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Data Legislation
Department of Health

Via email – HC.consultation@health.gov.au

MIGA submission – Medicare data matching proposals

As a medical defence organisation and medical / professional indemnity insurer, MIGA appreciates the opportunity to contribute to the Department of Health's consultation on Medicare data matching proposals, set out in the exposure draft Health Legislation Amendment (Data-matching) Bill 2019 and regulations.

Executive summary

MIGA endorses the need to maintain the integrity of the Medicare system. It supports an approach which

- 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.

This approach requires clarity for doctors and other healthcare providers on the Medicare system, thorough education and targeted compliance activities, underpinned by professional consultation.

MIGA has significant concerns about the Department's Medicare data matching proposals, both in terms of their scope and the case for them.

It supports Medicare data matching in cases involving suspected fraud or clearly inappropriate practice, targeting those not acting in good faith.

What is proposed goes well beyond these circumstances. There is no clear methodology for targeted compliance only. The scope of the proposals is concerning given

- Ability they provide for large-scale compliance programs to pick up minor Medicare / Pharmaceutical Benefits Scheme (**PBS**) claiming issues arising out of unintentional errors – these are often driven by Medicare claiming complexity, inadequate billing education and inability to get clarity around what is an appropriate claim and what is not
- Potential for greater information exchange between Medicare and professional regulatory authorities on a broader range of compliance issues, not just involving issues of fraud or clearly inappropriate claiming
- Potential degree of influence granted to private health insurers around healthcare billing issues.

There is lack a clear, compelling case for such broad powers and processes. They effectively imply many doctors and other healthcare providers claim Medicare benefits incorrectly, but without meaningful evidence.

Compliance initiatives should not be the only new method to try and resolve issues relating to inappropriate or incorrect Medicare billing. There should be concerted efforts to try and reduce the chances of inappropriate Medicare billing occurring in the first place. This requires further initiatives to reduce system complexity, improve education, and considerably more research and analysis of issues underpinning Medicare claiming behaviour.

MIGA's interest

MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting, educating and advocating for medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia.

With over 34,000 members, MIGA has represented the medical profession for almost 120 years and the broader healthcare profession for 17 years.

MIGA regularly advises and assists its members and clients in matters involving healthcare claims, complaints and investigations. It provides education to the professions on a range of medico-legal and risk management issues. It advocates for the professions with governments, regulators and other stakeholders on a range of medico-legal and other health regulatory issues.

Relevant to this consultation MIGA

- Regularly assists its members and clients in relation to the Medicare system, including claiming requirements, compliance audits and reviews, the Practitioner Review Program (**PRP**), and Professional Services Review (**PSR**) processes
- Is in the midst of running a nation-wide education program for its members, clients and the broader profession on Medicare, with participants from the Medicare Benefits Scheme (**MBS**) Review and PSR[1]
- Has been closely involved in recent engagements on Medicare issues, including the Department's consultation on the new Shared Debt Recovery Scheme earlier this year.

Medicare is a complex system

Medicare is a complex system that can be difficult to understand and navigate despite the best of efforts.

In MIGA's experience well-intentioned professionals and organisations can struggle to both understand and keep up with Medicare claiming requirements. It sees heightened risks of this occurring when doctors and other healthcare providers are transitioning to different contexts, such as from public hospital to private practice, or from overseas to Australian practice.

With the best of intentions doctors and other healthcare providers often rely on more senior or experienced colleagues' informal understandings of Medicare claiming, which of themselves may not be particularly well-grounded. This is at least in part due to limited education and guidance available to practitioners.

As Medicare changes and evolves doctors and other healthcare providers can be expected to use the complex Medicare system in new and broader ways with little, if any, meaningful education before and whilst doing so.

More needs to be done to reduce the complexity of the Medicare system and improve understanding of it.

The MBS review has focused on important issues around the overall Medicare system and specialty-specific issues. There is now a need to consider how to make Medicare claiming easier to understand and use so as to reduce the risk of unintentionally incorrect or inappropriate claims.

Understanding and education is imperative

Education of doctors and other healthcare providers is a key component of ensuring correct Medicare claims.

The Department does provide a range of education material, but this of itself is insufficient where for the most part these are general online resources. They can give some level of overall understanding of the Medicare system and claiming processes, but are insufficient for busy practitioners navigating a complex system.

The health professional guidelines, whilst helpful, are limited in range and focus on administrative aspects of compliance. The do not cover the clinical justifications for claiming that are often relevant in Medicare compliance activities. Similarly MBS online is focused on administrative compliance, not broader issues of appropriate clinical claims.

Importantly, these materials are not generally well-known amongst the professions.

MIGA and other professional bodies do provide their own education to the professions but this can never be sufficient of itself.

Once a doctor or other healthcare provider is part of an audit, PRP or PSR process, there is some level of education which does occur. Its utility is limited as it occurs after issues thought to warrant action have arisen. It is often rather informal, such as generalised face-to-face discussions about broad claiming practices, or

[1] More information on this initiative is available at www.migabulletin.com.au/dev/stories/medicare-does-your-dawg-bite/

limited to explaining compliance. It does not usually deal with the complexities of these issues, involving both clinical and administrative perspectives.

Given the legislative limits of what Medicare can do, MIGA acknowledges the need for the professions to work co-operatively with the Department to develop the right strategies and activities in educational and research as part of Medicare enforcement and compliance.

What is needed is education targeted at groups who may be more likely to struggle with understanding and keeping up with Medicare requirements. This should be developed by the Department in conjunction with key professional stakeholders, including MIGA, who can provide input and publicise their existence to the broader professions.

Medicare online and inquiry services should be expanded so they can answer enquiries around appropriate clinical claiming practices.

MIGA sees a considerable opportunity to feedback information from compliance and enforcement activities to provide targeted education. The recent PSR initiative to provide detailed summaries of cases is a good start, but much more is needed. There is a need to consolidate such material into specialty-specific educational materials. These too should be delivered in a variety of formats and platforms, developed by the Department with input from key professional stakeholders, including MIGA.

No meaningful case for broad compliance programs

There is no clear and convincing case that anything more than data matching in cases involving suspected fraud or clearly inappropriate practice is required. Recent very significant increases in Medicare recoveries relating to incorrect and inappropriate billing suggest existing powers are sufficient for 'lower level' issues.

Recent changes to Medicare compliance programs, including behavioural economics initiatives and the Shared Debt Recovery Scheme, need to be given time to work and be assessed before considering further initiatives.

MIGA is troubled by the comment in the Department's Consultation Guide (p 1) that

> *If only one half of a percent of Medicare payments are fraudulently, incorrectly or inappropriately billed, around $180 million of health benefits would be lost that could have otherwise contributed to essential health services for Australians.*

It endorses the need to ensure appropriate use of healthcare funding but rejects any implications that fraudulent, inappropriate or incorrect Medicare claiming is likely to be around $180 million per annum.

The latest available figures suggest that fraudulent, inappropriate and incorrect claiming is likely to be much less, noting

- There are over 702,000 registered health practitioners in Australia, including over 115,000 medical practitioners who make the bulk of Medicare claims[2]
- The Department writes to several thousand doctors each year in relation to their billing or prescribing patterns, and the Department interviews several hundred practitioners each year about these issues[3] - in MIGA's experience, many of these processes do not lead to identification of incorrect claiming
- For the Department's compliance program
  - Just over $22 million was recovered in 2017/18, compared with $13 million in 2016/17 and under $10 million in 2015/16
  - An estimated saving of over $148 million was achieved through changes in practitioner claiming patterns from prior years
- In 2017/18 the PSR had
  - 109 referrals by Medicare for suspected inappropriate practice (81 in 2016/17)
  - 1 referral to Medicare for suspected fraud (4 in 2016/17)
  - Recovered just under $21 million for inappropriate practice (doubling the 2016/17 recovery of over $10 million, and an exponential increase on 2015/16 recovery of over $4.5 million)
  - Reported 20 fraud cases were successfully prosecuted.

[2] AHPRA 2017/18 annual report, pp ii, 18 - available at www.ahpra.gov.au/annualreport/2018/registration.html
[3] PSR 2017/18 annual report, p 12 – available at www.psr.gov.au/publications-and-resources/annual-reports

MIGA also disputes incorrect Medicare claiming can be equated with depriving Australians of essential health services. Incorrect claiming, as distinct from inappropriate or fraudulent claiming, does not of itself represent a non-essential or otherwise inappropriate healthcare service.

In MIGA's experience incorrect claiming is more commonly associated with not meeting detailed and complex Medicare billing requirements, not a lack of appropriate healthcare. The limited number of cases referred by the PSR to the Medical Board of Australia / AHPRA supports this. In 2017/18, the PSR only made only 14 such referrals.[4]

Although the Department suggests it is limited in its ability to analyse Medicare data to identify non-compliance, it is clear that it has become very effective in the last two years in doing so. This appears likely to continue. Accordingly, the case for a broad scheme of data matching has not been made.

The trouble with compliance focused programs

MIGA is concerned about the scope of the Medicare data matching proposals.

Appropriately they catch circumstances of clearly inappropriate claiming. These include a number of the circumstances outlined in the Consultation Paper, such as Medicare claiming in breach of professional registration conditions, by doctors when overseas, for patients overseas, double billing relating to military veterans and when certain requirements relating to registered therapeutic goods are breached.

MIGA notes the Department's indication that

> *The proposed data-matching and sharing arrangements do not expand the powers of the Department to conduct compliance activities. Nor do they change the approach taken by the Department in conducting its compliance activities* (Consultation Paper, p3).

Similarly the Department also indicates that any changes to the current Medicare compliance process are "*out of scope*" (Consultation Paper, p4).

On MIGA's assessment of the Medicare data matching proposals they appear to allow for the Department to take a very different approach in its compliance activities.

Proposed Section 132B of the *National Health Act 1953* (Cth) allows Medicare data matching using any information lawfully provided to Medicare, except for that collected for the purposes of the *My Health Records Act 2012* (Cth).

The proposals would permit large scale 'compliance' focused programs looking to financial recovery from large numbers of doctors and other health practitioners who act in good faith, reasonably believe they are meeting Medicare requirements and provide appropriate clinical care, but have not followed each and every aspect of complex Medicare item requirements, making small, unintentional errors.

Concern is caused by the reference in the Privacy Impact Assessment, which refers to "*compliance checking purposes*" of the Medicare data matching proposals as including

- Identifying whether Medicare claims have been made which exceed payable benefits
- Monitoring services, benefits, programs or facilities that are provided for under Medicare.[5]

Although MIGA welcomes the reference to compliance checking purposes as including educating healthcare providers about requirements relating to Medicare programs, it remains concerned about the ability to undertake wide-scale Medicare compliance programs.

MIGA opposes such programs. They would be unfair, unduly punitive and undermine the intent and function of the Medicare system. They go well beyond the 'nudge' / behavioural economics approaches recently developed by Medicare, around which there are already concerns (such as in relation to opioid prescribing letters). It is concerned about the extent to which such an approach would reflect reduction in clinical perspectives and input, and an increased focus on financial issues.

Such programs could lead to an enormous increase in the number of doctors and other healthcare providers subject to Medicare scrutiny for small, unintentional errors involving small amounts of money. This could in

[4] PSR 2017/18 annual report, p 6 – available at www.psr.gov.au/publications-and-resources/annual-reports
[5] King & Wood Mallesons / Galexia Privacy Impact Assessment for the Data Matching Proposal (September 2019), p 6

turn cause further professional distrust in the Medicare system by its users. The time, effort and stress caused to individuals by such inappropriate approaches should not be forgotten when considering what is justified.

If Medicare data matching proposals are to be implemented beyond circumstances of suspected fraud or clearly inappropriate practice, such as broader programs focused on incorrect claiming and sharing information with professional regulators, there should be engagement with key professional stakeholders, including MIGA, in determining the scope and roll-out of such initiatives.

Disclosure by private health insurers

There is a potential for conflicting interests and unintended consequences involving private health insurer disclosures to Medicare.

Whilst the Medicare data matching proposals do not include data matching for private health insurance compliance purposes, the intent of a private health insurer providing information to Medicare for data matching may be to ensure appropriate private health insurance claiming. This could be achieved through referral of situations where the insurer has concerns about a practitioners' claiming to Medicare.

Section 130 of the *Health Insurance Act* already permits disclosure of information in certain circumstances to private health insurers where considered "*desirable*". Without clear and transparent limits on how this provision might be used in data matching circumstances, MIGA is left with considerable uncertainty and disquiet about the use of information provided by private health insurers for Medicare data matching.

Information sharing with AHPRA

A range of referrals can already be made by Medicare and the PSR to AHPRA and professional regulatory authorities.[6]

Beyond allowing disclosures relating to breach of practice conditions, it is open to question why more is required. It needs clear, defined criteria, requiring consultation with MIGA and other key professional stakeholders.

A targeted approach

MIGA recommends a targeted approach, involving

- Limiting Medicare data matching to suspected cases / circumstances of fraud or clear inappropriate practice – this could be based around a threshold of reasonable suspicion
- Consultation with key stakeholders before new data matching initiatives occur, including on proposed basis and scope - a public register to report on all data matching activities is insufficient
- A commitment to an 'education first' approach in compliance
- Awaiting the outcome of review of new initiatives involving behavioural economics and the Shared Debt Recovery Scheme before considering significant new data matching programs focused on broad compliance programs around incorrect or inappropriate practice
- Further consultation with MIGA and other key stakeholders prior to developing further compliance programs which may focus on doctors and other health practitioners who are trying to do the right thing.

If you have any questions or would like to discuss, please contact Timothy Bowen, 02 8905 3400 / timothy.bowen@miga.com.au.

Yours sincerely

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[6] Sections 106KC and 130, Health Insurance Act 1973 (Cth), r 93, *Health Insurance Regulation 2018* (Cth)