS), the Run-Off Cover Scheme (ROCS), the obligations of medical indemnity insurers (MIIs) under the Services Contract and the legislation for midwives.

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 32,000 members and a national footprint, MIGA has represented the medical profession for 117 years and the broader healthcare profession for 15 years.

MIGA is a signatory to the Services Contract developed to underpin the delivery of the PSS and other obligations for MIIs for medical practitioners. Since 2010 it has been the sole provider of indemnity insurance under a Federal Government Scheme for privately practising Eligible Midwives.

MIGA therefore has a significant interest in the FPR and considerable knowledge and experience to contribute it.

If you have any questions or comments in relation to MIGA's Submission, please contact Mandy Anderson, direct telephone [redacted] We would welcome the opportunity to discuss this Submission with you.

Yours sincerely

Mandy Anderson
CEO and Managing Director

1. Executive Summary

The Schemes that comprise the IIF were introduced as a package of reforms with key objectives to:

- Create stability in the medical indemnity industry, and
- Ensure the availability of affordable indemnity insurance for medical practitioners and midwives.

MIGA's position is that:

- The continuation of the IIF is critical to supporting the ongoing availability of affordable and secure indemnity insurance, to protect against uncertainty and volatility, and to facilitate access to affordable health care for the community
- Where pricing and cover obligations are imposed on MIIs as part of the IIF they should apply equally to all MIIs that have access to the benefits of the IIF, thus ensuring a level playing field and competitive neutrality.

In addition, MIGA believes that:

- The legislation which forms par of the IIF should be clearer, simpler and harmonised, enabling more consistent interpretation and better alignment with the key policy objectives
- Work needs to be undertaken to improve the administration of the Schemes which currently create unnecessary burden and costs for the MIIs
- The IIF should support safety and quality and not reduce the role of insurance in pricing, underwriting and management of risk.

MIGA has previously submitted its thoughts on how the medical indemnity legislation can be streamlined and simplified as part of the Thematic Review currently underway by the Department. A further copy of MIGA's submission dated 16 December 2016 is enclosed.

2. Should the IIF continue?

MIGA position at a glance

MIGA's position is that the continuation of the IIF is critical to supporting the ongoing availability of affordable and secure indemnity insurance, to maintain stability in the medical indemnity industry and to ensure access to affordable health care for the community.

MIGA submits that:

- Medical indemnity insurance is long tail in nature. Claims can take years to be notified, even longer to settle and they can be subject to significant variability in quantum and frequency, setting medical indemnity well apart from the rest of the general insurance industry
- A change in the legal environment, relaxing of tort reform, increasing activity of litigation funders and increasing class actions could have a significant impact on the cost and availability of medical indemnity insurance
- The National Disability Insurance Scheme (NDIS) has been introduced with the right to sue and pursue recovery maintained (despite the recommendation of the Productivity Commission to remove common law rights to sue for long-term care and support[1]). It is not yet clear the extent to which this may increase the frequency and cost of medical indemnity claims or change their nature in the future. This introduces a level of concern and uncertainty (including financial uncertainty) to the system
- The UK and USA are both experiencing significant deteriorations in the cost of medical indemnity claims with the potential for this to seriously destabilise the provision of health care in their countries[2]
- Australia, on the other hand, has enjoyed a long period of relative stability in its medical indemnity environment, largely as a result of the existence of the IIF and tort reform in the early 2000s
- The IIF plays an important role in maintaining the stability of the medical indemnity market and ensuring access by medical practitioners to affordable premiums
- Whilst the market has normalised substantially since the IIF was introduced, it continues to play a valuable role as a safeguard against uncertainty and is critical in a market which can be volatile and is a small subset of a larger general insurance market
- Whilst there is a cost of maintaining the IIF, the value it provides as a safety net to the system is significant.

3. High Cost Claims Scheme (HCCS)

MIGA position at a glance

MIGA supports the continuation of the HCCS in its current form as an effective mechanism to reduce the financial impact of large claims. It plays a critical role in maintaining affordability of insurance, it should be maintained at the new threshold of $500k and access to it should be restricted to MIIs that are subject to the Services Contract.

MIGA submits that:

- The impact of a complete removal of the HCCS would be an immediate 18% to 20% increase in medical indemnity premiums
- This would translate into higher costs being passed on to patients and could result in an additional burden to the Federal Government if patients instead fall back on Medicare and the public hospital system

[1] Recommendation 18.1, Productivity Commission Inquiry Report No 54 *Disability Care and Support*, 31 July 2011 - available at www.pc.gov.au/inquiries/completed/disability-support/report/disability-support-overview-booklet.pdf

[2] In the US, the industry claims cost has increased by 15% over three years to 2016. This is partially due to increases in large claim costs, with a material growth in the cost of claims above $1 million (Source: Milliman US 2017). The medical indemnity industry's underwriting profitability has steadily declined over this period, with 2016 approaching zero – a level not seen since 2005 (Source: Inside Medical Indemnity 2017 Second Quarter, PIAA). In the UK the NHS has experienced a 72% increase in claims cost over the last 5 years to 2016, driven by pressures on both indemnity and legal costs (Source: The rising cost of clinical negligence, who pays the price? MPS June 2017).

3. High Cost Claims Scheme (HCCS) cont....

- A significant reduction in the HCCS would have a greater impact on higher risk practitioners, for example those in obstetrics and neurosurgery, who will pay more for their insurance or be incentivised to reduce private medical practise
- The threshold should stay at $500k as at this level there is an appropriate level of protection against uncertainty and shocks in the system, while reducing the number of claims that the HCCS is involved with
- The threshold should not be increased further without a better understanding of the impact of the NDIS on medical indemnity claims costs; this will take some years to emerge
- Access to the HCCS for MIIs of medical practitioners should be restricted to those MIIs that are subject to the terms and conditions of the Services Contract (see 7.)
- There are a number of areas where greater clarity is required in the legislation, particularly in terms of what is and is not covered by the Scheme. This creates risk and uncertainty for MIIs. Matters that need to be clarified include the application of the HCCS to treatment provided across both the public and private systems, the application of the HCCS where there are multiple defendants, the provision of services to patients in Australia whilst the practitioner is based overseas and the aggregation of appropriate claims
- The scope of cover under the HCCS should be amended to ensure it is clear that it follows the terms and conditions of the policy issued by the MIIs, in the same way that their reinsurance follows the underlying terms and conditions. There is some confusion around this point, resulting in uncertainty and potential gaps in cover for MIIs
- The administrative process with the Department of Human Services (DHS) is cumbersome and frustrating and often results in significant delay and uncertainty. The *Medical Indemnity Act 2002* (the MI Act) should be amended so that it reflects a commercial arrangement where the evidence required to support a claim is practical and pragmatic.

4. Exceptional Claims Scheme (ECS)

MIGA position at a glance

MIGA supports the continuation of the ECS in its current form as it provides certainty to the medical profession in relation to large claims and assists with affordability of indemnity insurance.

MIGA submits that:

- The ECS is a very effective mechanism to control the cost of insurance for exceptionally high cost claims which otherwise would cost medical practitioners more in premium
- Whilst the ECS has not been triggered since its inception, this does not mean it is not a valuable stabiliser for the market. We understand (but cannot confirm) there has recently been a $27m medical indemnity claim in NSW which reinforces the potential for the ECS trigger to be reached and its value in terms of security for the profession
- The ECS is important to protect against uncertainty and extreme volatility in claims costs
- The protection provided by the ECS could be enhanced by removing the discretionary element of it
- It is best administered by the Commonwealth as all other mechanisms introduce cost for practitioners.

5. Run-Off Cover Scheme (ROCS)

MIGA position at a glance

MIGA supports the continuation of ROCS in its current form as it brings stability and certainty to medical practitioners as to their position in retirement, given their insurance cover is claims made. In its absence, access to run-off cover would be less certain and the cost might be prohibitive.

MIGA submits that:

- The rules around entry and exit into ROCS should be clarified as they are often the source of confusion for MIIs

5. Run-Off Cover Scheme (ROCS) cont...

- Consideration should be given to reducing the levy (which is 5%) as the funding of ROCS is currently in excess of its liabilities[3]
- Alternatively, the Government could consider extending the scheme to cover certain situations, such as medical practitioners uninsured in certain situations, to protect the community
- Protection should be introduced in the legislation so that insurers that provide indemnity in good faith and on reasonable grounds are not left funding claims because ROCS will not respond, possibly on a technicality. MIGA has experience of this
- Certain ambiguities in the legislation need to be fixed as they add to the uncertainty with ROCS. Areas that need to be clarified include - what happens with a medical practitioner who ceases practice due to disability which at the time was likely to be permanent but he/she subsequently returns to practice; matters where the employer is named, however the claim relates solely to the act/omission of the medical practitioner; what happens when a medical practitioner who has entered ROCS on the basis they have ceased practice in Australia returns to Australia to practice
- The ROCS legislation could be simplified and provide greater clarity for scheme administration (refer MIGA submission dated 16 December 2016)
- As with the HCCS, the administrative process with the Department of Human Services (DHS) is cumbersome and frustrating and often results in significant delay and uncertainty. The MI Act should be amended so that it reflects a commercial arrangement where the evidence required to support a claim is practical and pragmatic
- The fee paid to MIIs to administer ROCS claims is appropriate and necessary to cover their costs. The level is equivalent to what would normally be allocated by an insurer for claims administration and settlement[4].

6. Premium Support Scheme (PSS)

MIGA position at a glance
MIGA supports the continuation of the PSS in its current form as an important mechanism to ensure medical practitioners have access to affordable medical indemnity insurance.

MIGA submits that:

- The PSS is particularly important for high risk specialities (e.g. obstetrics, neurosurgery), medical practitioners practising in rural and remote areas and part time medical practitioners where the majority are female. It assists in supporting a more diverse medical workforce
- It helps facilitate access to health services in those communities where socioeconomic factors might otherwise limit the commercial viability and therefore availability of medical practitioner care
- The PSS plays an important role in helping to manage pricing shocks or unexpected outcomes which would reduce the affordability and availability of health services to the community
- In its current form it has a tested, appropriate and workable affordability trigger
- Reduced usage of the PSS in recent years does not equate to or remove the continuing need for Government assistance, nor does it mean the policy intent is not being met
- The fees paid to MIIs to administer the obligations under the Services Contract should continue, noting they are not just for administering the PSS but are also intended to offset the costs incurred by MIIs in managing other aspects of the IIF.

[3] In its 2014/15 report, the AGA acknowledged that there is a mismatch between the level of ROCS support payments levied on insurers and the level of ROCS indemnity payments.

[4] MIGA's actuaries currently assess its claims handling expenses to be 6.5% of gross claims payments, which is slightly higher than the 5% allowance received under the Scheme.

7. Level playing field

MIGA position at a glance

MIGA believes that all insurers entitled to access the benefits of the IIF should be bound, whether by contract or legislation, to the conditions imposed by the Services Contract as it relates to medical indemnity for the medical profession; otherwise the environment is anti-competitive and there is not a level playing field for MIIs.

MIGA submits that:

- The Services Contract is currently used as the mechanism to gain access to the PSS but it imposes a number of obligations on participating insurers that are not connected with the PSS, are non-commercial and not compatible with an open competitive market
- These conditions were originally proposed as being essential to underpin the framework of financial support provided by the Commonwealth to the medical profession
- The linkage between these obligations and access to the IIF was unfortunately never codified in legislation
- Given it is not mandatory for an MII to sign the Services Contract, this creates an anti-competitive environment where some insurers have conditions imposed on them, in terms of underwriting and pricing, that do not apply to all
- These include – the requirement to provide Universal Cover and be an insurer of last resort, the restrictions that apply to pricing and cover, the obligation to provide effectively free run-off cover to certain policy holders in certain situations and the requirement to manage Universal Cover complaints via the Financial Ombudsman Service
- If it is decided that the obligations in the current Services Contracts fulfil an important policy objective, and the benefits of imposing these obligations outweigh the risks, then these obligations should apply to all MIIs that have access to the benefits of the IIF for insurance for medical practitioners
- The linkage between access to the Schemes and the obligations imposed on insurers in the Services Contract should be clearer and the mechanism to achieve this needs to be addressed. This can be achieved, for example, by legislating that access to the benefits of the IIF, particularly the HCCS, is linked to an MII signing the Services Contract.

8. Universal Cover as a principle

MIGA position at a glance

MIGA recommends that if Universal Cover continues as a requirement, then:

- It should only continue if the current scope and level of Commonwealth support to the medical profession continues via the HCCS, PSS, ROCS and ECS
- All insurers of medical indemnity for individual medical practitioners must have an insurer of last resort obligation and be bound by all aspects of the Universal Cover requirements
- Insurers must be able to more effectively manage the risk (see 9.).

MIGA submits that:

- It is timely for a review of the policy rationale which considers all of the associated benefits and risks of Universal Cover
- Requiring MIIs to be bound by the Universal Cover requirements reduces risk signals which might otherwise influence the safety of medical practice and essentially requires the costs of providing cover to higher risk practitioners to be met by all other practitioners in the system
- In an environment of significant ongoing support for the industry and profession, Universal Cover is important however as it gives certainty to medical practitioners, protection for the community and removes concerns that MIIs might be quasi regulators
- There are some key principles that should underpin how Universal Cover is imposed if it continues as a policy. These should be:
    - There is a fair and level playing field amongst MIIs
    - The policy should support safety and quality for the community

8. Universal Cover as a principle cont....

- MIIs should have the ability to underwrite and assess their risks within reasonable parameters
- MIIs should retain their rights as per the Insurance Contracts Act
- The level and type of cover that is required to be offered should be the minimum required to meet registration standards with the additional benefits and covers as per the MIIs standard cover.

9. Key obligations in relation to the Universal Cover provision

MIGA position at a glance

MIGA recommends that the risk surcharge cap, the controls around pricing, the obligation to provide 'free' run-off cover, the provision for handling disputes in relation to Universal Cover and suggestions in relation to notification of matters to AHPRA need to be reviewed to ensure that the Universal Cover obligations send the right signals to high-risk practitioners and so that MIIs can better manage their risks.

a. Pricing

Under the Services Contract, MIIs must offer actuarially justifiable medical indemnity cover to any medical practitioner who seeks cover from the MII in their State of last resort. There are varying interpretations in terms of how this is calculated and different interpretations by the Financial Ombudsman Service (FOS) in handling disputes.

MIGA submits that the current wording is confusing and unworkable and recommends that:

- It be amended so that the premium must be linked to the standard premium charged for a practitioner of similar risk profile (e.g. similar category of practice, same State, same level of retroactive cover and similar income band)
- This is in fact the structure currently used by MIGA as it is the most practical approach.

b. Risk surcharge cap

Under the Services Contract there is a requirement that MIIs can only charge a maximum of a 100% loading (risk surcharge cap) for a high-risk medical practitioner.

MIGA submits that:

- This requirement does not allow insurers to appropriately price the risk with serious potential implications for patient safety. It is in conflict with the requirement for actuarially justified premiums
- In many cases a 100% loading is not material, particularly for low-paying medical practitioners or those where their ratio of premium to income is very low. Its benefit in influencing a change in behaviour is therefore low
- Other medical practitioners are cross subsidising the cost of this.

MIGA recommends that:

- The risk surcharge cap should be increased to either 4 times the standard premium or a monetary cap of say $200k, whichever is the lower
- This allows for low-paying, high-risk medical practitioners to have a reasonable premium given their risk
- It also allows for stronger messages to be sent to change behaviour, noting that the FOS is there to manage any dispute about fairness.

c. 'Free' run-off cover

Under the Services Contract MIIs must offer run-off cover to any medical practitioner who retires 3 years before being eligible for ROCS at a cost of no more than $50 per annum provided they have been insured with the MII for 10 years.

9. Key obligations in relation to the Universal Cover provision cont...

MIGA submits that:

- This is an unusual and non-commercial condition, not normally seen in an open market, but it does mean that run-off is affordable and accessible until a medical practitioner enters ROCS
- It gives certainty to the profession as to their access to cover and removes worries and concerns in retirement.

MIGA supports the continuation of this requirement, as a mechanism to provide certainty and affordability to the profession, but only provided all MIIs are bound by it (refer level playing field comments).

d. Handling disputes in relation to Universal Cover

MIGA recommends that:

- The FOS is the most appropriate vehicle as all other insurance disputes are handled by FOS and the system is therefore less confusing for practitioners. MIGA does not support the establishment of other panels via other entities to address medical indemnity disputes as this would be too confusing
- The contractual requirements in the Services Contract should be re-drafted so that the obligations on MIIs are clearer, to minimise risk of FOS misinterpretation
- FOS should be given clearer guidelines on how to handle medical indemnity disputes and they should be required to utilise experienced panels to consider medical indemnity matters. The forthcoming replacement of FOS with the proposed Australian Financial Complaints Authority provides an opportunity to revisit these guidelines.

e. Notification of matters to AHPRA

It has been identified that mandatory notification of claims to APHRA by high-risk medical practitioners may be a better way of managing the risk they pose not otherwise addressed by the Universal Cover provisions.

The Commonwealth has suggested options to address this which could include:

- A process of mandatory notification of claims by insurers
- Making it a condition of registration that all claims be reported.

Both are problematic for a range of reasons, including that some claims are vexatious, some may not proceed, such obligations would create conflicts for the MIIs representing the medical practitioners, they can impact negatively on the medical practitioners seeking help and they may delay reporting.

The current COAG Health Council consultation around mandatory reporting by treating practitioners, in which MIGA is involved, highlights the difficulties which mandatory reporting obligations can pose for medical practitioners who need professional help for the benefit of themselves, their patients and the community.

MIGA supports the need for an improved mechanism for AHPRA and the Medical Board of Australia to be more informed about high-risk medical practitioners as a means to better protect the community.

MIGA does not support mandatory notification of claims by MIIs.

MIGA would support a framework that requires notification by medical practitioners of special conditions or terms imposed on their insurance which are suggestive of potentially higher risk than comparable peers and where risk surcharges are applied. How that framework might look would be for discussion.

10. Midwives Legislation

MIGA position at a glance

The existing legislative framework, key conditions and registration requirements for privately practising Eligible Midwives should be maintained as they ensure Eligible Midwives have access to affordable and secure professional indemnity insurance. The current framework is the best mechanism to achieve this.

MIGA submits that

- The legislation is effective in delivering affordable and secure indemnity insurance for Eligible Midwives and should be maintained in its current form
- The current sole provider arrangements should continue because the market is too small to support multiple providers
- Key elements of the Scheme are important in ensuring there is an insurer prepared to provide cover under the Scheme. These include the restriction on access to the Scheme for privately practising midwives who have met the requirements to be registered as eligible and the exclusion in relation to home births
- Consideration should be given to amending the exclusion in relation to employment so that Eligible Midwives who are employed by a company that they do not own can access the Scheme (a proviso could be introduced that this is subject to the company being majority owned by midwives). This would broaden access to the Scheme to Eligible Midwives for whom the Scheme was intended [5]
- Consideration should also be given to reviewing the requirements for collaborative agreements and care plans for practice which is not high risk and not linked to intrapartum care. Some changes have already been made in this regard but there are more areas of practice where such agreements are not essential given the context of the practice. This is in line with the Nursing and Midwifery Board amendments in early 2017 to register midwives in the context of practice in which they have been endorsed to practice, rather than across the continuum of care, as applied before. This would bring clarity to the Scheme and the entitlements to cover for Eligible Midwives
- The focus on safety and quality, integral to the current Scheme, should be maintained.

[5] Current policy exclusion – refers to services *"in any way related to Midwifery Services that are provided by You in the course of Your employment other than Midwifery Services that are provided by You in the course of Your employment (full or part-time) by a company that is owned solely by You, or that is owned solely by practising midwives including You, where the only directors of that company are You and other practising midwives."*