

22 November 2020

Senator Wendy Askew
Chair, Senate Community Affairs Legislation Committee
Senator for Tasmania
Parliament of Australia

Via online submission

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Dear Senator

MIGA submission – Health Insurance Amendment (Compliance Administration) Bill 2020

MIGA appreciates the opportunity to provide a submission on the Health Insurance Amendment (Compliance Administration) Bill 2020 (Cth).

MIGA's position

MIGA endorses both the need to maintain Medicare system integrity and ensuring the system remains fit for purpose amidst technological change. It supports an approach which

- Ensures Medicare is clear, practical and well-understood by the doctors and other health providers
- Provides appropriate powers to respond to those who do not act in good faith
- Does not penalise or punish those who are trying to do the right thing.

It is concerned about proposed scope for Medicare benefits recovery from health providers

- Where a patient makes a Medicare claim using information given to them by a health provider, particularly where the patient may have misunderstood or misinterpreted what they were told
- Applying to Medicare claims made prior to commencement of the proposed changes.

MIGA proposes limiting recovery relating to these issues to

- Where it can be shown a health provider intentionally gave false or misleading information to a patient
- Medicare claims made after the commencement of the changes.

More broadly there is a need for greater recognition of and work around the causes of incorrect Medicare claiming. MIGA considers much of this is driven by the complexities of the Medicare system and challenges for the health professions in both understanding and using it.

MIGA's interest

MIGA is a medical defence organisation and medical / professional indemnity insurer with over 36,000 members and clients. It has represented the medical profession for over 120 years and the broader healthcare profession for 17 years.

Through advice, assistance, education and advocacy, it has considerable expertise and experience in the Medicare system.

MIGA advises its members and clients on Medicare use, assists them in compliance matters, educates them on the Medicare system and engages with government, regulators and the profession around Medicare reform initiatives and ongoing / emerging issues.

Most recently it has contributed to consultations on the Shared Debt Recovery Scheme and Medicare data matching, the Auditor-General's audit of health provider compliance and the Department of Health advice to the professions.

Medicare is a complex system

Medicare is a complex system that can be difficult to understand and use correctly.

In MIGA's experience doctors and other health providers acting in good faith and with the best of intentions can struggle to both understand and keep up with complex Medicare claiming requirements.

Medicare Benefits Schedule (MBS) 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.

The complexity of the Medicare system is illustrated by

- Over 5,700 MBS item numbers, containing both item descriptors and notes
- Its current framework including a principal Act (the *Health Insurance Act 1973* (Cth), to which numerous amendments have been made over the years), multiple regulations and over 40 determinations
- The Medicare Benefits Schedule Book running to over 1,300 pages
- The recent MBS review having over 70 clinical committees and working groups.

Whether an item number can be claimed is not based solely on the item number descriptor itself, but also through ensuring each claim meets the requirements of legislation, determinations and explanatory notes.

The MBS review has been important, but its focus was on ensuring individual item numbers reflect current clinical practice. Its biggest impact is most likely to be around ensuring individual MBS item numbers are up to date and in attempting to provide greater clarity around certain item numbers.

There is now a need to consider more broadly how to make Medicare claiming both clearer to understand and easier to use for health providers. This requires

- A clearer, simpler Medicare claiming system
- Better understanding amongst health providers of what the system requires
- Greater emphasis in Medicare health provider compliance on trying to stop problems before they occur.

This improved approach would provide clarity for health providers on the Medicare system, through a clear, practical and fair claiming system, earlier and enhanced education, and better targeted compliance activities.

Importantly such an approach reduces risks of incorrect claiming by those trying to do the right thing.

The resource heavy and costly approach of remedial compliance could then focus on clearly inappropriate billing behaviours, i.e. by the very small number of health providers who have made little or no effort to understand what a clearer, simpler Medicare system would require of them.

Recovery on the basis of patient representations

MIGA acknowledges that the Medicare system must adapt to technological developments, and that there must be appropriate mechanisms for recovery of benefits incorrectly paid.

It also agrees that there should be clarity around the type of information which can be considered in determining whether a Medicare claim was made incorrectly or inappropriately.

What concerns MIGA is proposed scope to recover Medicare claims from a health provider based on a patient's interpretation of what they were told by that provider.

The Explanatory Memorandum (p2) provides

The amendment specifies that information can be given through a representation. This covers a situation where a patient made the Medicare claim, but it can be shown that the health provider gave false or misleading information to the patient through some kind of representation to the patient that a Medicare benefit was payable. If that representation is shown to have resulted in an incorrect claim and payment was made, then the incorrect amount can be recovered from the health provider.

In a complex Medicare system, with patients already dealing with the implications of their own health issues, there are significant risks of patients misunderstanding what they were told by their health provider, and then making an incorrect Medicare claim.

Such broader scope for recovery could unfairly expose health providers to Medicare compliance and recovery actions where they have acted in good faith, tried to provide appropriate information to their patient but, for whatever reason, the patient has made an incorrect claim.

Whilst it might be said that recovery would only occur where it is clear false or misleading information was given by the provider to their patient, it could be very difficult to work out (potentially some years later)

- The precise content of the information the health provider gave to their patient
- What the patient understood this information to mean
- How it impacted the information the patient provided in making their Medicare claim.

Absent any clear intention to encourage an incorrect or inappropriate claim, recovery from a health provider should not occur based on second hand patient representations.

Recovery should be limited to where it can be show a health provider intentionally gave false or misleading information to a patient.

Retrospective application

MIGA objects to retrospective recovery for Medicare claims under the proposed changes.

This could permit recovery arising out of a range of compliance processes already underway or completed prior to commencement of the changes, unless already heard by a court.

It creates the possibility of re-opening past Medicare compliance and Professional Services Review matters. This should not occur.

Retrospective operation is also at odds with recent Medicare reforms applied prospectively, such as the Shared Debt Recovery Scheme.

The proposed changes should apply only to claims made after their commencement.

If you have any questions or would like to discuss, please contact Timothy Bowen,

Yours faithfully

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