

20 May 2016

New South Wales Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

By post and email: nsw_lrc@agd.nsw.gov.au

**General Enquiries
and Client Service**

P 1800 777 156
F 1800 839 284

**Claims and Legal
Services**

P 1800 839 280
F 1800 839 281

www.miga.com.au
miga@miga.com.au

Postal Address

GPO Box 2048, Adelaide
South Australia 5001

Dear Colleagues

MIGA Submission to Review of s6 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*

MIGA welcomes the opportunity to respond to the issues raised in the Commission's Consultation Paper, *Third Party Claims on Insurance Money*, as part of its review of s6 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW) (the Act)*.

MIGA, through its organisations, offers a range of medical and professional indemnity insurance products and associated services to the health care profession across Australia. It provides insurance for medical practitioners, health care companies, privately practising eligible midwives and medical students.

MIGA comprises the following organisations:

- MDASA Limited – a doctor owned mutual, non-profit organisation providing a range of membership services and benefits to medical practitioners and medical students across Australia
- Medical Insurance Australia Pty Ltd – a wholly owned subsidiary of MDASA Limited, which is a licenced general insurer regulated by the Australian Prudential Regulation Authority and subject to the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 (Cth)*, providing medical and professional indemnity insurance to its members and policy holders.

In summary, MIGA:

- supports Option 4 identified in the Consultation Paper, namely that s6 of the Act be repealed
- endorses the position outlined in the Paper, namely that both legislative regimes and the common law address sufficiently the need for a direct remedy against insurers, and that current insurance practices and regulation mean that the concerns to which s6 of the Act were directed no longer exist.

MIGA addresses some of the issues raised by the Consultation Paper, and explains why it takes the position that it does, below.

In doing so, it references some of the provisions in its medical and other professional indemnity insurance policies for medical practitioners, health care entities and privately practising eligible

midwives, which are available at www.miga.com.au (on the front page, select 'Doctors', 'Midwives' or 'Practices' menus at the top of the page, and then the option to 'Download documents')

Original intention

MIGA notes that the introduction of s6 of the Act around 70 years ago was driven by concerns about potential for 'collusive' agreements between insureds and insurers, insurers paying amounts directly to insureds for amounts owing to a plaintiff and other situations where enforcement of a settlement or judgement may be frustrated.

As suggested in the Consultation Paper, MIGA would not contemplate paying insurance money direct to an insured unless it could be satisfied that such money was reimbursement to the insured for money already paid to the plaintiff, or if other exceptional circumstances existed.

It is in MIGA's interests to ensure that obligations of its insureds for which it provides insurance cover are met.

(a) How MIGA conducts matters

In the vast majority of situations where an insured notifies a matter to MIGA, it takes over conduct of any such matter which may give rise to entitlement to cover under the relevant insurance policy.

By its policies, MIGA retains full discretion in conduct and resolution of any claim or other matter.

MIGA's insurance policies also contain mitigation, co-operation and assistance clauses, requiring insureds to act reasonably in assisting MIGA in the investigation, defence or settlement of matters

Although MIGA's insureds retain the right to assume conduct of a matter if they do not agree with an MIGA proposal to resolve a matter, in practice this happens very rarely.

In those circumstances, MIGA will not cover the insured for an amount, including any claim, claim costs and other expenses, beyond which it believes it could have resolved the matter for.

There would need to be exceptional circumstances existing for MIGA to advance anything other than defence costs to an insured in this situation prior to resolution of a matter by settlement or judgment.

Again, it is in MIGA's interests to preserve any amounts payable to plaintiffs under its insurance policies until due and payable to them, and payable in a way in which MIGA can ensure receipt by a plaintiff, ie by paying amounts directly to them or their authorised representatives, such as their solicitors.

(b) 'Compromises' with insureds

MIGA notes the reference made in the Consultation Paper to cases in jurisdictions that do not have an equivalent to s6 of the Act where insurers have compromised with their insureds to release them from any claims for indemnity.

In the rare situations this would occur, it is in MIGA's interests to ensure that obligations of its insureds for which it provides insurance cover are met, and that amounts payable to plaintiffs are payable in a way in which MIGA can ensure receipt by a plaintiff.

Subsequent issues with s6 of the Act

(a) Advancing defence costs

The issue of advancing defence costs is not one for only directors' and officers' insurance policies, but also medical and other professional indemnity policies which MIGA provides.

Under the terms of its insurance policies, MIGA has discretion to advance defence costs or other expenses prior to completion of matters. This normally involves MIGA retaining lawyers of its choosing to act for its insured, and MIGA then pays those lawyers directly, as the matter progresses.

MIGA does not believe it could preserve its relationship with those lawyers, chosen for their expertise in medico-legal matters, not that it would be a fair method of remuneration if they were required to await the resolution of a damages claim before they were paid for their work.

MIGA's members and policy holders can face a wide variety of matters which may lead to damages claims, including:

- disciplinary investigations and proceedings, such as those involving the NSW Health Care Complaints Commission, Medical Council of NSW or the Australian Health Practitioner Regulation Authority
- coronial investigations and inquests
- complaints to, or disputes with, professional colleges or associations, hospitals and other health care entities, Medicare Australia and private health insurers
- criminal investigations and proceedings
- royal commissions

Often, these matters take place and either progress significantly, or run their course, prior to any civil claim being brought, incurring significant defence costs.

As set out in the Consultation Paper, the present state of the law in New South Wales is that an insurer is not precluded from advancing defence costs under its policy by the operation of s6 of the Act.

The nature of s6 of the Act has caused a variety of differing judicial interpretations over the years about how it operates.

MIGA is concerned that this issue has not been resolved definitively by the High Court.

On the issue of defence costs advancement, a different position has been taken in other jurisdictions involving similar provisions.

MIGA is concerned that s6 of the Act may be interpreted in a way which affects its ability to support its members and policy holders through damages claims, and a variety of disciplinary, coronial and other matters. These latter matters can have substantial impacts on a professional's ability to practice, their reputation and livelihood, and affect the provision of health care more generally.

Accordingly it is imperative to have clarity around the issue of advancing defencing costs to insureds in the health care context.

(b) Reinsurance

As observed in the Consultation Paper, there are uncertainties about whether s6 of the Act would apply to an insurer's reinsurance arrangements.

MIGA is troubled by this uncertainty, given that such contracts are in place to protect the exposures of it as an insurer and are not intended to reimburse policy holders direct. MIGA is concerned about the potential this has to affect the ability to secure appropriate reinsurance arrangements in the future.

(c) Other issues

MIGA also shares the concerns raised about a number of the other areas of uncertainty outlined in the Consultation Paper, particularly in relation to:

- priority between charges where there are multiple plaintiffs, which is a relevant issue in the medical negligence context involving consequential nervous shocks claims
- territoriality, which can encourage forum shopping – given the differences in civil liability regimes in different Australian states and territories, and the significant numbers of lay and expert witnesses usually required for medical negligence claims, often located in one jurisdiction, it does not consider forum shopping a practice to be encouraged

Other legislative provisions and scope of insurance cover

MIGA notes the scope for plaintiffs to access insurance proceeds where an insured is bankrupt, missing, deregistered or deceased under various Commonwealth legislation.

In terms of the concerns raised about the scope of legislative provisions relating to deceased or missing insureds, MIGA medical indemnity insurance policies for medical practitioners and professional indemnity insurance policies for eligible privately practising midwives include extended definitions of insureds encompassing their estate, heirs and legal representatives or assigns in the event of death or permanent disablement of the insured.

In professional indemnity insurance policies for healthcare companies, MIGA's policy provides an extended reporting benefit, providing cover for insureds which cease to exist, are merged with or acquired by other entities or become externally administered bodies within a period of insurance.

If you have any questions about our submission or wish to discuss, please contact Timothy Bowen, Senior Solicitor – Advocacy, Claims & Education at [REDACTED]

Yours sincerely



Mandy Anderson
CEO & Managing Director



Timothy Bowen
Senior Solicitor – Advocacy, Claims & Education