

28 May 2020

Senator Katy Gallagher
Chair
Select Committee on COVID-19
Parliament of Australia

Via online submission

Postal Address
GPO Box 2048, Adelaide
South Australia 5001

Dear Senator

MIGA submission – Senate COVID-19 inquiry

As a medical defence organisation and medical / professional indemnity insurer, MIGA appreciates the opportunity to contribute to the Select Committee's inquiry into the Australian Government's response to the COVID-19 pandemic.

MIGA's submission focuses on healthcare issues, particularly what can be learnt from these unprecedented circumstances to ensure the healthcare profession is both well-placed and well-supported to continue in delivering world-class care to the Australian community.

Summary – MIGA's response

The response of Australia's healthcare workers to the COVID-19 pandemic is a testament to their commitment, expertise and professionalism. Where Australia is at now owes much to these dedicated professionals.

Key decisions have been made by Australian governments which have gone a long way to supporting the healthcare response to the pandemic. Government departments and professional groups have worked hard to support frontline workers respond to the challenges of the pandemic.

From its experience so far of the pandemic, MIGA seeks

- Continuation of new Medicare telehealth items beyond the pandemic, for use where clinically appropriate
- Appropriate recognition by governments and regulators of the unique challenges which frontline healthcare workers have faced, and will continue to face, during the pandemic in the context of any compliance, disciplinary or other regulatory actions
- Greater scope for involvement of medical defence organisations and professional indemnity insurers by governments at the early stages of initiatives involving medico-legal, other health regulatory and / or insurance issues.

MIGA's COVID-19 role

MIGA has had a significant role in supporting and assisting its over 36,000 members and clients across Australia respond to the COVID-19 pandemic.

Its membership and client base consists of medical practitioners, healthcare organisations, medical students and eligible privately practising midwives providing healthcare in a wide range of situations across the country.

MIGA has represented the medical profession for more than 120 years and the broader healthcare profession for over 17 years. It advises, assists, educates and advocates for its members and clients in a wide range of medico-legal, health regulatory and insurance matters.

During the COVID-19 pandemic, MIGA has advised and assisted its members and clients on numerous medico-legal, health regulatory and insurance issues, both through its frequently updated Q&A (www.miga.com.au/coronavirus) and via direct communication. Frequently encountered issues include

telehealth, elective surgery restrictions, permissible healthcare treatments, scope of practice, electronic medication prescription, personal protective equipment, privacy / confidentiality, certification and patients posing risks to others.

MIGA has also worked with a range of governments, regulators, professional bodies and other medical defence organisations (**MDOs**) / professional indemnity insurers (**PIIs**) on COVID-19 issues for the health professions, from each of medico-legal, health regulatory and insurance perspectives.

Telehealth

The COVID-19 pandemic has shown the suitability and workability of a whole of population Medicare telehealth model for Australia.

This model should continue after the pandemic ends, for use in circumstances which professional opinion judge to be clinically appropriate.

Further work will be needed to ensure this supports appropriate models of care. This is particularly to ensure

- Healthcare can be provided at the same standard as through a face-to-face consultation
- Continuity of care for patients, including prompt ability to see a patient's doctor or their colleague when an issue requiring face-to-face assessment is identified during a telehealth consultation.

As indicated in MIGA's recent submission to the Commonwealth Department of Health's consultation on the National Medical Workforce Strategy, telehealth can be a very important component of continuity of care, and to ensure access to peers and other specialists.

Appropriate support and resourcing for the healthcare profession is needed to avoid unforeseen detriments telehealth could pose for professional health and well-being, particularly through increased demands and expectations.

An example of important issues to work through for telehealth are privacy, confidentiality and security.

MIGA is concerned that privacy and security expectations on the healthcare profession around use of telehealth platforms and communication may become unduly burdensome and unrealistic. This may discourage telehealth use.

During the pandemic, MIGA has seen a variety of government and professional advice on telehealth privacy.

There is a developing disconnect between the realities of healthcare and perceptions of necessary IT security.

Privacy law requires reasonable steps be taken to keep health information secure. Appropriate protection of sensitive information, like a patient's health records, is imperative. MIGA is unconvinced that the right framework has been found for healthcare.

Significant and unduly onerous obligations may be placed on the healthcare profession, particularly frontline workers like doctors, to ensure telehealth use complies with a wide range of regulatory requirements. There is a need to shift at least some of this burden towards governments, regulators and product manufacturers.

Another important issue is Medicare telehealth item clarity.

As indicated in its recent submissions to the Department of Health consultation on Medicare data-matching and the Auditor-General's audit into managing health provider compliance, Medicare is a complex system that can be difficult to understand and use correctly. Item requirements are detail heavy and legalistic. They are often open to a range of interpretations. Trying to match them with clinical and professional practice can be difficult.

During the pandemic, uncertainties have arisen over provider and patient eligibility, and appropriate claiming.

As part of continuation of Medicare telehealth item numbers, there should be a review after the pandemic into their operation, with a view to considering any necessary clarifications and improvements. This should draw on input from key professional stakeholders, including MIGA.

Digital image medication prescribing

MIGA welcomed the work undertaken by Australian Governments to move towards electronic medication prescribing, particularly to support telehealth. This started with digital image prescribing from late March,¹ to be followed by electronic prescribing models from late May onwards.²

Unfortunately, there have been implementation issues around digital image prescribing.

Although the model was announced and guidance issued for its use, various states and territories were yet to make the necessary arrangements under their own medication prescribing legislation to legalise this new framework.

This posed difficulties and uncertainties for doctors in this interim period. The framework had been announced and its usage was being encouraged. However there were potential medico-legal issues, particularly risks to doctors of state or territory regulatory action against them for using the new framework.

MIGA acknowledges the challenges involved in implementing such a framework across the country, given it involved laws at both Commonwealth and state / territory levels. It would have been helpful to provide some form of interim arrangement that did not put the healthcare profession at risk of regulatory action, announcements of when it would be legal in various states and territories, or at least communication that it should not be used until further notice.

It is imperative that no adverse regulatory or disciplinary action is taken against any doctor who prescribed medication using digital image prescribing in good faith, relying on announcement of the new framework, without realising it was not yet legal where they practice. Although this is ultimately an issue for individual states and territories, MIGA believes a consistent national approach is needed on this issue. The Queensland and South Australian approaches of retrospectively authorising such prescriptions are welcome.

Remembering COVID-19 in compliance, disciplinary and regulatory activity

Frontline healthcare workers have faced a myriad of challenges and pressures during the COVID-19 pandemic.

MIGA is conscious that complaints have been and will continue to be made about healthcare during the pandemic.

It is imperative that the regulatory response to these complaints (or 'notifications' under the national healthcare regulatory scheme) to the Australian Health Practitioner Regulation Agency (**Ahpra**) and the national professional boards reflect the realities for frontline healthcare workers of dealing with the pandemic.

For example, a doctor attempting to provide the best care they could in difficult circumstances, under significant personal and / or professional pressure, should not be judged by unfair standards of being able to provide a best practice response in ideal circumstances.

MIGA has welcomed the recognition by Ahpra and the National Boards of the challenges posed by the pandemic to the healthcare profession, and its response through the notifications process.³ In particular, it welcomed the Medical Board's indication that *"If there is a complaint about you during this time, the Medical Board of Australia will take into account the extraordinary circumstances in which you are working and the heavy demands being made of you"*.⁴ It has also appreciated the engagement efforts made by these bodies during the pandemic, including around these issues.

In addition, MIGA understands that the Department of Health will consider compliance with Medicare telehealth item numbers and elective surgery restrictions.

It is important that such processes acknowledge sufficiently the speed of reform, the inevitable uncertainties they posed and the good faith efforts of doctors and other healthcare professionals in trying to ensure their patients continued to receive the care they needed during the pandemic.

¹ Involving a digital image of an original prescription being sent to a pharmacy for a patient via email, fax or text message

² Initially involving a token based model (using QR codes), followed by an Active Script List Model

³ www.ahpra.gov.au/News/COVID-19/COVID-19-queries.aspx#Notifications

⁴ COVID-19 update from the Medical Board of Australia: 31 March 2020

The Department's suspension of its behavioural economics or 'nudge letters' (about which MIGA already held reservations) during the pandemic was welcome. This recognised the imperative of focusing on provision of appropriate care in difficult circumstances.

As MIGA indicated in its submissions to the Department of Health consultation on Medicare data-matching and the Auditor-General's audit into managing health provider compliance, an 'education first' approach is needed for professionals trying to use a rapidly evolving Medicare system in good faith and in the best interests of their patients, but who may have misunderstood complex claiming requirements.

Doctors and other health professionals should not be subject to inappropriately targeted remedial compliance processes focusing on recovery of significant amounts of money for supposed 'incorrect' claiming where such issues can be attributed to misunderstandings, not deliberate or reckless behaviour.

Greater scope for early MDO / PII involvement

MIGA believes the response of the healthcare system to the COVID-19 pandemic illustrates the need for and value of early MDO / PII input into healthcare initiatives and reforms that raise medico-legal, other health regulatory and / or insurance issues.

For example, MIGA welcomed the early engagement it had with the Department of Health (Commonwealth) and the Medical Board of Australia around the issue of doctors returning to practice from retirement to support COVID-19 initiatives and the agreement to ensure such doctors continued to be covered by the Run Off Cover Scheme (ROCS). This ensured appropriate attention to associated medico-legal and insurance issues.

Although MIGA has appreciated its later stage engagement with the Commonwealth Department of Health on the private hospital COVID-19 partnership agreement, it believes earlier engagement would likely have assisted with some of the complex medico-legal and insurance issues the partnership raised for doctors and private hospitals, still being worked through in a number of states and territories. The matter of who should be responsible for liability for treatment of public patients in the private sector is complex and would have benefited from clarity in the Partnership Agreement between the Commonwealth and the states / territories. A consistent national approach would have been extremely valuable for something that is still not resolved in a number of states and territories and which may emerge as an uninsurable risk in the future.

MIGA believes other initiatives would have benefited from early MDO involvement, such as Medicare telehealth expansion, Ahpra telehealth standards, digital image prescribing and potential use of students in clinical roles. MIGA has had a significant increase in the volume of calls for help and advice from its policyholders, largely driven by a need for clarity about what state / territory and Commonwealth decisions have meant in their day-to-day practice.

As indicated in its recent submission to the Department of Health's consultation on the National Medical Workforce Strategy, systems and processes around telehealth should be developed in consultation with a range of professional stakeholders, including MDOs.

MIGA would welcome the opportunity to work with officials from the Department of Health and other relevant Commonwealth departments to identify a framework for when early MDO / PII involvement in initiatives and reviews is necessary and appropriate.

If you have any questions, please contact Timothy Bowen

Yours faithfully

Timothy Bowen
Senior Solicitor – Advocacy, Claims & Education

Mandy Anderson
CEO & Managing Director