



21 April 2022

Ms Renee Easten
Committee Secretary
Legal Affairs and Safety Committee
Queensland Parliament

Via email - lasc@parliament.qld.gov.au

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Dear Ms Easten

MIGA submission – Qld personal injury claims costs

MIGA appreciates the opportunity to contribute to the Committee's inquiry into the Personal Injuries Proceedings and Other Legislation Amendment Bill 2022.

MIGA's position

MIGA recognises the right of injured persons to appropriate compensation and that those representing them deserve fair and reasonable payment for their professional work. It supports work by the Queensland Government to ensure this occurs.

Its two concerns about the bill are

- Extent to which the bill's intent may be undermined by uncertainties around the role of barristers
- Scope of the obligation placed on a respondents' solicitors to report failure by a claimant's solicitor not to provide a law practice certificate.

MIGA proposes

- Barristers' fees be included in the scope of claim-related costs and additional amounts for a claim under cl 16 of the bill, amending s 347 of the *Legal Profession Act 2007* (**the LPA**) (see pp 15-16 of the bill)
- Changes to reporting failures to provide law practice certificate under cl 51 of the bill, inserting new s 71G into the *Personal Injuries Proceedings Act 2002* (**PIPA**) (see pp 56-57 of the bill), namely by
 - o Removing the obligation of a supervising principal of a law practice retained by a respondent or the respondent's insurer to report contraventions of law practice certificate requirements
 - o Replacing this obligation with a discretion to make such a report, consistent with the discretion provided to a respondent's insurer
 - o Including new protections for reports made / giving information in good faith to the Legal Services Commissioner.

MIGA's interest

As a medical defence organisation and professional indemnity insurer, MIGA has over 36,000 members and clients across the country practising in both community and hospital settings. It advises and assists doctors, healthcare organisations and privately practising midwives in a range of civil, disciplinary, investigative and administrative processes involving healthcare.

Barristers' fees and uncertain roles

Barristers can play an important and valuable role in the preparation of a claimant's personal injury claim.

It is not entirely clear why a barrister's work in obtaining instructions or preparing statements after a claim is made would be treated differently to that of solicitors or other third parties, particularly if substantive preparations for any trial / hearing are not yet underway.

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The problem with excluding barristers' work on these issues from the caps on costs under s 347 of the LPA (**the 50/50 rule**) is that it could lead to more work appropriately undertaken by solicitors being done by barristers instead. This would mean

- A claimant's "*in pocket*" compensation would depend on how much work a barrister undertook
- For matters involving compensation amounts only somewhat more than matters where PIPA costs recovery thresholds apply¹, scope for settlement prior to trial may be reduced if a barrister's costs are significantly more than may be seen in comparable claims where solicitors have undertaken more work
- There is a disincentive to claimant's solicitors to undertake tasks for which they have appropriate skills. Over time this could create unintentional de-skilling of solicitors in these important tasks.

MIGA proposes that barristers' work be included in the scope of claim-related costs and additional amounts for a claim under the 50/50 rule (s 347 of the LPA).

In addition the nature of "*obtaining instructions or preparing statements in relation to the claim*" under new s 347(8)(a)(i) of the LPA is open to interpretation.

On a narrow reading this work could be limited to that traditionally undertaken by barristers in settlement negotiations, settling pleadings and finalising evidentiary statements.

A broader reading of the work permissible could incorporate much of the substantive work involved in progressing a claim, including

- All conferences with the claimant
- Preparing written advices to a solicitor and the client on prospects, evidence and conduct
- Drafting and finalising
 - o Pleadings and other court documents
 - o Statements and affidavits from the claimant and other 'lay' witnesses
 - o Statements, affidavits and reports from expert witnesses
- All other preparatory work associated with the above tasks.

Within that scope of work lies the bulk of substantive work on a claim.

If certain exclusion on a barrister's work from the 50/50 rule are to remain (which MIGA does not support), there should be clearer limits placed around the scope of this work, limiting it to work which would not normally be undertaken by a solicitor sufficiently skilled in personal injury law.

MIGA acknowledges that its position on claim costs could be critiqued on grounds that as an insurer it has an inherent interest in limiting amounts of compensation it is legally obligated to pay under insurance contracts.

As a provider of medical indemnity insurance which doctors are legally required to have in the interests of ensuring appropriate compensation is available to injured claimants², it is a stakeholder in ensuring fair and sustainable compensation mechanisms.

It is not in the interests of claimants, respondents or their insurers for matters to be difficult to settle prior to trial on costs grounds, or for the affordability and sustainability of insurance cover to be adversely affected by more matters proceeding to trial and larger costs claims.

Reporting obligations

Although MIGA is supportive of discretionary scope for an insurer to report a failure to provide a law practice certificate under new s 71G(4) of PIPA, it opposes this being a mandatory obligation for supervising principals acting for respondents or their insurers under s 71G(2) of PIPA.

¹ The PIPA costs recovery thresholds apply to compensation less than \$80,000 for injuries occurring from 1 July 2021 onwards, and are between \$50,000 and \$79,790 for injuries occurring after 2 December 2002, depending on exact date of injury – see r 12, *Personal Injuries Proceedings Regulations 2014*

² See s 129 of the *Health Practitioner Regulation National Law* as it applies in Queensland

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It recognises the importance of ensuring compliance with legal obligations, particularly ones directed at ensuring protection of claimants in personal injury claims.

MIGA does not see imposing what is effectively a supervisory obligation of a claimant's solicitors on a respondent's solicitors as an appropriate way of ensuring this protection.

In the context of a contested claim, imposing an obligation on a solicitor to report their opponent's apparent failure to do something required of them to the Legal Services Commissioner may create a problematic element for future conduct of the claim in question. One solicitor making a report about another is unlikely to assist in either resolving the claim or its orderly progression to trial.

Such an obligation also requires principals and associates to make value judgments and / or decisions where they may not or cannot be aware of all relevant circumstances, including whether

- Section 8E of PIPA – a law practice certificate is false or misleading in material way
- Section 8F of PIPA – a certificate has been supplied by a claimant's former solicitors to their new solicitors
- Section 9C of PIPA – a certificate has been by new solicitors within 1 month of being retained.

In those circumstance, inclusion of a 'signalling' note in new 71G(2) of PIPA, namely that failure to report may constitute unsatisfactory professional conduct or professional misconduct under the LPA, is particularly inappropriate.

MIGA also holds significant concerns about

- Equating knowledge of the principal's associate (including employed or contracted solicitors) to be that of the principal under s 71G(3) of PIPA
- Lack of a reasonable excuse provision for not making a mandatory report – for example because the principal was on leave, or there was an IT failure.

MIGA believes the appropriate approach is to instead provide a supervising principal and a law practice associate with scope to make a report to the Legal Services Commissioner, consistent with that proposed for insurers under s 71G(4) of PIPA.

There should also be protections for making reports / providing information to the Legal Services Commissioner under s 71G of PIPA in good faith from

- Liability under a civil, criminal or administrative process – this could be similar to that available for making notifications relating to registered health practitioners under s 237 of the *Health Practitioner Regulation National Law* as it applies in Queensland
- Detrimental action or victimisation by other parties.


Next steps

If you have any questions or would like to discuss, please contact Timothy Bowen, [REDACTED]
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Yours sincerely



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