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Dear colleagues

### **MIGA Submission – Enhancements to Unfair Contract Terms Protections**

As a medical defence organisation and medical / professional indemnity insurer, MIGA appreciates the opportunity to contribute to Treasury's consultation on Enhancements to Unfair Contract Terms (UCT) Protections.

MIGA contributed to Treasury's consultation on extending the UCT regime to insurance contracts, and both Treasury and ACCC Digital Platform Inquiry consultations on UCT illegality and civil pecuniary penalties.

#### **Unfair contract terms in healthcare professional indemnity insurance**

MIGA welcomes the recent exclusion of medical indemnity insurance (MII) from the extension of the UCT regime to insurance. This exclusion recognises MIGA's concerns about creating conflict with existing regulation, introducing new complexities and destabilising a mature, stable MII market.

Extension of the UCT regime to other professional indemnity insurance (PII) in healthcare sector poses the concerns and complexities which MIGA set out in its earlier Treasury submission. These include

- Application of the UCT regime to eligible privately practising midwives, whose PII cover is regulated under legislation and a Federal Government contract - these complexities are comparable to those which would have been posed for MII, but avoided by appropriate exclusion from the UCT regime
- Challenges in determining 'fairness' in healthcare PII contexts involving community protection imperatives and sophisticated insureds in a highly competitive market
- Narrow definition of 'main subject matter' of a contract excluded from the UCT regime – this means terms and conditions a healthcare PII insurer uses to impose appropriate limits around scope of coverage are open to challenge
- The focus of healthcare PII (as in PII more broadly) on third party processes (i.e. civil damages claims and legal expenses cover for various regulatory, investigative and administrative processes) – consequently many PII contract terms reflect the realities of court / regulatory obligations and expectations, which may be at odds with 'fairness' to an insured.

None of the arguments for extension of the UCT regime to insurance contracts are relevant for healthcare PII, or PII more broadly. The healthcare PII market is fundamentally different to insurance markets where arguments were put forward about the need for UCT regime protections.

MIGA's position remains that the UCT regime should not apply to healthcare PII. The most appropriate way to achieve this would be to limit its application to retail general insurance contracts, excluding MII.

More generally, MIGA does not see a proper basis at this time to consider changes to the definitions of 'small business' or 'value thresholds' for an insurance contract to fall within the UCT regime.

The decision to extend the UCT regime, as it currently stands, to insurance has just been made. Now is not the time to consider further changes before the UCT regime commences for insurance. Changes should only be considered after the new regime is implemented and its operation analysed properly.

### **Use of minimum standards - eligible midwives and public protection imperatives**

If healthcare PII is to be subject to the UCT regime, MIGA considers that options raised by Treasury around 'minimum standards' should be used to

- Avoid the significant issues the UCT regime would pose for privately practising midwifery PI cover
- Recognise the role healthcare PII plays in ensuring maintenance of appropriate professional standards in healthcare.

MIGA is the sole provider of PII, under legislation and a Federal Government contract, to eligible privately practising midwives.<sup>1</sup> 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 that can be insured. There are a range of important discretions around coverage offered, including to ensure appropriate professional practice.

Mere exclusion of terms and conditions required or expressly permitted by law is insufficient to ensure private midwifery PI cover can be offered on the basis agreed with the Federal Government.

There is no reason why the UCT regime should be used to challenge this specialty category of insurance product.

MIGA proposes that the UCT regime exclude PII reflective of Federal, state or territory government schemes, obligations or agreements.

In addition, healthcare PII can contain terms and conditions designed to ensure or encourage safe healthcare.

PII cover necessarily and appropriately provides cover for errors and omissions by healthcare professionals. However in healthcare various policy terms and conditions ensure PII cover is not used to justify practices that are well outside what is considered acceptable by professional peers. This includes things such as

- Practising beyond scope of profession / specialty
- Practice which is far outside accepted professional standards
- Intentionally negligent or unlawful acts
- Criminal or reckless conduct.

PII policy terms and conditions relating to these issues are an important public protection mechanism.

There should be an exclusion from the UCT regime for provisions necessary and / or otherwise appropriate to ensure protection of the public and maintenance of professional standards.

### **Unfair contract terms illegality and pecuniary penalties**

MIGA opposes prohibiting UCTs or imposing civil penalties for their use in insurance.

There is no identified need for prohibition or civil penalty for UCTs in insurance, particularly healthcare PII or PII more broadly.

Arguments raised for UCT prohibition or civil penalties are unrelated to healthcare PII or PII more generally. They are based on experiences in the existing UCT jurisdiction, which excludes insurance.

It is unfair and unduly punitive to make UCTs illegal or subject to civil penalties before there is any real clarity on what is and what is not a UCT across a wide range of policy terms and conditions, each in very different insurance markets.

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<sup>1</sup> 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)

For some time after the UCT regime commences, insurers acting in good faith when putting forward standard form insurance policies will effectively need to guess what is and is not permissible. This is inappropriate.

Any consideration of making UCTs illegal for insurance, or introducing civil penalties for their contravention, should be deferred pending

- Commencement of the UCT regime for insurance
- Subsequent analysis of its effectiveness, involving stakeholder consultation.

You can contact Timothy Bowen, telephone 1800 839 280 or email [timothy.bowen@miga.com.au](mailto:timothy.bowen@miga.com.au), if you have any questions about MIGA's Submission, or if you would like to discuss further.

Yours sincerely



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