Bulletin

It's renewal time again

It's hard to believe that another year has gone by and it's time for renewal again for many of our members and clients.

If your policy is due on 30 June 2021, you would have received your renewal package by now.

You will have noticed that you can now access your renewal documentation via our new Client Portal, which provides a greater level of security for your personal information. Your renewal includes instructions outlining the steps you will need to follow to set up your access to the Client Portal.

The process of setting up your Client Portal account is straightforward, but if you encounter any difficulties, please call our Client Service Team who will step you through the process.

Supporting our members and clients

As a member-owned mutual, we are dedicated to serving the needs of the healthcare profession. We operate on the basis of a very different set of guiding principles than a commercial insurer. Our philosophy as a mutual revolves around personal care, support, quality service and expert advice. We are not profit driven and this enables us to use excess capital for the benefit of our members and clients, rather than being focused on returns to shareholders.

The services we offer, in addition to your insurance cover, aim to support you in your day to day practice. Our hope is that through the assistance we provide, you feel not only protected, but that in MIGA you have a team of people ready and willing to help and support you when you encounter the inevitable 'bumps' in the road. A career in healthcare is indeed a long road but a fulfilling career and we are here for the long haul and happily walk by your side.

We have a heritage, experience and track record of supporting doctors for more than 120 years and the broader healthcare profession for more than 16 years. We remain committed to supporting you and being there for you when you need us most.

Thank you.

Mandy Anderson
CEO and Managing Director

June 2021

Welcome to the June edition of the Bulletin. In this issue our Legal Service team discuss a recent NSW Civil and Administrative Tribunal decision relating to improper access to patient clinical records, where the person accessing records was not directly involved in the patient's care.

We also share a case study prepared by Panetta McGrath Lawyers discussing accusations of inappropriate pre-surgery advice and follow-up care, and how this case was defended.

Insurance renewals are due on 30 June 2021 and we encourage you to contact the Client Services team if you have any questions or experience any difficulties accessing your documents via our new Client Portal. My colleagues and I are here to help you so please give us a call.

I hope you enjoy this issue.

Jodie Vincent
Client Services Officer

MIGA Bulletin to go electronic

MIGA has been publishing the Bulletin every second month for the last 21 years. In 2017 we started transitioning to an electronic format and since then we have been producing decreasing numbers of hardcopies as recipients have opted for electronic delivery. The cost of producing a small number of hard copies is no longer viable.

From the December 2021 issue we will only be issuing the MIGA Bulletin electronically. Besides reducing the production cost there are a number of benefits to providing our Bulletin information in digital form.
It enables us to:

- Include links to further information and other websites, adding depth to articles
- Have some flexibility around article length if a topic requires greater explanation
- Update article information in real time if there are changes between the time we finalise content and the time the Bulletin is distributed. We want to provide you with accurate and timely information and this has been a problem during the pandemic when information has changed rapidly.

As the vast majority of members and clients already receive the Bulletin as an electronic edition, there really is little change. However, for those who have been receiving Bulletins in hard copy, we hope the transition to an electronic issue is an easy one, noting that many medical and industry publications have made similar transitions.

Adam Hughes
Marketing Manager

2021 Member Loyalty Benefit

Exciting news!

If you are eligible (based on years of continuous insurance with MIGA), your renewal includes details of a 2021 Member Loyalty Benefit[1], a reward we are pleased to provide eligible clients as thanks for their ongoing trust and support of MIGA.

Check your renewal information for details!

1 Eligibility criteria apply, based on years of continuous insurance with MIGA.

Changes to accessing Risk Management Activities

There has been a lot going on in the world of "Risk Management" at MIGA and we are thrilled to again be planning activities for the 2021/2022 year that will mean we can meet face to face as well as the wide range of initiatives available on-line. We know that over the last year many of you have missed our face-to-face activities (postponed due to COVID-19) and the opportunity they provide to meet and network with colleagues.

As you are aware, we have been implementing a new insurance system which means that things will be a little different.

When it comes to accessing education activities these things stay the same:

- You will still find the log in button at the top of our webpage
- The location of REO is unchanged (if you have it as a favourite)
- You can contact us anytime if you need help.

However, these things have changed slightly:

- When you log in now, your username has changed
- Log in instructions have been updated in REO to help you log in
- You can no longer access the 'old' client area to check the Risk Management Points you have earned
- If you need to check your Points or look at past completed activities please log into REO where you can now find all of that information.

A quick update on what's new in 2021/2022

This year we are planning to offer quite a bit of our risk education via face-to-face Conferences and Workshops again in addition to what is available on-line. Here is a summary of what's new:

Conferences – They're back!

A new plenary session topic, 'Recent cases – a forensic examination' is being developed for Conferences in Adelaide, Melbourne, Sydney and Brisbane. A range of topics will be available for you to choose from for the second session.

Online and Face-to-Face Workshops

In addition to online workshops we will be offering special events, comprising 2 face-to-face workshops on a Saturday morning, in Adelaide and Perth.

New Webinars

These were so popular last year that we are developing 2 new topics for 2021/2022:

- Chronic Pain Management
- Doctors' Health

More information will be available as we finalise our plans, so keep an eye on your inbox for all the details and links to book.

New online Modules

Look out for our 2 new self-directed online learning modules!

Medicare

You may recall that a year or so back our Conference plenary session looked at Medicare's scrutiny of doctors' billing practices. There was so much information which raised a lot of questions, so we have brought this together as the basis of a new module.

Healthcare Errors

How do you contribute to less than optimal outcomes? Can you recognise when the system that you are working in doesn't have your best interests at heart? Do you know how you might go about making some changes in that system? Self-reflection on what we see, hear and do can be uncomfortable, but it can also make space for finding ways to make or enable change.

If you haven't participated in risk education in the past, the 2021/22 year is the perfect time to start!

If we can help you in anyway with accessing REO or if you need to chat about Risk Education and your options, don't hesitate to call or email us reo@miga.com.au

Liz Fitzgerald
National Manager - Risk Services

Case Study

Unauthorised access to clinical records

Carmelina Parisi
Solicitor – Legal Services

Practitioners need to think twice before accessing clinical records. A recent decision of the NSW Civil and Administrative Tribunal – Occupational Division highlights the potential consequences of unauthorised access to clinical records. An enrolled nurse was deregistered after accessing the clinical records of several patients in circumstances where she was not involved in their care. Although this case involved an enrolled nurse working in a hospital context there is no doubt the principles apply across professions.

Facts

The case in question, *HCCC v Livermore [2021] NSWCATOD 48,* involved an enrolled nurse (Livermore) working in the Orange Base Hospital Patient Transport Unit. Livermore accessed the electronic health records of 13 persons on 154 occasions over a period of approximately 2.5 years in circumstances where she knew that:

- she did not have authority to do so;
- she did not have the patient's prior consent and knowledge;
- she did not have a proper therapeutic or clinical reason to do so; and
- she had not been involved in the health care of the patients.

Livermore also accessed her own medical records without seeking authorisation from her employer.

When questioned in evidence, Livermore said that her intention in accessing the medical records was just to check on these people and their welfare. The Tribunal found that hers *"was an entrenched pattern of behaviour motivated by personal curiosity"*. Of the 13 people whose records she accessed, one was a friend, one was the wife of a work colleague, two were work colleagues, two had no connection to Livermore and the remainder were family members.

Livermore admitted all of the allegations made against her and accepted that her conduct amounted to *unsatisfactory professional conduct.* She was sorry for her conduct, undertook to never again access patient records unless she is authorised to do so and took steps to address her behaviour by undertaking relevant education. Livermore did not admit that her conduct amounted to *professional misconduct.* She left this to the Tribunal to determine.

Decision of the Tribunal

The Tribunal held that Livermore's conduct did indeed amount to professional misconduct and stated that any order short of deregistration would be an inadequate response to the seriousness of her misconduct. Her registration was cancelled by the Tribunal and an order was made that she should not be permitted to apply for re-registration for a period of 6 months.

Code of Conduct

The professional responsibilities of doctors in respect to patient privacy and confidentiality are outlined in Medical Practice: A Code of Conduct for Doctors in Australia:

> Patients have a right to expect that doctors and their staff will hold information about them in confidence, unless release of information is required or permitted by law. Good medical practice involves:
>
> 4.4.1 Treating information about patients as confidential.
>
> 4.4.2 Appropriately sharing information about patients for their healthcare, consistent with privacy laws and professional guidelines about confidentiality.
>
> 4.4.3 Accessing an individual's medical record only when there is a legitimate need.
>
> 4.4.4 Using consent processes, including forms if required, for the release and exchange of health information.
>
> 4.4.5 Being aware that there are complex issues related to genetic information and seeking appropriate advice about its disclosure.
>
> 4.4.6 Ensuring that your use of digital communications (e.g. email and text messages) and social media is consistent with your ethical and legal obligations to protect patient confidentiality and privacy and the Board's social media guidance.

Other healthcare providers including nurses and midwives have professional responsibilities set out in codes of conduct. For midwives these are set out in clause 3.5 of the Code of Conduct for Midwives.

Healthcare providers also have professional and ethical responsibilities. In relation to privacy these obligations are set out in the Privacy Act 1988.

It is important to note that Privacy legislation in Australia permits access and disclosure of health records in certain situations. These include defending complaints as well as quality control activities or clinical audits. However, practitioners need to ensure that when accessing records for these non-clinical purposes, they are also doing so in accordance with any relevant hospital or practice policies. We suggest that you err on the side of caution when faced with these decisions and seek the guidance of your colleagues or the legal services team at MIGA.

Key takeaway

This case is a reminder to practitioners about the importance to be placed on patient privacy and confidentiality. It is never appropriate to access patient records in circumstances where there is no clinical or other justification to do so. As the Livermore case demonstrates, it can lead to very serious consequences, including deregistration.

Case Study

Plastic surgeon accused of providing inappropriate pre-surgery advice and inadequate follow-up care

Enore Panetta & Daniel Spencer
Panetta McGrath Lawyers

In this case, a plastic surgeon accused of providing inappropriate pre-surgery advice and inadequate follow-up care following revision bilateral breast reduction surgery resulting in the necrosis and loss of a patient's right nipple-areola complex has had the case dismissed.

The key issues
The issues in this case include obtaining informed consent, advising of material risks of surgery, and maintaining adequate clinical records.

The background
On 7 July 2016, Dr Timothy Brown, the plastic surgeon, performed revision bilateral breast reduction on Ms Vicki Fischer.

Ms Fischer alleged that Dr Brown failed to recognise and treat the venous congestion that arose in her right nipple after surgery which resulted in the necrosis of her right nipple-areola complex (NAC) and multiple corrective surgeries.

Dr Brown saw Ms Fischer post-operatively on 8, 9, 12 and 19 July 2016. On the last of these occasions, he noted the NAC to be viable and improving. Eight days later, Ms Fischer reported that the NAC had turned black, hard and leathery.

It was found that, at the pre-operative consultation on 16 June 2016, Dr Brown had completed notes while sitting next to the patient on a couch, which he says was done so the patient could better see and understand the concepts he was explaining. The notes support Dr Brown's position that he warned Ms Fischer of the acute risks of smoking (at all) before and after surgery. Dr Brown had also provided a consent form to Ms Fischer which warned her of such risks, which she signed and returned. Ms Fischer's evidence was that Dr Brown had told her that she should reduce her smoking to four to five cigarettes per day. Other evidence showed that Ms Fischer *was* smoking at the time of her surgery. Dr Brown's evidence was accepted in this regard.

The Court found that the consenting process was adequate.

Post-surgical examinations on 7 and 8 July 2016 found nothing that required attention. Evidence about what happened on the latter date relating to the extent of the examination performed was disputed between Ms Fischer and Dr Brown. Dr Brown's evidence was that he conducted the examination with a nurse, touched each breast and visually observed them. He found that the degree of venous congestion was not normal but not so severe that anything other than watching and waiting needed to occur.

Ms Fischer's evidence in this regard was that she was in significant pain, but this evidence was not accepted for several reasons including that a nurse had not recorded anything about her being in significant pain. The Court considered that Dr Brown had considered the issue of venous overflow and that his approach to wait and see was appropriate.

At further post-operative consultations, there was no evidence to support that Ms Fischer was in significant pain or that there was abnormal swelling, supported by the clinical notes of the nurses and Dr Brown.

The Court preferred the evidence of Dr Brown, most significantly based on his contemporaneous notes from the relevant pre and post-operative consultations, the consistent oral evidence he gave in Court and the consistency with the nursing notes.

Expert evidence for Ms Fischer, which postulated that Ms Fischer should have been taken back to theatre as there was a reversible cause for the venous congestion and suggested that the cause resulted from a large haematoma, a small haematoma, a kinked pedicle or tight sutures, was not accepted.

The Court found that there was no reversible cause for the venous congestion found on 8 July 2016 and there was no reason for Dr Brown to take Ms Fischer back to theatre or commence chemical leeching at that time.

The outcome
The Plaintiff's case was dismissed and judgment entered for the Defendant.

The implications
This case reinforces that the maintenance of detailed, contemporaneous clinical notes is critical in supporting a practitioner's clinical decision-making and version of events.

Managing mental health issues in the workplace

The prevalence of mental health issues in the workplace emphasises the importance of employers having in place strategies to manage and monitor the health of their employees. MIGA receives an increasing number of requests from our clients for assistance in managing workplace conflicts and disputes. It is often necessary to consider the potential for mental health issues to either develop or become aggravated in the event of a workplace investigation or disciplinary process which may be exacerbated if poorly managed.

Mental health in the workplace

Mental health issues in the workplace are often associated with common behavioural issues including repeated absences, poor performance, excessive risk taking or risk avoidance and complaints of bullying and harassment. Employers must manage such behavioural issues in a way that does not discriminate against their employees and potentially aggravate any mental health issues.

Often clients contact us after a workplace investigation or performance management process has already commenced and before any potential mental health issues have been considered. Workplace investigations in particular have the potential to cause additional stress which may result in a significant exacerbation of pre-existing mental health issues. It is therefore critical for investigations to be treated sensitively, for confidentiality to be strictly maintained and for adequate support and counselling to be offered to employees throughout the process.

Is performance management acceptable when mental health issues are involved?

The Fair Work Commission, Federal Court and Federal Circuit Court have jurisdiction over workplace disputes and closely scrutinise an employer's investigative and disciplinary processes, particularly in instances of dismissal or resignation from employment when mental health issues are involved.

The presence of mental health issues may even provide an employee with a complete defence in instances of serious misconduct.

Accordingly, it is critical for an employer to engage in a proper performance management process when mental health issues are involved and if disciplinary action becomes necessary.

If a mental health issue is affecting an employee's ability to perform the duties required of them in their role, it may be reasonable for an employer to commence a performance management process as follows:

- Consider the terms and conditions of the relevant employment contract as they may provide guidance regarding the performance management process that has been agreed to by both parties
- Ensure that all relevant incidents are documented in a format that can be provided to the employee as evidence of the concerns raised
- Arrange an initial meeting with the employee and reassure them that confidentiality will be strictly maintained. The employee should also be invited to bring a 'support person' to the meeting (this can be a family member or friend, but preferably not a work colleague)
- Maintain a record of all discussions held at the initial meeting in a format that can be provided to the employee following the meeting
- The employee should be given the opportunity to respond to the concerns raised at the initial meeting, whether that be during or following the meeting. The employee should also be offered support and appropriate counselling following the meeting
- Depending on the terms and conditions of their employment contract and the nature of the employer's concerns, it may be necessary to arrange a follow-up meeting after a reasonable review period to assess whether there has been any improvement in the employee's behaviour and/or performance

Is it necessary to address mental health issues when performance management is not required?

It is important to note that there is no obligation on an employee to disclose a mental health condition to their employer or prospective employer(s). This presents a difficulty for employers as they have an obligation to support their employees and if necessary, allow for reasonable adjustments in the workplace to avoid aggravating any mental health issues. Reasonable adjustments can include flexible working hours, alternate duties and offering additional supervision, support and counselling.

If an employee has disclosed a mental health issue in the absence of any performance management issues, it is still reasonable for an employer to engage in open dialogue with them and to offer them support and the opportunity to obtain a report from their treating psychologist or psychiatrist in an effort to avoid aggravating their condition in the workplace.

MIGA's Legal Services team can provide assistance and guidance to our clients when dealing with workplace investigations, performance management processes and the appropriate management of mental health issues in the workplace.

Anita Filleti
Solicitor - Legal Services

The Medical Board of 2025
What will it look like?

In our April Bulletin we foreshadowed that in the coming months there will be considerable Medical Board / Ahpra advocacy work. What is happening will be a major influence on what the Medical Board of 2025 looks like, particularly how it deals with complaints against doctors.

What we have achieved

MIGA works hard for sensible, practical and fair regulation of the healthcare profession. It has worked closely with the Medical Board / Ahpra, governments and professional bodies across a broad scope of issues and contexts.

It has been pleasing to see some important 'wins' over the past few years. These include successfully resisting what might have been detrimental changes to professional regulation, a framework for dealing with vexatious complaints, treating practitioner mandatory reporting changes, due recognition of the pressures of the COVID-19 pandemic, an evolved Good Medical Practice Code, a recalibrated approach to regulating off-label prescribing and emerging medicine, and a balanced Professional Performance Framework process. We have also welcomed meaningful and more frequent engagement with the Medical Board / Ahpra across a broad range of emerging and recurring issues.

What we're looking at now

How the Medical Board / Ahpra operate is being looked at from 'inside' and 'outside'.

A 'fit for purpose' review of the Health Practitioner Regulation National Law has been underway for the past couple of years. Governments have decided on the changes to be made, and MIGA's work on how this will look in practice continues.

Separately the Federal Senate is inquiring into the Medical Board / Ahpra, following a similar review 4 years ago which MIGA was extensively involved in.

Key issues we have raised include

Role of 'public confidence' in dealing with complaints

- The community needs to be confident in those treating them, but MIGA believes the proposed introduction of the concept of 'public confidence' as a key consideration in managing complaints is vague and uncertain and the wrong way to do this
- Instead we are advocating for 'integrity of the profession' to be a key consideration, referable to widely accepted professional ethics

New mandatory reporting obligations for all 'charges' for breaching scheduled medicine requirements

- This risks unnecessary notification for comparatively minor issues, and could significantly increase matters referred to the Medical Board / Ahpra where doctors are dealing with regimes like electronic prescribing and real-time prescription monitoring
- MIGA believes the better approach is to allow medication regulators to inform the Medical Board / Ahpra of serious risks of harm

Broad scope to notify former employers, hospitals and other healthcare providers of any risk of harm

- This could lead to more, longer and broader complaint investigations across a range of matters and impose uncertain responsibilities on those receiving the notification, ranging from a small GP practice to a large tertiary hospital
- MIGA considers the better approach is to limit notifications of places where a practitioner formerly worked to situations where there is a serious and continuing risk to past patients.

Fast forward to 2025…

With a longer-term lens, MIGA sees the opportunity to deal with two key challenges for the Medical Board / Ahpra, namely:

Year on year increases in complaint numbers, with no indication of decreasing standards of care

- Ahpra annual reports over the last 5 years reveal complaints against doctors have almost doubled, but only 20 to 30% over that time have raised any issues of patient safety or fitness to practice needing Board action
- This means much time is being spent on complaints which don't require the Board's input, leaving the spectre of regulatory action hanging over a doctor unresolved for some time
- MIGA seeks
  - Better community awareness of where to appropriately raise concerns
  - Board / Ahpra having discretion in appropriate matters to ask a patient to attempt to resolve their concern with a healthcare provider directly before their complaint is considered
  - Greater scope for earlier referral of mere 'dissatisfaction' to State / Territory health complaint bodies to focus on explanations and dispute resolution, not regulatory action.

Improving recognition of and response to systemic issues underpinning many complaints

- Management of complaints tends to focus on the individual – this is often the symptom, not the true cause, of complaints
- MIGA seeks better scope for the Board / Ahpra to examine broader systemic issues, covering issues such as training, staffing levels, fatigue, resourcing and bullying / harassment
- This offers the chance of helping to improve workplace conditions and culture in hospitals and other workplaces, and ensure continuing high standards of healthcare.

These are not issues which can be dealt with overnight. A Medical Board in 2025 that can deal with the complaints it needs to, and look at what is really leading to complaints, is what MIGA is working hard to achieve.

Timothy Bowen
Manager – Advocacy & Legal Services

Risk Management for Midwives
How will you manage your risks in 2021?

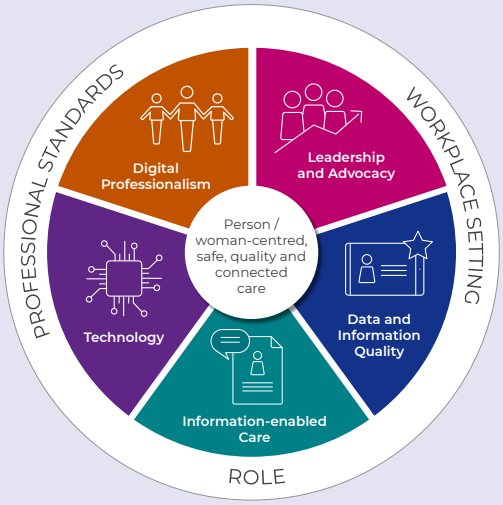
The time has come to start planning how you are going to complete the MIGA Risk Management Program this year. Under the Federal Government Scheme there is a requirement that you participate in Risk Management Education. This year we have two new offerings to help make it easy for you to fulfil that requirement and give you a 10% discount on your premium when you renew in June 2022.

Digital Health for Midwives

The newly launched National Nursing and Midwifery Digital Health Capability Framework has been incorporated into a new online workshop 'Digital Health for Midwives'.

The workshop provides insight into the risks associated with all things digital health including medical records, electronic forms of communication, mobile medical devices and social media.

Furthering your understanding of the benefits and risks of the variety of digital sources of information that impact the care you provide is in the best interests of the women in your care, your practice and yourself.



Midwife Health & Wellbeing

Looking after your own health can be a challenge. A busy midwife will generally have the wellbeing of the women they care for as their first consideration.

The World Medical Association has recently acknowledged that you need to make looking after your own health and wellbeing a priority in order to provide optimal care to your clients.

Completing the three stages of this Practice Support offering, provides you with 10 Risk Management Points and will provide us with valuable information on where we can provide further education and support:

- ✔ Complete the self-assessment
- ✔ Attend an online peer review session
- ✔ Complete an action plan documenting the changes you are going to make to improve your health and wellbeing.

Watch out for further communications from the Risk Management team about the launch of the new Risk Management Program to find options for booking into either one of these, and to explore other activities available.

Hallie Barron
Clinical Risk Coordinator