

**MIIAA Submission
to the
Senate Community Affairs Committee
inquiry into
Compliance Audits on Medicare Benefits**

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Terms of Reference

“Any government proposal to implement the Government’s announced 2008-09 Budget measures to increase compliance audits on Medicare benefits by increasing the audit powers to Medicare Australia to access the patient records supporting Medicare billing and to apply sanctions on providers.”

This submission is based on the following documents:

1. Exposure Draft of the Health Insurance Amendment (Compliance) Bill 2009;
2. Exposure Draft of the Health Insurance Amendment (Compliance) Bill 2009 Explanatory Material.

The MIIAA notes the Privacy Impact Assessment (PIA) referred to at paragraph 1.63 of the Explanatory Material has not yet been released for stakeholder consideration. Given the concerns about the privacy impact of the Bill expressed below and elsewhere by the AMA and others, the MIIAA requests an opportunity to make a further submission to the Committee upon release of that document.

Key Terms used in this submission

The Glossary to the Exposure Draft of the Explanatory Material is adopted herein with the following additions:

The Bill	Exposure Draft of the Health Insurance Amendment (Compliance) Bill 2009
The Explanatory Material	Exposure Draft of the Explanatory Material to the Health Insurance Amendment (Compliance) Bill 2009
MIIAA	Medical Indemnity Industry Association of Australia

The MIIAA

The Medical Indemnity Industry Association of Australia (MIIAA) is the peak consultative group for the medical indemnity insurance sector in Australia. The MIIAA’s members have 70% of the market for professional indemnity insurance of medical practitioners in Australia. Further information about the MIIAA can be found at www.miaa.com.au.

Background and the MIIAA’s position

The MIIAA submits the amendments proposed in the Bill are unnecessary, introduce further unwarranted complexity to a system already burdened by increasing over-complexity and would, if enacted, lack fairness.

As a matter of practical reality almost all medical practitioners must operate within the Medicare system. That system is highly regulated and, in recent years particularly, has become increasingly complex at an alarming rate¹. With 280 million transactions per year there is an inevitable degree of administrative error – both positive and negative. Despite this, there is no evidence of widespread misuse of the Medicare system by practitioners.

The expanding administrative demands on practitioners and medical practices caused by that complexity have left the individual practitioners increasingly vulnerable to personal liability for any administrative errors in claims made under the practitioner’s Medicare provider number

There is no specific or general educational or preventative component to the measures proposed by the Bill. In broad terms, the Bill proposes a further system comprised of powerful coercive

¹ Medicare Australia’s information notice titled “The Increased MBS Compliance Audit Initiative” (undated) states, inter alia: “In the last five years alone, Medicare Expenditure has increased by 43% and there has been considerable growth in both the number of items (23%) and the number of providers (15%).”

administrative intervention and punishment to operate concurrently with the present accountability mechanisms:

- Health Advisory Branch Program Review Division;
- Practitioner Review Program;
- Director of Professional Services Review;
- Professional Services Review Committees;
- Medicare Participation Review Committees; and
- The investigation of suspected criminal behaviour.

The present mechanisms can and do result in the repayment of incorrectly claimed benefits, findings of inappropriate practice, the reprimand of practitioners and partial or full disqualification of practitioners from the Medicare system for periods of up to 5 years.

The MIIAA acknowledges the need for accountability mechanisms and controls within the Medicare system. The MIIAA does not oppose, as a part of those necessary accountability mechanisms, a program of appropriately-directed and soundly-based compliance auditing and education.

Further complexity of the sort proposed in the Bill will serve only to create additional uncertainty and to further diminish the capacity of practitioners to devote their time and energy to the treatment of patients. The present mechanisms are already a powerful disincentive to intentional or opportunistic overbilling of Medicare benefits.

The budget measures announced in May 2008 have already been put into effect by the increase in compliance auditing since 1 January 2009.

Specific submissions

Privacy

The MIIAA is concerned that the examination of patient's private medical information in the manner proposed will impact adversely on patient safety and care.

The effect of the application of the proposed new s.129AAD (*Notice to Produce Documents*) will be to erode the confidence of patients that private health information disclosed to their practitioner in the course of a professional consultation for the purpose of receiving medical advice and treatment will remain confidential.

The Practitioner Review Program and Professional Services Review already operate to provide a comprehensive system to investigate anomalous Medicare billing - including by the examination of patients' medical records. However, such examination of patients' private medical information in these processes is appropriately confined to the professional peers of the person under review.

These are important safeguards to ensure patients' private medical information is interpreted by people qualified and experienced to do so and that patient's private medical information is handled in a manner and for a purpose consistent with the expectations of the patient when the information was disclosed to the practitioner.

The Bill provides for a dramatic increase in the disclosure of private health information that will not go unnoticed by patients or the general public.

Irrespective of the practices employed by Medicare Australia to safeguard information, the inevitable result will be that a proportion of patients will choose not to disclose relevant information which they would otherwise have disclosed or will provide incorrect information to their practitioners in apprehension, rightly or wrongly, of how the Commonwealth may use that information.

The health of individual patients, their families and sexual partners and the general community can be adversely affected by the provision of inadequate or incorrect information to their practitioners.

The 'special training' of Medicare's administrative staff is insufficient

The MIIAA submits it is not appropriate or safe that private health information should be interpreted by clerks who, though presumably trained to handle the documents obtained and created which contain the private information, are not qualified to interpret the information.

Assuming the person to whom Medicare Australia's Notice to Produce was directed has complied with that notice, the question to be determined by Medicare Australia is whether "*the information contained in the document, extract or copy does not properly substantiate (wholly or partly) the amount paid*" (s.129AC(1C)(c)).

The Explanatory Material (paragraph 1.25-6) states that the compliance audit will involve an assessment by administrative staff as to whether "*the service the practitioner provided met the requirements of the Medicare item...*".

It is asserted (paragraph 1.26) that "*...is a question of fact which does not require any clinical assessment of the service*". To the contrary the MIIAA believes that, in many cases, a non medically-qualified administrator would be called upon to make a determination which clearly requires medical expertise and experience.

It is both disrespectful of the patient's privacy and unfair to the practitioner whose conduct is under consideration for such judgments to be made by persons who lack the qualifications and experience necessary to properly interpret the information they receive.

The MIIAA submits that the interpretation of medical records or other records of clinical care should be performed by persons with professional qualifications and experience in the relevant discipline.

Lack of specificity and a notice to 'show cause'

The amendments proposed by the Bill (for example, s.129AC(1C)(c)) would require that findings be made by Medicare Australia as to a number of very significant matters, each with a potential to result in a punitive outcome for the practitioner.

The MIIAA submits that where findings/decisions of such consequence are proposed to be made there ought to be a fair degree of certainty and specificity grounding such a decision or finding.

The proposed section 129AAD requires that a person on whom a Notice to Produce is served must produce any document or extract of any document "*that is relevant to ascertaining whether the amount paid in respect of a professional service should have been paid*".

Medicare Australia is not required to specify what documents or even what class of documents the recipient is required to produce. However, if Medicare Australia determines that the recipient of the notice has failed to comply, it can impose either a civil or an administrative penalty.

Where the recipient of the notice rendered the service (or the service was rendered by a person on their behalf) it is proposed in section 129AAE that a decision by Medicare Australia that the recipient of the notice '*does not comply with the requirement*' in the notice will result in the full amount of the benefit paid for the service being deemed to be a debt owed to the Commonwealth by the practitioner. The practitioner has the burden of proof to satisfy

Medicare Australia that the alleged non-compliance is due to circumstances beyond the practitioner's control. Importantly, Medicare Australia is not required to prove that the notice has been served upon the practitioner, and provision is not made in the defence contained in section 129AAE(2) for non-compliance resulting from a practitioner's failure to receive the notice.

In no case is it proposed that Medicare Australia be required to give reasons for its findings.

The MIIAA submits that in all cases where Medicare Australia proposes to decide/find that there has been non-compliance with a notice to produce or where it is proposed to make a decision/finding that the material produced does not properly substantiate the amount paid, an opportunity must be

afforded the person who would be adversely affected by such a decision to 'show cause' why such a decision/finding should not be made. A debt should only become recoverable under section 129AC(1) after the practitioner has been afforded the opportunity to show cause.

Such a notice to show cause should include a statement of the reasons for the proposed decision/finding and provide a reasonable time and sufficient information for the person affected to correct any alleged non-compliance or to provide further material to address any alleged deficiency in the substantiating material previously produced.

Merits review

The MIIAA submits that any decision that a notice to produce has not been complied with or that material produced (by whomever it may be produced) 'does not properly substantiate (wholly or partly) the amount paid' must be amenable to external merits review.

The MIIAA submits such review should be by way of a hearing de novo and available as a matter of right on application by the recipient of the notice to produce or the person by or on whose behalf the service was rendered, as the case may be.

The Administrative Appeals Tribunal is the appropriate body to conduct such a review.

A stay of the operation of Medicare Australia's decision should operate as of course until Medicare Australia's decision has been confirmed, carried or set-aside by the Tribunal.

Summary of submissions

The MIIAA submits that a careful balance must be preserved between safeguarding the resources of the Commonwealth and choking an already complex system with further burdensome administrative regulation.

The MIIAA does not support the proposed amendments to the HIA contained within the Bill.

The MIIAA submits the amendments to the HIA proposed by the Bill should not be supported for the following reasons:

1. The MIIAA submits the production of patients' private health information to Medicare Australia will result in a detriment to the ability of practitioners to properly care for their patients because of a greater incidence of patients providing inadequate or incorrect information to their health providers due to privacy concerns;
2. The MIIAA submits the question of whether documents produced under a notice 'substantiate the amount paid' is not a question of fact that can be reliably answered by non-professionally trained and experienced clerks. Examination of many of the most commonly rendered MBS items will necessarily involve questions of a clinical nature which can only fairly be answered by an appropriately trained professional experienced in the area of inquiry;
3. The proposed provisions relating to the service of notices to produce documents substantiating particular services lack any requirement that the documents or classes of documents sought are to be specified in the notice. The MIIAA submits that the exercise of coercive powers in such a vague and unspecified manner is unfair to the recipient of the notice and would likely be viewed as such by a court;
4. The MIIAA submits that in all cases where Medicare Australia proposes to decide that there has been non-compliance with a notice to produce or where it is proposed to decide that the material produced does not properly substantiate the amount paid, an opportunity must be afforded the person who would be adversely affected by such a decision to 'show cause' why such a decision should not be made. Such a notice to show cause should include a statement of the reasons for the proposed decision and provide a reasonable time and sufficient information for the person affected to correct any alleged non-compliance or to provide further material to address any alleged deficiency in the substantiating material previously produced.
5. The MIIAA submits that any decision that a notice to produce has not been complied with or that material produced (by whomever it may be produced) 'does not properly substantiate (wholly or partly) the amount paid' must be amenable to external merits review by the Administrative Appeals Tribunal.

Should you have any queries in relation to this submission contact should be made with:

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