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

Via online submission

Dear Senator

MIGA submission – Medicare compliance bill inquiry

MIGA appreciates the opportunity to contribute to the Committee's inquiry into the provisions of the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021.

It follows MIGA's earlier engagement with the Department of Health on high level proposals for Medicare compliance legislative reforms.

Summary – MIGA's position

MIGA continues to support

- Proposals for the PSR Director to be able to enter into agreements with corporate entities – this fills a 'gap' between Medicare's Shared Debt Recovery Scheme and a PSR committee process
- Power for the PSR Director (or their delegate) to counsel an entity under review, requirements for those entities to provide information to others about appropriate claiming and constituting the Determining Authority with appropriate peer expertise
- Appropriate changes to debt recovery powers to ensure recovery of debts owed by corporate entities.

It holds concerns about limits to reasonable excuse provisions, greater powers to recover debts from an individual's estate and sees an imperative in ensuring new debt recovery powers are not used in unfair ways.

It welcomes the removal of potential imprisonment penalties for corporate officers from initial proposals, given issues MIGA raised about significant uncertainties around responsibility for corporate decision-making.

In terms of proposals it has first seen in the bill, MIGA is concerned about the clarification of basis of referrals to the PSR and sees a need to protect the interests of individual healthcare providers caught up in PSR processes involving corporate entities.

More broadly there are needs for a greater educative focus to ensure Medicare compliance, particularly healthcare providers acting in good faith, and enhancement to PSR processes to ensure fairness to them.

MIGA's interest

MIGA is a medical defence organisation and healthcare professional indemnity insurer with over 36,000 members and clients nationwide. It has represented the medical profession for over 122 years and the broader healthcare profession for over 19 years.

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 the ongoing review of s 92 of the Commonwealth *Health Insurance Act*, the Committee's 2020 inquiry into previous Medicare compliance chances, 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.

Challenges with the Medicare system for healthcare providers

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

- Ensures Medicare is clear, practical and well-understood by the doctors and other healthcare 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.

Medicare is a complex system that can be difficult for healthcare providers, both individuals and corporates, to understand and use correctly.

In MIGA's experience healthcare 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.

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.

MIGA acknowledges the Department of Health does provide a helpful range of information about Medicare claiming. It has valued participating in the development of Department guidance at various times (and would like to be more involved given its expertise and experience). However it does not see the Medicare compliance process as being focused sufficiently on education. Current shortcomings include

- Available information tends to be at a higher level and comprehensiveness varies across professions and sub-specialties
- The AskMBS inquiry service, whilst useful, cannot be relied on to support subsequent claiming decisions
- Direct communications by the Department with healthcare providers, raising potential Medicare compliance issues, are generally the first time a provider has been made aware of any concerns
- Such communications being effectively part of a compliance process where a provider has been contacted because they are on the Department's 'radar' for potential compliance issues.

To ensure appropriate Medicare claiming there is a need to consider how to make it clearer to understand and easier to use for healthcare providers. This requires

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

This improved approach would provide clarity for healthcare 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 healthcare providers who have made little or no effort to understand what a clearer, simpler Medicare system would require of them.

Implications of the PSR process

The PSR process is complex and can have very significant impacts on healthcare providers. It can

- Take significant time and resources, each of professional, financial and personal, to resolve
- Require payments of significant amounts - p13 of the PSR's 2020-21 annual report indicates repayments range from $10,000 to $1.5m, with more than half being above $200,000, and an average repayment of around $235,000

- Lead to significant restrictions on scope to practice – these can be comparable to restrictions on practice imposed by the Medical Board of Australia, given widespread patient expectations of Medicare system use by doctors and other healthcare providers.

Given the potential implications of the PSR process it is imperative that PSR

- Referrals are made at the right threshold
- Processes are sufficiently clear
- Matters are always handled fairly, irrespective of any changes to / differences between PSR Directors, committees and the Determining Authority.

Further clarification / additions to the bill are required to try and ensure this will always occur.

Inadequate basis for referral to PSR

MIGA is concerned that proposed amendments to s 86 of the *Health Insurance Act 1973* (Cth) (**the HIA**) create the grounds for too low a threshold for referral of matters to the PSR Director.

A higher threshold of "*reasonable belief*" that a person may have engaged in inappropriate practice should be required for PSR referral.

A threshold of mere possibility of inappropriate practice for referral opens up scope for a broad range of referrals based on speculation, without sufficient investigation or evidence. This is unfair to healthcare providers and could impose significant, unsustainable burdens on the PSR process.

Whilst p 5 of the explanatory memorandum indicates that requests for PSR Director review are based on "*Medicare claiming information, open source material and any information volunteered by practitioners*" there is no prescription of the process required or methodology of considering inappropriate practice.

Under s 82 of the HIA "*inappropriate practice*" involves evaluative judgments based on peer practice. A mere possibility threshold leaves open the scope for referral based on little more than perceptions of aberrant data not subject to any meaningful analysis.

By contrast a "*reasonable belief*" threshold incorporates a need for proper investigation and careful consideration of a person's Medicare claiming before making a PSR referral. It would not usurp the role of the PSR Director or committee, or impose an unreasonable burden on the Chief Executive Medicare. Instead it would merely impose a test of reasonableness.

Individuals affected by corporate PSR matters

MIGA supports the PSR being able to assess Medicare services rendered or initiated by an "*associated person*" (e.g. an individual healthcare provider) in the context of a corporate entity PSR process.

However there is a need for further clarification to ensure the interests of those associated persons, particularly individual providers, are protected properly and not prejudiced by what occurs in the corporate PSR matter.

Although p 6 of the explanatory memorandum provides that a corporate acknowledgement of inappropriate practice will not prejudice the position of individual providers, this should be clarified in the bill.

MIGA proposes inclusion in s 92 of the HIA a "*for the avoidance of doubt*" provision clarifying that any acknowledgement of inappropriate practice by a person / entity under review is to be disregarded in the context of any Medicare compliance or PSR process involving associated persons.

Reasonable excuse provisions

Lack of broader reasonable excuse provisions for breach of strict liability requirements cause significant concern to MIGA.

The Commonwealth Criminal Code does not provide sufficient defences for the broad range of circumstances which occur, particularly around issues of notice, practicality and proportionality.

Existing excuses only cover self-incrimination, emergency and a limited range of very serious medical conditions.

For example it is uncertain if provider would have a reasonable excuse for failing to comply with a PSR process requirement if they

- Experience difficulty complying with requirements for documents to be provided because of IT problems
- Lose a loved one just before a PSR committee hearing, but are not considered to be suffering from a consequential diagnosable medical condition.

Reasonable excuse provisions are commonly used in healthcare regulatory situations.

Inclusion of reasonable excuse provisions are also necessary so the PSR decision-maker (whether Director or committee) focuses on whether non-compliance is justified before taking the issue further.

Recovering debts from an healthcare provider's estate and fair use of debt recovery powers

Greater powers in relation to recovery from an individual healthcare provider's estate continue to cause concern to MIGA.

There is no apparent limitation around when this would be fair and appropriate.

For instance pursuing recovery against an estate may be entirely inappropriate in circumstances of recent passing and / or very limited estate funds.

MIGA would like to see the development of guidelines around when pursuing an estate would be considered inappropriate, or should at least be delayed.

More broadly whilst there may be issues the Department of Health has encountered around avoidance of debt by certain individuals or entities, it is important that there are sufficient checks and balances so that new recovery powers cannot be used in an unfair way, e.g. depriving a healthcare provider of reasonable means of living, or a corporate the ability to conduct their business. Further guidance should be developed by the Department.

Reforming PSR Director agreements

In the context of the ongoing review of s 92 of the Commonwealth *Health Insurance Act*, which involves the PSR Director's power to enter into agreements with persons under review (extended to include entities under the bill) MIGA has recommended

- Clearly defined legislative criteria for offering / ratifying agreements between the PSR Director and a person under review, and the terms of such agreements
- Removing the requirement for the person under review to acknowledge inappropriate practice
- Introducing requirements to
    - Provide the expert opinions / advice obtained by the PSR Director to a person under review
    - Offer a meeting with the PSR Director and including a peer of the person under review in that meeting
- Reducing disparities in timeframes between opportunities for response and broader PSR processes
- Clearer explanations of the Director's decisions around offering agreements and their terms
- Ensuring a person under review can respond properly to any subsequent National Board / Ahpra process, irrespective of whether they follow a s 92 agreement or a PSR committee process.

Although a number of things that MIGA seeks are already informally available at the Director's discretion in individual circumstances, their importance in ensuring procedural fairness and transparency, together with the inevitable risks of varying approaches by differing decision-makers over time, mean they should be required under legislation.

The current requirement in s 92 of the *Health Insurance Act* for an acknowledgement of "*inappropriate practice*" as a pre-condition to an agreement with the PSR Director operates as a disincentive to persons under review considering an agreement. It may also contribute to perceptions of "*coercion*" and "*unfairness*" that can exist in the healthcare profession around the PSR process.

At present it is the strong likelihood that a PSR committee outcome would be no better, or worse, than an agreement with the Director that operates as the primary incentive to seeking such an agreement.

This incentive is inadequate. There should be greater legislative emphasis placed on the role and value of agreements in resolving matters more quickly and ensuring responsible use of public funds.

There is no evidence that acknowledgement of "*inappropriate practice*" is a necessary pre-requisite to ensuring likelihood of appropriate future Medicare claiming.

The definition of "*inappropriate practice*" goes beyond Medicare claiming patterns, to cover broader concepts of what is unacceptable to peers or the broader profession (s 82, HIA). It can be far more difficult for a person under review, particularly the individual healthcare provider, to accept this concept than to make a repayment that is implicit recognition that their Medicare claiming has not met expectations.

There is also a disconnect between the proposed amendment to s 93 of the HIA that a basis for referral to a PSR committee by the Director is that a person under review "*may have*" engaged in inappropriate practice, and an expectation under s 92 that an agreement with the PSR Director involved the person under review acknowledging they "*engaged*" in inappropriate practice.

Page 9 of the explanatory memorandum indicates "*it has never been part of the PSR scheme that the Director makes any findings in relation to inappropriate practice before referring a matter to a PSR Committee. It is properly a matter for a PSR Committee to investigate and make any findings of inappropriate practice*". It is odd to then require a healthcare provider to make such a definitive, evaluative judgment at the same stage.

Use of clearly defined legislative criteria for considering an agreement, including insight and changes to practice, would provide reassurance that such agreements are used in appropriate circumstances and that similar issues are unlikely to arise again for that healthcare provider.

Representation before a PSR committee

Changes to PSR powers raises the issue of legal representation before a PSR committee.

It is inappropriate that an individual healthcare provider or corporate is not entitled to representation before a PSR committee. Instead they are merely able to be accompanied to the committee hearing by a lawyer, with very limited scope for a lawyer to address the committee.

Issues of the Medicare legislative scheme and MBS items are inevitably complex. The potential implications, including loss of Medicare rights and significant paybacks to the Commonwealth, are serious and significant.

Foreshadowed acquisition in the Federal Government's 2021-22 budget by the PSR of jurisdiction over a range of private health insurance hospital certification disputes, which will raise new and complex issues, provide a further justification for permitting legal representation before a PSR committee.

The issue is even more acute for an individual healthcare provider where it is their decisions which are under review. A corporate's executive officer may have a greater degree of distance from decisions being examined (as they could be anyone involved in the corporate's management). It could even mean a corporate's inhouse lawyer represents that entity, an opportunity which an individual cannot have.

It is odd that individual healthcare providers are advised against treating themselves, and the legal profession has reservations about lawyers representing themselves, but an individual provider is expected to be able to represent themself before a PSR committee, including to call and question witnesses when it is their own conduct which is under question.

Inevitably it is challenging for an individual in those circumstances to bring the necessary detachment and objectivity they need to respond to the issues before a PSR committee, particularly where committee hearings normally last a number of days.

Legal representation is permitted in comparable forums involving healthcare decision-making, including civil damages claims, disciplinary tribunals, Medical Board hearings and coronial inquests.

By comparison to PSR committee hearings, disciplinary tribunal and Medical Board hearing matters where legal representation is permitted tend to be shorter.

There can be an important narrowing of issues and efficiencies achieved by legal representation for the individual healthcare provider or corporate, of benefit to each of the provider / corporate, PSR committee and the public (through minimising unnecessary use of public funds).

Next steps

MIGA would welcome engaging further with the Committee around the issues raised in this submission.

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

Yours sincerely

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