Contracts, claiming and the colon

Putting the sometimes perplexing Medicare rebate in the spotlight, **Margaret Faux** explores bulk billing versus patient claims.

Please take this quick quiz…

Q: I have a contractual relationship with my patient as a service provider:

a. When I bulk bill
b. When I don't bulk bill
c. Whether I bulk bill or not
d. Don't be silly – I'm a doctor, not a service provider!

Margaret Faux is Managing Director of Synapse Medical Services.

The answer was touched on by a reader in a welcome reply to my article *Claiming on Consumables*, which appeared in the last issue of this magazine. The reader offered an alternative solution, involving adding fees for consumables such as bandages, which was fully compliant with the law.

The reader suggested that you bill the patient for the service, say item 23, at the Medicare rebatable price, let's say $30, and then add the consumables like bandages, say $10, on top. In that way the patient would not ultimately be out of pocket for the service but they would pay for the consumables.

At the point of service the patient would have to pay the full amount for both consultation and consumable but would get the consultation fee straight back – the patient pays $40, gets $30 back almost immediately from Medicare and the law is obeyed. It's nice and neat and, best of all, the practice gets reimbursed for the consumable items.

The structure of this hypothetical claim is applicable to all medical practitioners in private practice and is underpinned by the legal nature of the relationship between doctors and patients under our national health scheme.

The example was both helpful and legally correct, and therefore useful to us all.

Remembering that there are only two types of claims in the outpatient context – bulk billing or patient claims – what the reader described was a patient claim. Here the scenario is simplified:

Let's say the Medicare rebate for a particular service is $30, irrespective of whether it is 100%, 85% or 75% of the schedule fee, you (the doctor) can either:

1. Bulk-bill it, in which case the patient assigns their right to the $30 to you and Medicare then pays the $30 directly to you.
2. Ask the patient to pay you $30 upfront and then the patient can obtain the $30 rebate from Medicare.

Either way, the service is ultimately cost-neutral to the patient, and you end up with the same amount of $30 in your bank. However, there are important advantages and disadvantages for both you and your patient that are worth considering.

CLAIMING CONTRACTS

The legal nature of the transaction that takes place between a doctor and patient, in relation to the payment of fees, is governed by the law of contract.

The High Court has confirmed this in various decisions, the most recent being *Wong v Commonwealth* (2009). Wong involved a challenge to the constitutional validity of both the Medicare Scheme and the Professional Services Review Scheme constituted under the Health Insurance Act 1973. The court decided, by a 6:1 majority, that both were valid.

The decision again highlighted the contractual relationship between doctor and patient in the provision of professional services. The High Court held that the relationship between doctor and patient was governed by contract and was a private arrangement between the two individuals.

The elements of a contract at their most basic are:

a. Offer
b. Acceptance
c. Consideration

In the context of the provision of medical services, you (the doctor) offer your services, the patient accepts them and the consideration is your fee. But the interesting question here is: Where does the Medicare rebate fit into the consideration element of the transaction, and does that have any impact on the contract itself?

An earlier High Court decision, *Breen v Williams* (1995), extensively examined the precise nature of the contractual relationship between doctors and their patients in the claiming context. In this case the court held that, under the patient-claim options, the contractual relationship between doctor and patient is consistent with general legal principals.

On a practical level, this means the doctor issues an invoice to the patient for the service fee, the doctor obtains the payment from the patient and it is irrelevant to the doctor that either some or all of the payment will be obtained by the patient from Medicare. The doctor will therefore have the usual debt recovery options available for the recovery of any unpaid amounts. This includes a civil action against the patient for the recovery of the full amount of the fee or any unpaid balance.

But if you bulk bill, it's a very different story.

Because the legal right to the Medicare rebate resides with the patient and not the doctor, when a claim is bulk billed what the doctor effectively acquires to satisfy the consideration element of the contract is a right to a benefit that belongs to the patient.

And because the patient's right to that benefit has been held by the High Court to be a gratuity rather than a proprietary right – *Health Insurance Commission v Peverill (1994)* – the usual debt recovery avenues do not apply.

What this means, practically, is that in the unlikely event your bulk-bill claim was unpaid, you cannot sue the Commonwealth for its payment, as there is no contractual relationship between you (the doctor) and the Commonwealth. You have no right or remedy relating to the Medicare rebate – it comes out of consolidated revenue and is a gratuity for the patient, not the doctor.

ADVANTAGES & DISADVANTAGES

So, returning to the reader's response to *Claiming on Consumables*, let's now consider the advantages and disadvantages of bulk billing versus patient claims.

Advantages for the patient when bulk billing are obvious and there are no apparent disadvantages.

For you (the doctor), the advantages are quick payments made directly into your bank account, in most instances, and happy patients.

The disadvantages are that the amount you will be paid for your service is determined by the government and you have no legal right to that benefit – it is a gratuity and you therefore cannot recoup the Medicare rebate if something goes wrong (though in practice this would rarely occur, if at all).

If you chose to go with the patient claim option, the advantages for you (the doctor) are that you are free to set your fee as you see fit; you have full rights under the general law to recover the debt and you can add various other costs that you can't add when bulk billing (such as bandages).

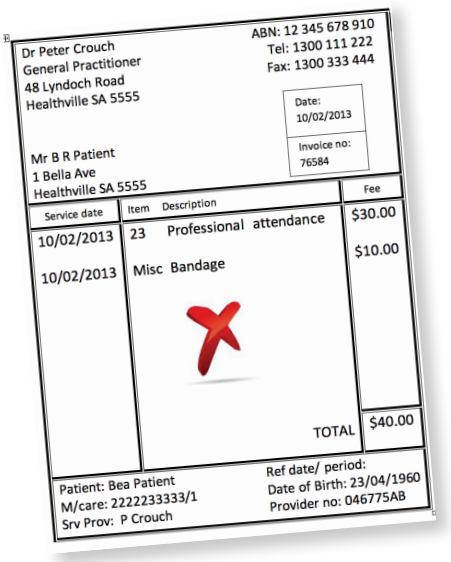
The disadvantages are that, unless you have excellent systems in place to ensure ALL patients pay on the day or even in advance, you will inevitably have more bad debts and will have to deal with the consequent headaches involved in chasing patients to pay their bills. And you may not have as many happy patients!

For the patient, there are no clear advantages to the patient-claim option and the disadvantage is higher fees, but, as our reader explained, you don't have to charge higher fees. You have complete control over the amount you charge your patients when doing patient claims and therefore also the out-of-pocket amount your patients will be required to pay.

As our reader suggested, you can charge the equivalent amount that you know the patient will recover from Medicare. And even though the patient will have to pay the full amount upfront, if you are claiming online using either an Ezyclaim terminal or online claiming software, you can submit the claim to Medicare for your patient right at the point of service, and your patient will have their rebate within minutes or, at worst, overnight.

INVOICE EXAMPLES

Here are some sample invoices to demonstrate correct and incorrect itemisation of this scenario. Remember, this is a hypothetical claim whereby the Medicare rebate payable to the patient will be $30. I have used item 23 to keep it simple but the actual rebate for item 23 is more than $30.


Dr Peter Crouch
General Practitioner
48 Lyndoch Road
Healthville SA 5555

ABN: 12 345 678 910
Tel: 1300 111 222
Fax: 1300 333 444

Date: 10/02/2013

Invoice no: 76584

Mr B R Patient
1 Bella Ave
Healthville SA 5555

Service date	Item	Description	Fee
10/02/2013	23	Professional attendance	$30.00
10/02/2013		Misc Bandage	$10.00
		TOTAL	$40.00

Patient: Bea Patient
M/care: 2222233333/1
Srv Prov: P Crouch

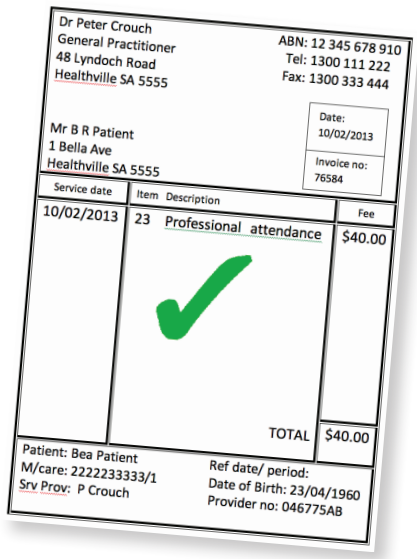
Ref date/ period:
Date of Birth: 23/04/1960
Provider no: 046775AB

This invoice has been incorrectly itemised because, under regulation 13 of the *Health Insurance regulations 1975*, the full amount of the service (item 23) must be itemised on your account. This begs the question: Is the bandage part of the service or should it be itemised separately?

The definition of a 'professional service' relates to clinical relevance and each item in the MBS is intended to be one complete professional service. However, it is not always simple to work out what's in and what's out, and there are no decisions or rulings to assist us but, in our current example, it's pretty easy.

Medicare has made it clear that we cannot add the fee for a bandage if we are bulk billing a service because the bandage is viewed as being part of that service.

So, there it is – Medicare says the bandage is part of the service if you bulk bill so common sense tells us it is also part of the very same service if you don't bulk bill. Therefore you would not separate the bandage and the consultation on your patient claim invoice. Instead, it would look like this:



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10/02/2013	23	Professional attendance	$40.00
		TOTAL	$40.00

Patient: Bea Patient
M/care: 2222233333/1
Srv Prov: P Crouch

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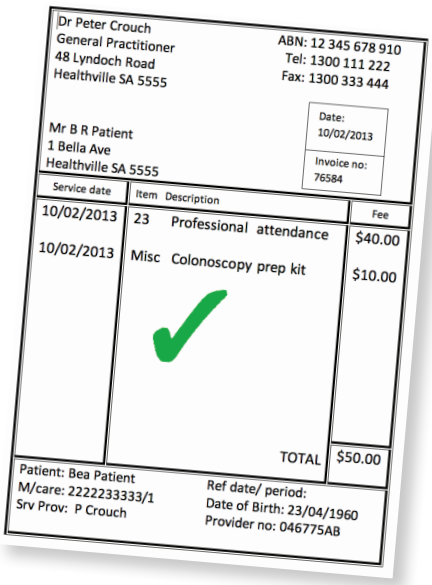
Provider no: 046775AB

But what about the colonoscopy prep kit?

Just to throw a spanner in the works, what if you have consulted a patient who presented with a leg ulcer and your consultation involved the examination and treatment of that ulcer (including dressing it), but then, just as you were finishing up, the patient said she was having that colonoscopy you ordered next week and wondered if you might sell 'those prep kits', which of course you do.

Where do you put it on your account? Is it part of the service you intend to invoice as item 23 for the ulcer consultation, which was why the patient came to see you?

Well, probably not. It would be hard to argue that the private sale of a colonoscopy prep kit related to the leg ulcer, so it should not be added to the total fee for the item 23. The colonoscopy prep kit should be itemised separately, as follows:



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Date: 10/02/2013
Invoice no: 76584

Service date	Item	Description	Fee
10/02/2013	23	Professional attendance	$40.00
10/02/2013	Misc	Colonoscopy prep kit	$10.00
		TOTAL	$50.00

Patient: Bea Patient
M/care: 2222233333/1
Srv Prov: P Crouch

Ref date/ period:
Date of Birth: 23/04/1960
Provider no: 046775AB

I know some practices will issue a separate invoice for the prep kit but there really is no need. Everything can go on the one invoice when you are doing patient claims and this will still be fully compliant with the legislation.

LAW ABIDING

The legislation is clear – any non-clinically relevant services are a private matter between the doctor and the patient, and such services should not be billed to Medicare. As long as you are not adding inappropriate extras to the MBS item numbers, all will be well. Medicare will simply ignore the items described as 'Misc' (or whatever other description your practice uses) when they receive the claim from the patient.

What Medicare is rightly concerned about is the MBS item numbers, as it foots much of the bill for these items on behalf of taxpayers.

Medicare is not interested in miscellaneous costs you and the patient have agreed upon under your private contractual arrangement. Conversely, however, the full amount you charge for your service must be included on the invoice and be disclosed to Medicare – that's the law. So, if you routinely charge your patients $100 for item 23, this amount must be fully disclosed to Medicare on your invoice for that item number.

The answer to the quiz, then, is 'c'. And there's one last thing I want to mention: Medicare is a fee-for-service scheme, which means that, subject to the odd exception, if you provide more than one service to your patient on the same day, you can bulk bill one and not the other. But that's another story.