

24 January 2013

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Senate Standing Committee on Community Affairs
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Dear Committee Secretary

**Re: Inquiry into the National Disability Insurance Scheme Bill 2012
Submission by MIGA to the Standing Committee on Community Affairs -
Legislation Committee**

MIGA is a national medical indemnity insurer. We are a member of the Insurance Council of Australia (ICA) and support the ICA submission to the Committee in relation to the National Disability Insurance Scheme Bill 2012. In addition to the items covered by the ICA, we make the following submission.

Our submission is focused in the following areas:

- The requirements of Chapter 5 as they relate to the NDIA's ability to require the person to pursue litigation, including how this will impact on Cerebral Palsy matters
- Concerns about the potential impact on the cost of claims and insurance premiums
- The anticipated timing of recovery payments to the NDIA
- A recommendation that all disability that is the result of a medical accident form part of the NDIS rather than be split between the NDIS and the NIIS.

Chapter 5

In considering the establishment of the NDIS/NIIS, the Productivity Commission was keen to reduce or remove the need for disabled persons to pursue litigation. The current draft NDIS legislation, under Chapter 5, can require a person to pursue litigation to enable the NDIA to recover costs already incurred.

We understand that the intention of this requirement is to reduce the possibility of individuals 'double dipping' and to ensure that compensation payers continue to pay the share of costs for which they are currently liable. However, we would question whether, in the context of public liability generally and medical indemnity in particular, this clause is the best means to ensure that this goal is achieved.

Medical indemnity actions are often complex, with issues of causation and negligence rarely being clear cut. This can result in considerable time and expense being incurred, only for the plaintiff to have the claim dismissed, or settle for a very small sum. In these cases it is possible that the operation of the draft NDIS legislation will result in injured persons pursuing litigation at their own expense for the primary benefit of the Commonwealth, which would seem to be counter to good public policy.

The ICA, in its submission on the draft NDIS bill, has outlined a practical alternative to requiring individuals to pursue litigation. Under this proposal, no personal injury settlement could be made without a contribution, where required, being paid to the NDIS. This is similar to the arrangements that currently apply under the Medicare legislation. This process is well understood by all parties to litigation and has the advantage of administrative simplicity. We would further endorse the Insurance Council's proposal that the payment of these amounts be streamlined, with a central Commonwealth agency assuming responsibility for the collection and payment of these amounts.

A particular concern relates to the treatment of Cerebral Palsy matters. Under the Productivity Commission proposal, the costs of Cerebral Palsy matters was to be fully passed to the NDIS, without the requirement to recoup costs from insurers and other bodies. Under the current NDIS bill it now appears that sufferers from Cerebral Palsy may also be required to seek recovery from third parties.

Potential impact on the cost of claims and insurance premiums

We have considered the requirements of Chapter 5 and the NDIA capacity to require a disabled person to pursue litigation in relation to the potential impact on the cost of claims for medical indemnity insurers and have identified the following:

- The costs of claims handed by insurers may increase
 - o The key reasons for this are - there may be more claims notified (including those where recovery is pursued), more costs may be incurred in resolving issues of allocation between the insurers and the NDIA, there may be more uncertainty about future recovery actions from the NDIA and the total cost of claims may be higher as plaintiffs seek to maximise their settlement for the non-care component, which will still give them access to a lump sum settlement albeit on a fault basis
- Increase in the number of matters litigated
 - o In the current environment litigation is generally only pursued when legal advice indicates that there are reasonable grounds for success, particularly in relation to establishing causation and negligence
 - o If the NDIA requires disabled persons to pursue litigation without consideration of the likelihood of success the number of litigated matters is likely to increase.

- Premiums may increase
 - o The Productivity Commission report assumes the NIIS will be cost neutral to policy holders because:
 - Any levy will be offset by reductions in premiums (as claims costs are transferred to the NIIS and NDIS for cerebral palsy and reinsurance costs are reduced)
 - Whilst no fault matters will be included in the NIIS, the cost of these may be offset by reductions in legal expenses currently incurred by insurers
 - o If the cost of all matters dealt with by the NDIS where there is an allegation of negligence are still to be recouped from insurers, then a key component of the Productivity Commission recommendations will not be achieved. Instead of there being reductions in premiums, which would then be offset by a levy for the NIIS, most likely premiums will not reduce (and in fact may increase).

Timing of recovery payments to the NDIA

In the current environment the settlement of claims on a negotiated basis (the most common basis of settlement) involves the agreement of a single lump sum amount paid immediately after agreement. The final cost of the claims and liability to the insurer is then certain and the matter closed.

The draft NDIS legislation refers to the potential recovery by the NDIA of care costs. The legislation does not indicate at what point the recovery amount will be determined or by what mechanism. We are concerned that it may result in the payment of recovery amounts across many years as care is provided to the disabled person. Recovery on this basis from insurers would create significant uncertainty about the final cost and the timing of payments into the future.

This issue needs to be considered carefully in the legislation and the arrangements clearly articulated.

Disability resulting from medical accident

As a medical indemnity insurer we would endorse the current legislation in as much as it is expected to cover all people with a disability no matter how acquired. Further, we would suggest that given the complexities of causation and negligence, and funding, that all medical accidents should be covered by the NDIS rather than being split between the NDIS and the NIIS, at least in the initial years of operation. This is on the proviso that the issues raised by us in this submission in relation to the NDIS are resolved. This would allow time for the costs of both schemes to emerge and for a more appropriate assessment of the potential allocation of costs to take place.

Thank you for the opportunity for MIGA to make a submission.

We look forward to ongoing dialogue in relation to the NDIS.

Yours sincerely

Mandy Anderson
CEO