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30 August 2019

Manager
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Via email – InsuranceConsultations@treasury.gov.au

Dear colleagues

MIGA Submission – Extending unfair contract terms to insurance contracts

MIGA welcomes the opportunity to contribute to Treasury's consultation on extending unfair contract terms to insurance contracts.

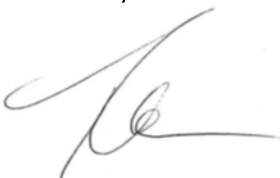
A copy of its Submission is enclosed.

MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting, educating and advocating for medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. With over 34,000 members and a national footprint, MIGA has represented the medical profession close to 120 years and the broader healthcare profession for 16 years.

MIGA would welcome the chance to discuss its position and the issues raised with Treasury.

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

Extending unfair contract terms to insurance contracts

August 2019

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30 August 2019

MIGA Submission – Extending unfair contract terms to insurance

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Executive Summary – MIGA's position

1. Appropriate protections for consumers who take out insurance cover are an imperative, but what is necessary will vary from context to context.

2. Extending the unfair contracts term (**UCT**) regime to medical and professional indemnity insurance for the healthcare sector is not necessary nor is it an appropriate consumer protection for medical and professional indemnity insureds in healthcare.

3. MIGA seeks exclusion of medical and professional indemnity for the healthcare sector from the proposed extension of the UCT regime to insurance.

4. A UCT regime for insurance should be limited to the contexts where arguments for its extension have been made, namely first party, non-medical indemnity retail insurance. Reforms must be directed to the issues that warrant them. The issues suggesting a need for a UCT regime in insurance do not relate to medical indemnity and professional indemnity insurance for the healthcare sector.

5. MIGA provides medical and professional indemnity insurance cover to sophisticated consumers in a highly regulated environment where those consumers are legally required to have a clearly defined type of indemnity insurance cover. Both the nature of the cover MIGA provides and the market it provides it to are distinctly different to contexts where concerns about unfair contract terms have arisen.

6. A UCT regime for medical indemnity and professional indemnity insurance for the healthcare sector offers significant risks of
    - Creating conflict with existing regulation, including Federal Government schemes
    - Introducing a range of new complexities
    - Destabilising a mature, stable insurance environment which itself is undergoing reform and review.

7. If the UCT regime is extended to medical and professional indemnity insurance it is necessary to
    - Provide a broader definition of 'main subject matter' of the insurance contract excluded from UCT review, particularly given community interest in ensuring appropriate limits on insurance coverage and the need to avoided unintended effects around Federal Government schemes
    - Extend what is excluded from UCT review to insurance contract terms and conditions relating to the operation of Government schemes both under law and contract
    - Undertake sector-specific consultation with medical and professional indemnity stakeholders, including the effect of upcoming changes to Federal Government medical indemnity insurance schemes and the introduction of a new allied health professional indemnity scheme
    - Await the outcome of the Federal Government's intended review of private midwifery professional indemnity insurance.

MIGA's interest

8. MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting educating and advocating for medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. It is a not for profit mutual, where profit is not driven by need to pay dividends to shareholders. It provides a range of services and benefits to its members and clients outside insurance cover.

9. With over 34,000 members and a national footprint, MIGA has represented the medical profession for close to 120 years and the broader healthcare profession for 16 years.

10. MIGA contributes to industry engagement on insurance regulatory issues, including both ongoing development of medical indemnity insurance reforms and other general insurance reform proposals. Most recently this includes Treasury's consultations on disclosure in general insurance and proposals for the removal of the claims handling exemption, and ASIC's review of internal dispute resolution requirements.

No case for an unfair contact terms regime for medical and professional indemnity insurance

MIGA position at a glance
There is no case for introducing an unfair contract terms regime for medical and professional indemnity insurance for the healthcare sector. Proposals to extend the unfair contracts regime to insurance relate to issues arising from very different insurance products and markets.

11. The proposals to extended the UCT regime to insurance contracts regulated under the *Insurance Contracts Act 1984* (Cth) (**the ICA**) do not arise out of concerns relating to the provision of medical and professional indemnity insurance for the healthcare sector.

12. Instead these proposals are driven by concerns relating to other lines of general insurance, focused on non-medical indemnity retail insurance products, particularly first party insurance coverage.

13. Arguments for extending the UCT regime to insurance contracts before, during and after the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**the Royal Commission**) did not raise any concerns about medical and professional indemnity insurance, particularly within the healthcare sector.

14. The issues giving rise to Royal Commission recommendations to extend the UCT regime to insurance contracts relate to non-medical indemnity retail consumer insurance, such as home and contents, motor, travel, life and consumer credit insurance. These concerns themselves arise in first party insurance contexts, focusing on how an insurer interacts with its insured in providing payments and insurance benefits directly to them for various defined events. They did not raise concerns with medical indemnity insurance, professional indemnity insurance and third party liability cover more broadly.

15. By contrast the focus in medical and professional indemnity insurance is on assisting insureds respond to third party liabilities and processes. Attempting to deal with issues arising in a first party insurance context do not fit easily into a third party insurance context. The implications of extending the UCT regime to medical and professional indemnity insurance, and third party liability policies more broadly, have not been considered.

16. There would be discrepancies in applying the UCT regime to medical indemnity insurance, healthcare professional indemnity insurance and private midwifery professional indemnity insurance where
    - Only medical indemnity insurance is a retail product and therefore falling under the jurisdiction of the Australian Financial Complaints Authority (**AFCA**)
    - Medical indemnity insurance is excluded from new product design and distribution obligations applying to other lines of retail insurance
    - Proposed general insurance disclosure requirements would only apply to retail products, not professional indemnity insurance for privately practising midwives or other healthcare providers and organisations
    - Consideration is being given to whether new claims handling obligations should only apply to retail products.

17. Accordingly the UCT regime should be limited to the contexts it is intended to address, which are not medical indemnity or professional indemnity insurance.

18. The Federal Government’s intention, wherever possible, to simplify financial services law to eliminate exceptions and qualifications to the law should not be treated as an presumption against compelling cases for limiting the extent of sector-wide reforms. Laudable general aims to ensure fundamental norms of behaviour cannot come at the cost of introducing a new regime to sectors where it is not fit for purpose, would conflict with existing obligations and pose a range of adverse, unintended effects for a well-developed, finely balanced regime that continues to be undergo review and reform.

Medical and other professional indemnity insurance in healthcare - a very different product

MIGA position at a glance
Medical and professional indemnity products in healthcare are very different to other lines of insurance which would fall under an unfair contract terms regime in insurance. The nature of the insurance products and their market, bespoke regulatory arrangements and degree of Federal Government involvement indicate such a regime for these lines of insurance is unwarranted and inappropriate.

19. The very different nature of medical and professional indemnity insurance for the healthcare sector as compared with other lines of general insurance means detailed sector-specific consideration is required before imposing broader general insurance obligations on those lines of insurance.

(a) Sophisticated markets

20. Medical and professional indemnity insurance for the healthcare sector are highly competitive markets involving insurers offering similar cover to a sophisticated market.

21. Registered health practitioners are legally required to have appropriate professional indemnity insurance arrangements in place.[1] Each year, they are required to make declarations of having appropriate insurance cover in place to their professional regulatory and disciplinary boards.[2] This means significantly greater consideration is given by medical and other health practitioners to the insurance cover they are required to have as compared with other contexts.

22. The issues raised in other insurance contexts around financial literacy, ability to negotiate and bargaining power have not been demonstrated to be an issue in medical and other professional indemnity insurance in healthcare.

23. Markets for medical and professional indemnity insurance for the healthcare sector feature active professional interest groups, highly engaged with insurance and who have been closely involved with ongoing industry insurance review and reform initiatives. In particular, registration boards have consulted the professions they regulate on what are appropriate professional indemnity insurance requirements.

(b) Federal Government schemes

24. Medical indemnity insurance is subject to a high degree of additional requirements and regulation, both through legislation and Federal Government contracts. These include the Premium Support Scheme, Run-Off Cover Scheme, High Cost Claims Scheme, Universal Cover / Insurer of Last Resort Scheme and Exceptional Claims Scheme. There are also contracts between the Federal Government and some, but not all, insurers.[3]

25. Both medical indemnity insurance and professional indemnity insurance for privately practising midwives are subject to a range of mandatory minimum product standards.

26. MIGA is also the sole provider of professional indemnity insurance, under legislation and a Federal Government contract, to eligible privately practising midwives.[4] In addition to mandatory minimum product standards, it involves provision by MIGA of a Federal Government approved insurance product. Strict requirements are set out around who can be insured and scope of practice which can be insured. A range of important discretions around coverage offered are also provided, including in relation to ensuring appropriate professional practice.

27. Comparisons cannot be drawn with overseas UCT experience for insurance, given the unique nature of the Australian medical indemnity insurance and private midwifery insurance schemes.

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[1] Section 129, *Health Practitioner Regulation (National Law)*
[2] See for example Medical Board of Australia, *Registration standard: Professional indemnity insurance arrangements* – available at www.medicalboard.gov.au/Registration-Standards.aspx
[3] Legislation includes the *Medical Indemnity Act 2002* (Cth) and *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Cth) (**MIPSPS Act**). Contracts include the Premium Support Scheme contracts, entered into between various medical indemnity insurers, including MIGA, and the Commonwealth
[4] Legislation includes the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (Cth) and the *Midwife Professional Indemnity (Run-Off Cover Support Payment) Act 2010* (Cth)

28. Changes to the current legislative framework for medical indemnity are still to be finalised, including the Premium Support, High Cost and Exceptional Claims Schemes, and Universal Cover obligations.[5]

29. The Federal Government has also indicated an intention to review private midwifery coverage before mid-2020, with a view to considering potential reforms.

30. The degree of regulation for both medical indemnity insurance and private midwifery professional indemnity insurance has compelling parallels with compulsory third party motor vehicle or workers' compensation insurance. Those lines of insurance would not be open to UCT review, not being regulated under the ICA.

31. Medical and other health practitioners working in the public healthcare system can obtain insurance cover from state or territory schemes, the providers of which do not face obligations that apply to private medical and other professional indemnity insurers.

(c) Exemptions made from comparable proposals

32. Treasury's decision to exclude medical indemnity insurance from proposed general insurance product design and distribution powers is a recognition of the unique nature of this line of insurance, and the lack of issues in it around product targeting and fitness for purpose. As they are not retail products, professional indemnity insurance for privately practising midwives and healthcare practices are also not part of the product design and distribution regime.

33. Given the comparable consumer intent protections of both the product design and distribution regime and UCT regime, the same case for excluding these products from product design and distribution obligations can also be made for exemption from the UCT regime.

(d) The impossibility of defining 'fairness' in these contexts

34. There is an unquestionable needs for fairness in an insurance contract. Defining what fairness is creates a significant challenge in more straightforward contexts. It becomes enormously difficult and unpredictable in contexts such as medical and professional indemnity insurance for the healthcare sector involving community protection imperatives, complex bespoke regulatory regimes and sophisticated insureds. Developing a test for what is unfair is impossible in these contexts. There will be a wide range of views on what is fair and what is not.

35. If the UCT regime is extended to medical and professional indemnity insurance for the healthcare sector, insurers in healthcare will be left trying to foresee what may and may not be unfair on a case by case basis. Trying to develop appropriate policy terms and conditions, price the cover, reserve for liabilities and obtain appropriately priced reinsurance then becomes an almost impossible challenge.

(e) Existing dispute resolution scope and experience

36. Notably AFCA also has a jurisdiction over medical indemnity insurance premium or risk surcharge, beyond what is available for other lines of general insurance.[6] This provides a broad protection in medical indemnity insurance to insureds beyond what could ever be offered by a UCT regime, where premium review is excluded.

37. Consideration should be given to the numbers of medical indemnity insurance disputes dealt with by AFCA and its predecessor Financial Ombudsman Service.[7] It would appear there have been less than 40 disputes handled by AFCA / FOS since 2011 involving medical indemnity insurance. This represents a miniscule proportion of disputes handled by AFCA / FOS in even a single year for general insurance.

38. Accordingly there is no evidence to suggest broader issues of unfairness in medical indemnity insurance.

[5] Consultation has recently been completed on the draft Medical and Midwife Indemnity Legislation Amendment Bill 2019 (Cth) by the Commonwealth Department of Health

[6] C.1.2, AFCA Complaint Resolution Scheme Rules

[7] AFCA has jurisdiction over medical indemnity insurance disputes as medical indemnity is a retail product – s 761G Corporations Act 2001 (Cth), r 7.1.17A *Corporations Regulations 2001* (Cth). Disputes involving privately practising midwives also fall under its jurisdiction under MIGA's contract with the Federal Government. AFCA does not have jurisdiction over other professional indemnity insurance disputes in healthcare

Unintended adverse consequences

MIGA position at a glance
Application of the unfair contract terms regime to medical and professional indemnity insurance for the healthcare sector poses significant risks of undermining existing regulatory schemes and impeding well-established practices which place reasonable limits around what is appropriate, safe healthcare.

40. Extending the UCT regime to medical and professional indemnity insurance for the healthcare sector poses significant risks of unintended consequences including
    - Undermining the Federal Government medical indemnity and private midwifery insurance schemes, both at law and under contract
    - Opening up the effects of contractual arrangements between the Federal Government, MIGA and other professional indemnity insurers to UCT review
    - Impeding the ability of MIGA and other insurers to impose reasonable and appropriate insurance policy terms and conditions, reflective not just of underwriting risk, but also of comparative risk posed by an insured in their professional practice to the public.
41. Treasury's proposal would capture the overwhelming majority of medical indemnity insurance policies held by doctors with MIGA and other medical defence organisations / professional indemnity insurers. It would apply to individual doctors, eligible privately practising midwives and healthcare practices who take out standard form MII / PII cover with MIGA, subject to certain business size and premium limits.
42. There are over 112,000 practising doctors across Australia. Most within private practice would fall within the proposed 'small business contracts' definition. Similarly many healthcare practices would fall within this definition. A range of their staff would also have UCT rights as third party beneficiaries. The overwhelming majority of eligible privately practising midwives would also fall under the 'small business contract' definition.
43. Medical indemnity insurance, being regulated under Federal Government Schemes, is generally offered on a standard form basis. The use of non-standard, negotiated terms and conditions is relatively rare. Professional indemnity insurance provided to healthcare organisations is also generally offered on a standard form basis, with the use of non-standard terms relatively limited. As set out above, professional indemnity insurance provided to eligible privately practising midwives is a product approved by the Federal Government.
44. The vast majority of medical indemnity and other professional indemnity insurance contracts on healthcare would be open to UCT review, excluding only terms describing what is being insured, terms required or expressly permitted by law, and premium and excess / deductible amounts.
45. Although some of the obligations between the Federal Government and contracting medical indemnity insurers are proposed to be transferred to legislation, the timing for this remains to be determined. The exclusion of terms and conditions relating to what is required or expressly permitted under law would still not protect sufficiently the integrity of those regimes. In addition there is no proposal to make a similar change to the arrangements arising from MIGA's private midwifery professional indemnity contract with the Federal Government.
46. Accordingly it may be that extending the UCT regime to medical and other professional indemnity insurance could lead to a need for
    - Review of Federal Government medical indemnity and private midwifery professional indemnity schemes, which of themselves are either undergoing reform, or where reforms are being considered
    - Consideration of whether non-standard form, bespoke terms need to be used more frequently in policies in order to ensure appropriate management of risk – even so this would not necessarily avoid the term or condition being open to UCT review
    - Wholesale rewriting of medical and other professional indemnity policies, the broad form of which have been in place for many years, to try and address, however imperfectly or inadequately, the issues raised below.

Main subject matter – problems with a narrow definition

MIGA position at a glance
A narrow definition of main subject matter of an insurance policy excluded from unfair contracts term review, namely description of what is being insured, is inappropriate for medical and professional indemnity insurance for the healthcare sector, and more broadly for third party liability cover. It poses significant risks of providing defacto endorsement for inappropriate practices and destabilising well-developed systems for these lines of insurance.

47. The narrow definition of the 'main subject matter' of an insurance contract proposed to be excluded from UCT review, namely the description of what is being insured, causes significant issues and uncertainty for medical and professional indemnity insurance for the healthcare sector, and more broadly in third party liability contexts.

48. What is being insured is comparatively easier to determine when insuring an object, such as a house or car, as compared with insuring a person or corporate entity for third party liability as occurs in the case of professional indemnity insurance. It is unclear whether scope of practice or practice category would be open to UCT review.

49. Medical and professional indemnity insurance for the healthcare sector also provides cover for expenses incurred, such as in professional disciplinary proceedings, not just compensation for liability claims. Expenses cover in this context is much closer in nature and operation to third party liability cover than first party cover. In professional indemnity expenses contexts, the triggers for cover normally arise on the actions of a third party (such as a professional regulator or disciplinary tribunal), which has a range of powers over an insured. This is comparable to a Court in a compensation claim, rather than a payment to an insured by an insurer for a defined event in a first party context.

50. A narrow definition of main subject matter causes considerable difficulty in setting reasonable and appropriate limits on cover in medical and professional indemnity insurance for the healthcare sector, which limits the ability for insurance to protect itself from becoming a defacto support of practices outside what is considered to be appropriate healthcare by professional consensus. The ability of medical and professional indemnity insurers in the healthcare sector to limit their cover to appropriately defined healthcare also fills an important public interest function. This should not be subject to UCT review.

51. A narrow definition of main subject matter could also destabilise systems developed over many years by with the Federal Government to ensure premium stability through providing a defacto mechanism for practitioners who engage in questionable practices to obtain cover for what they do. This would significantly increasing potential insurer exposures to liability claims, and consequently Federal Government exposures to these claims under medical indemnity and private midwifery professional indemnity schemes.

52. For example MIGA imposes an exclusion on its medical and professional indemnity insurance policies involving "*inappropriate practice*". This excludes cover for compensation claims relating to practice which would not be supported by peers. This is an important mechanism to ensure practitioners do not operate outside their scope of practice, or engage in objectionable practices.

53. If the UCT regime is to be extended to medical and professional indemnity insurance, the 'narrow' definition should be rejected and the European Union definition used instead. This would exclude from UCT review terms that "*clearly define or circumscribe insured risk and insurer's liability*". Such a definition would allow medical and other professional indemnity insurers in the healthcare sector to use policy terms and conditions to impose reasonable and appropriate limits around the scope of practice being insured.

Excluding terms required or expressly permitted under law is insufficient

MIGA position at a glance
The scope to exclude terms required or expressly permitted under law from UCT review must at a minimum be extended to include mandatory considerations of intent and operation of any laws, Government schemes or Government contracts, and public interest / broader community considerations.

54. MIGA supports insurance contract terms and conditions required or expressly permitted under law being excluded from UCT review. However this is insufficient for medical and professional indemnity insurance for the healthcare sector.

55. If the UCT regime was to be extended to medical and professional indemnity insurance for the healthcare sector, at a minimum the criteria to consider around what is an unfair term ought also include
    - Intent and operation of any laws, Government schemes or Government contracts relating to the provision of insurance cover
    - Whether there is a public interest in use of the term or condition.

(a) Inappropriate limits on discretions granted under law and contract

56. Legislative, regulatory and contractual obligations which MIGA and some other medical indemnity insurers have with the Federal Government for the provision of medical indemnity insurance, and which MIGA has with the Federal Government for the provision of private midwifery professional indemnity insurance, are contained in various policy terms and conditions. These are not necessarily things which are required or expressly permitted by law.

57. For example, the Federal Government medical indemnity scheme contemplates providing insurance cover for various "*health care incidents*", being those that "*occur in the course of, or in connection with, the provision of health care by the health care professional*".[8] Terms or conditions of a medical indemnity insurance policy consistent with this provision are not things, of themselves, which are required or expressly permitted by law. The Federal Government scheme does not prevent an insurer from providing insurance cover outside those boundaries. However access to the scheme is an important part of ensuring a stable medical indemnity insurance market and appropriate professional practice.

58. The consequence of these proposals is that there is considerable scope for terms and conditions relating to what is "*health care*", which is often based on professional assessments of what is acceptable and appropriate, to be open to challenge under the UCT regime.

59. Another example is a 'complying' medical indemnity insurance offer under the Federal Government Scheme, including for retroactive cover, contemplates such an offer including "*reasonable and appropriate*" exclusions from cover.[9] Would such exclusions be excluded from UCT review as they are permitted under law? Or would they be reviewable under the UCT regime as it is only the scope to make exclusions, not the nature and content of those exclusions themselves, which is not reviewable? If the latter, there is an apparent conflict between the nature of what is "*reasonable and appropriate*" under medical indemnity legislation, and what would be 'fair' under the UCT regime. By comparison
    - What is "*reasonable and appropriate*" under medical indemnity legislation includes consideration of
        - Nature of the health care provided by the health care professional during the period during which an otherwise uncovered prior incident occurred
        - Kinds of exclusions usually provided for in comparable insurance contracts
        - Any other relevant consideration
    - What is 'fair' under the UCT regime assesses whether a term
        - Would cause a significant imbalance in the parties' rights and obligations under the contract
        - Is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term
        - Would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[10]

[8] Sections 4 and 5, MIPSPS Act
[9] Sections 22 and 24, MIPSPS Act
[10] Section 12BG, *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**)

60. The two tests cannot be easily reconciled. It is unclear whether a Court, Tribunal or AFCA would import the "*reasonable and appropriate*" test into a UCT regime assessment. If it did not, this would undermine the Federal Government medical indemnity insurance schemes.

61. A further example relates to universal coverage / insurer of last resort obligations. By contract MIGA and other insurers have discretion around excluding certain healthcare from cover based on risk involved, and have the ability to impose training, supervision or chaperone requirements. Although proposed to be transferred to legislation with proposed medical indemnity reforms, these discretions presently are contractual. Even when transferred to legislation, it remains doubtful whether they would be "*permissible*" by law. They both allow appropriate underwriting decisions and provide an additional mechanism to ensure healthcare is delivered safely and appropriately. However they would be open to challenge under a UCT regime, and could be found unfair in unintended ways.

(b) Issues with consequential terms and conditions

62. There are also be issues with the extent to which medical indemnity insurance and private midwifery professional indemnity insurance terms and conditions arise from the Federal Government schemes, but are not directly required or expressly permitted by them.

63. For example medical indemnity insurance and private midwifery professional indemnity insurance legislation impose a range of information requirements, breaches of which are strict liability offences without reasonable excuse provisions.[11] A range of conditions are contained in MIGA's policies which assist in meeting these obligations, particularly around assistance and co-operation.

64. Another example relates to pre-conditions for Commonwealth Government contribution towards a claim under private midwifery professional indemnity insurance legislation, being that

    - It meets certain qualifying criteria, including who it was made against, the context in which it occurred and the nature of practice involved[12]
    - Its defence was conducted "*appropriately…consistent with the usual standard for defending claims*".[13]

    A range of terms and conditions are included in MIGA's professional indemnity insurance policy for eligible privately practising midwives which allow it to meet these obligations, including around insured disclosure, assistance and co-operation.

65. These two examples of 'consequential' terms and conditions are not of themselves required or expressly permitted by law and thereby excluded from UCT review. Although it might again be argued these two examples of conditions could be justified as 'fair' on the basis that they are reasonably necessary to protect MIGA's legitimate interests, the determination of this question in individual circumstances would be far from clear.

(c) Issues with policies involving non-Federal Government scheme components

66. A further complexity arises from not all aspects of MIGA's medical indemnity insurance policies falling under the Federal Government medical indemnity insurance scheme. This could create uncertainties for terms and conditions relating to the policy as a whole.

67. For example medical indemnity insurers are required to make certain offers of retroactive medical indemnity cover. The aspect of this relating to insurance cover falling under the Federal Government medical indemnity scheme (such as compensation claims, disciplinary and administrative proceedings, inquiries and investigations[14]) would be excluded as being required or expressly permitted under law. However the offer of retroactive cover for other aspects of the policy (such as cover for employment / industrial disputes, loss of documents, protection of reputation, professional relations expenses and mandatory breach notification) would be open to UCT review. This would create unnecessary and inappropriate complexities for both MIGA and its insureds.

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[11] Sections 34AB, 34Y, 34ZO, 38, 44 and 71, *Medical Indemnity Act 2002* (Cth); ss 62 and 82, *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (Cth) (**MPICCS Act**)
[12] Section 11, MPICCS Act
[13] Section 19, MPICCS Act
[14] The scope of the Federal Government medical indemnity insurance scheme is set out in ss 4 and 5 of the MIPSPS Act

Issues with unfair contracts regime terminology and remedies

MIGA position at a glance
The test for fairness in the unfair contracts regime is not fit for purpose for medical and professional indemnity insurance for the healthcare sector, involving broader considerations than the interests of the parties to the insurance contract. Proposals to introduce civil penalties for UCT regime breaches are inappropriate for contexts where insurers have worked closely with Governments to produce an insurance product.

68. There are a range of problems with the UCT regime framework when applied to medical and professional indemnity insurance for the healthcare sector. These focus on the definition of what is an 'unfair' contact term.

69. In relation to what is an 'unfair' term the following criteria are relevant
    - Would cause significant imbalance in contractual rights and obligations
    - Is not reasonably necessary to protected the advantaged party's legitimate interests
    - Would cause detriment (financial or otherwise) if used
    - Transparency of the term in question
    - The contract as a whole.[15]

70. These criteria provide an insufficient basis to consider whether a term or condition of a medical and professional indemnity insurance policy for the healthcare sector is truly unfair. They pay no consideration to the imperatives underpinning the medical indemnity and private midwifery professional indemnity insurance schemes. Instead they are designed for a broad range of consumer contexts, generally those involving a lack of additional regulation or oversight where there are significant differences in bargaining power.

71. The focus on imbalance between the parties and detriment to an affected party in the UCT regime test of unfairness does not properly account for the broader interests involved in providing medical and professional indemnity insurance for the healthcare sector, particularly around broader community interest in public protection.

72. Although it might be argued that a medical or professional indemnity insurer could rely on the 'defence' of a term or condition being reasonably necessary to protected the advantaged party's legitimate interests, this is of no real assistance given its focus on the insurer's interests only, not those of the profession and community, and does not account for the complexity of the considerations required.

73. MIGA is also troubled about the scope for ASIC to seek Court intervention to prevent reliance on the unfair term or seek compensation and / or other remedies in relation to an allegedly unfair term or condition relating to the Federal Government Schemes, and ACCC proposals for scope to declare such terms and conditions be illegal, leading to civil monetary penalties.

74. This is an unnecessarily draconian and punitive approach to insurers like MIGA who work closely with the Federal Government and other stakeholder to develop fair, sustainable and appropriate insurance schemes to support healthcare in Australia.

75. Clearly there are a range of reasons why the extension of the UCT regime to medical and professional indemnity insurance for the healthcare sector is inappropriate.

[15] Section 12BG, ASIC Act