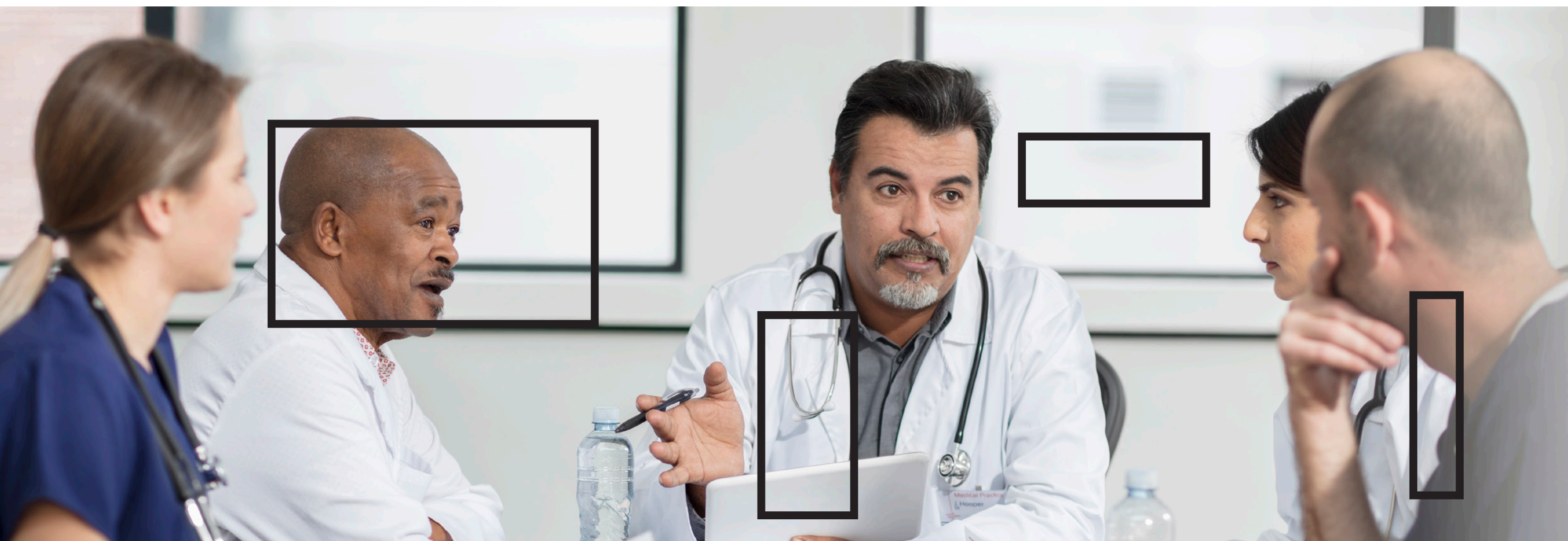
Healthcare Market Update

Australia - September 2020



Insurers can no longer ignore rising losses in the healthcare sector, driven by Medical Malpractice and Professional Indemnity claims. A market correction is underway, signalling an end to favourable policy coverage and competitive rates.

Insurers are maintaining a less flexible approach to underwriting renewals and remain cautious of new business. Outside of aged care, rates are increasing on average 5-15%, deductibles are being closely monitored and coverage restrictions continue to be imposed. For aged care, rate increases typically range from 20% up to 100% or more, depending on the quality of the risk. The long-term claims outlook for COVID-19 remains uncertain.

US market conditions

As the largest market for medical malpractice, the US is where much of the world's capacity is ultimately owned or reinsured. As such it is a bellwether of what we can expect to see in other jurisdictions. Current trends reflect that social inflation is increasing the size of claims for several reasons:

- cultural attitudes are shifting toward more plaintiff-friendly awards
- health systems are growing larger through merger and acquisition making them attractive targets for malpractice lawsuits
- advances in healthcare technology have resulted in a significant increase in the value of life care
- tort caps are being eroded or overturned, and
- increasing media attention.

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As early as 2018, US insurers began reacting to years of poor underwriting and claims performance. Subsequent portfolio remediation resulted in a significant rate uplift, increased deductibles and coverage retractions.

More recently, line sizes have dramatically reduced, making it difficult to fill capacity on larger programs, with QBE the latest global insurer to have largely exited the healthcare business. With a fundamental shift in frequency and severity, the US market has quickly become challenged. The overall outlook is poor with insurers re-evaluating their position and commitment to the market – this is particularly evident in the aged care sector.

London market conditions

London is also under significant pressure. Long tail underwriting losses and lower investment returns have led insurers such as SwissRe, MS Amlin and ChinaRe to exit the healthcare sector over the past 12 - 24 months. More recently, Zurich has closed its doors to new business and other insurers are considering this course of action as global directives bite. The remaining market conditions are firming as insurers become selective about risk quality, particularly with US business flooding into London seeking additional capacity.

Notably, some insurers are mandating COVID-19 related restrictions, with a full spectrum of exclusions and limitations being imposed and "batch"[1] coverage limitations being a developing theme. As insurers' positions differ, non-concurrent policy language and varying interpretations are emerging through larger coverage towers, creating substantive risk of erosion issues.

The London market is expected to continue hardening throughout 2021 with an increasing use of co-insurance and mid-tower self-insurance due to severe capacity restrictions. Whilst the real impact of the pandemic is unclear at this stage as claim notifications are immature, any new exclusions would need to be carefully considered as to the potential impact on both primary and excess layer coverage.

Australian market conditions

The local market is limited to a small number of key insurers licenced to underwrite healthcare exposures and it is clear that their appetite for new business is reducing. Insurers are cautiously monitoring the risks arising from COVID-19 and the scope of claims notified, particularly in relation to inquiries into poor risk management practices or infection breakouts.

1. Batching refers to approaches used by insurers to aggregate claims based on events/occurrences; series of events; related series of acts or omissions; or originating cause or source, which require varying degrees of connectivity between multiple claims in order for them to aggregate.

Where a client's risk profile has deteriorated, insurers are responding differently. For some, the imposition of an absolute COVID-19 exclusion is non-negotiable, while others are seeking additional information around the implementation and monitoring of risk mitigation protocols. These include but are not limited to robust infection control policies, the availability and supply of adequate stocks of personal protective equipment (PPE) and limitations around the movement and sharing of staff.

Long running formal investigations, in particular Royal Commissions, continue to expose vulnerabilities across the healthcare sector, with increasing media scrutiny serving to raise public awareness and expectations around the quality of care provided to our disabled and aged care communities.

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The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is expected to deliver its Interim Report by 30 October 2020. This broad ranging inquiry has focused on community, institutional, workplace and residential settings that provide care and support services to the disabled. Public hearings have already heard systemic and appalling accounts of abuse, fear and humiliation, with allegations this vulnerable group of people has been denied access to basic human rights, needs and poor medical care.

The aged care sector is particularly troubled. The Royal Commission into Aged Care Quality and Safety's Interim Report on the failures of the aged care system has been described as "a shocking tale of neglect". The report summarises a range of harrowing experiences and insights into unkindness towards, neglect and abuse of, those in our aged care communities. The report has, amongst other things, revealed instances of substandard and under resourced care, and a lack of transparency in communication, reporting and accountability. The pandemic has further served to highlight how ill-prepared some sectors of the industry were. Counsel assisting with the royal commission, recently acknowledged the "extraordinarily difficult times" the sector was experiencing, citing statistics that evidenced Australia as having one of the highest rates of aged care deaths as a proportion of all deaths from COVID-19 in the world.

A concerning local development has been the recent filing of class actions against owners of aged care facilities by families of residents who died of COVID-19, alleging a breach of their duty of care and negligence in their handling of the crisis, by failing to:

- deliver proper services and care
- provide an adequate number of trained staff and vaccinated staff
- provide and use adequate PPE within a timely manner
- ensure appropriate sanitation and disinfection controls
- implement appropriate visitor screening/restrictions and isolation protocols
- restrict staff movements to reduce infection spread.

In the case of one filing, allegations go even further, asserting the defendant improperly concealed or misrepresented information to families and government authorities regarding the severity of risks and dangers of contamination within the facility.

Similar experiences are being replicated in other jurisdictions around the world where class actions are an allowable legal remedy.

Insurers are taking note. Remedial actions such as limiting coverage for legal defence costs associated with Inquiries and reducing overall capacity are common. Rate increases in the aged care sector typically start at 20% but can escalate to more than 100%, reflecting an evolving and deteriorating risk landscape. Insurers are becoming even more selective and, in some cases, are exiting the sector. Major insurer Zurich is the latest to withdraw from underwriting aged care risks, with another insurer reportedly poised to follow.

With exposures often falling in the grey area between General Liability and Medical Malpractice/Professional Indemnity policies, there has been a noticeable shift as insurers seek to realign their appetites across both classes of insurance. As a result, a change in General Liability appetite locally or globally can trigger re-evaluation of an insurer's willingness to cover certain malpractice exposures for the same client.

Trends

New claim notifications arising from COVID-19 continue to be reported on a steady basis with a sharp rise in numbers seen as of late July. As noted above, the market's coverage approach to underwriting systemic risks such as the pandemic has been diverse – some insurers have elected to review businesses on a case-by-case basis, while others are imposing mandatory conditions or limitations, including pandemic or COVID-19 exclusions, at renewal. The language of such exclusions should be carefully reviewed to understand any unintended consequences, including potentially carving out coverage for the treatment of patients with COVID-19.

A more recent trend has seen the imposition of onerous Infectious/Communicable Disease exclusions. These are exceptionally broad and preclude coverage for a wide variety of diseases and, as a result, potentially pose a problem in most direct healthcare settings.

Other less common COVID-19 related exclusions that are emerging relate to claims arising directly or indirectly from failing to follow health directives or laws, failure to report COVID-19 outbreaks, inadequate staffing levels, failing to procure and utilise appropriate PPE supplies, and rationing or withholding care.

Whilst COVID-19 has dominated the risk landscape throughout 2020, claims continue to arise from traditional treatment sources. New trends arising from the treatment of mental health and substance abuse, patient privacy and an increased risk of miscommunication and misdiagnosis arising from the use of telehealth are also now evident.

Globally, insurers are also closely scrutinising how their policy language defines the treatment of multiple related claims. These are commonly known as "batching" or "aggregation" clauses, depending on the jurisdiction.

Whether batching or aggregation of claims is possible to avoid multiple policy deductibles applying is fact specific, for example, in a healthcare setting where COVID-19 caused the death of multiple individuals due to a systemic failure of key risk management practices or the same medical error. Close attention is therefore being paid to how broad or narrow the policy language is specific to:

- how relatability is determined within policy language
- whether multiple deductibles must be absorbed
- how and when excess layers attach in the event of limit erosion
- the length of time clients may have to report similar related incidents, and
- which policy years are affected.

Medical Malpractice/healthcare Professional Indemnity remains one of the classes of insurance where we foresee an increase in COVID-19 claim notifications, particularly in the event of subsequent infection waves.

Outside of COVID-19, claims continue to arise from traditional treatment sources, including failure to diagnose/delayed diagnosis or medical errors, costs associated with Coroners' inquests and regulatory investigations. In line with global trends, losses arising from mental health and substance abuse issues are on the rise with more attention needed to ensure appropriate mental health plans are in place for affected individuals.

Failing to adequately protect patient privacy is also squarely in the spotlight. The Office of the Australian Information Commissioner declared the health sector has consistently reported the highest volume of data breaches compared to any other industry sector since the commencement of the Notifiable Data Breaches scheme in 2018.

The rapid adoption of telehealth has also created new concerns around healthcare best practice and security of personal information. While the rush to embrace telehealth has been necessary for patient and staff safety, it is clear that some illnesses can't be effectively diagnosed remotely. Telehealth potentially carries an increased risk of miscommunication and misdiagnosis due to an inability to conduct physical examinations, and the potential for a break in continuity of care for new patients. In addition, the added reliance on technology brings a complex web of risks that extend beyond the scope of Medical Malpractice/ Professional Indemnity insurance that should be considered contemporaneously and in conjunction with organisational, clinical and privacy law requirements. Telehealth does, however, bring many benefits and efficiencies and post COVID-19, there is an expectation that telehealth consultations will continue, forever changing the way primary healthcare is delivered.

Coverage for molestation claims has become increasingly challenging due to a market retraction in this area. It is now common for insurers to either completely exclude any loss associated with allegations of abuse, or to severely sublimit coverage and/or provide defence costs cover only.

It is critical that robust planning processes produce detailed renewal strategies to account for multiple contingencies, with a view towards sourcing alternates to the traditional insurance marketplace where necessary and possible.

Irrespective of the type of loss, where claims are notified, insurers are looking for comfort that clients have adapted from lessons learnt to reduce or avoid any reoccurrence.

These indicators all point towards a shifting marketplace that is constantly assessing its exposure to risk. It is critical that robust planning processes produce detailed renewal strategies to account for multiple contingencies, with a view towards sourcing alternates to the traditional insurance marketplace where necessary and possible.

Given the uncertainties around the potential impact of COVID-19 on these policies, frequent engagement and enhanced communication with all key stakeholders is critical moving forward to ensure informed decision making and continued alignment with an organisation's risk appetite and tolerance.

Contact Us

For more information please speak with your Willis Towers Watson broker, or contact:

Tracy Grant
Healthcare Industry Leader – Australasia
tracy.grant@willistowerswatson.com
D+ 61 2 9285 4052
M+ 61 478 305 955

Willis Australia Limited | ABN 90 000 321 237 | AFSL No. 240600
CKA Risk Solutions Pty Ltd | ABN 33 109 033 123 | AFSL No. 276915

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