

DR GARO ARTINIAN v. THE COMMONWEALTH OF AUSTRALIA and ORS
No. NG 861 of 1996

FED No. 760/96

Number of pages - 12

Administrative Law - Practice and Procedure

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
HILL J

CWDS

Administrative Law - decision that a reference be made under s86(1) of the Health Insurance Act 1973 in respect of medical practitioner and decision to set up a committee to consider whether that medical practitioner had engaged in inappropriate practice - whether interlocutory relief should be granted - balance of convenience in favour of refusing interlocutory relief.

Practice and Procedure - interlocutory relief - test to be applied where constitutional challenge raised.

Health Insurance Act 1973: ss86, 87, 88, 89, 93, 94, 95, 96, 97, 106.

Australian Capital Television v Commonwealth of Australia (1992) 104 ALR 389; followed.

Edelston v Health Insurance Commission (1990) 27 FCR 56; followed.

HRNG

SYDNEY, 14 November 1996

#DATE 27:11:1996

#ADD 5:12:1996

Counsel and Solicitors Dr G Flick instructed by
for Applicant: Abbott Tout

Counsel and Solicitors S Gageler instructed by the
for Respondents: Australian Government Solicitor

ORDER

THE COURT ORDERS THAT:

1. The motion for interlocutory relief be dismissed.
2. The applicant to pay the respondents' costs of the motion.

Note: Settlement and entry of orders is dealt with in Order 36 of the

Federal Court Rules.

JUDGE1

HILL J The applicant, Dr Artinian, is a medical practitioner who carries on a general practice in the Chatswood Medical Centre. He applies to the Court for judicial review, relying both upon the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act") and s39B of the Judiciary Act 1903 (Cth) of two decisions. The first is a decision said to have been made by the Health Insurance Commission, the second respondent ("the Commission"), or Dr Newton, the third respondent, taken on or about 29 September 1996, that a reference be made under s86(1) of the Health Insurance Act 1973 (as amended) ("the Act") to the Director of Professional Services Review in respect of Dr Artinian's conduct. The second decision is that said to have been taken on or about 28 October 1996 by Dr Holmes, the fourth respondent, who is the Director of Professional Services Review, to set up a committee to consider whether Dr Artinian had engaged in inappropriate practice, as that expression is used in the Act. The committee, which Dr Holmes purported to set up, is the fifth respondent.

2. The committee is scheduled to commence its hearing on 6 December next. It is for this reason that Dr Artinian seeks interlocutory relief by way of injunction, restraining the committee from conducting its investigation into the conduct of Dr Artinian pending the hearing of Dr Artinian's application for judicial review.

THE STATUTORY BACKGROUND

3. In order to understand the submissions made on behalf of Dr Artinian, it is necessary to summarise briefly the relevant provisions of the Act.

4. The Act contemplates a four step procedure to deal with investigations into conduct of medical practitioners who engage in what the Act refers to as "inappropriate practice". As defined in s82(1) of the Act, a practitioner will engage in inappropriate practice if:

"... the practitioner's conduct in connection with rendering or initiating services is such that a Committee could reasonably conclude that:

...

(b) if the practitioner is not a specialist - the conduct would be unacceptable to the general body of the members of the profession in which the practitioner was practising when he or she

rendered or initiated the services."

5. The first step in dealing with allegations of inappropriate practice is a reference by the Director of Professional Services Review, a person appointed under s83 of the Act, by the Commission. Under s86(1), that reference is a reference of the conduct of a person:

"... relating to one or both of the following:

(a) whether the person has engaged in inappropriate practice in connection with rendering of services;

(b) whether the person has engaged in inappropriate practice in connection with initiation of services."

6. By force of s86(2) of the Act, the relevant services must have been rendered during the two year period preceding the referral and on or after 1 September 1993. Certain particular services are excluded under s86(4) of the Act.

7. The content and form of referrals is dealt with in s87(1) of the Act which provides relevantly:

"The referral must specify whether it relates to one or both of the following:

(a) specified services;

(b) services rendered or initiated by a practitioner that are one or more of the following:

(i) services of a specified class;

(ii) services provided to a specified class of person;

(iii) services provided within a specified location."

The section also requires the content and form of the referral to comply with any guidelines made by the Minister under s87(3). It does not appear whether any guidelines have in fact been made.

8. Where the Commission has made a referral it must, under s88, send a copy of that referral to the person under review within 48 hours of sending the referral to the Director. That copy is to be accompanied by a notice inviting the person whose conduct is under review to make written submissions within fourteen days, stating why the Director

should dismiss the referral without setting up a Committee.

9. Under s89(1), after twenty-eight days have expired from the receipt of the referral, the Director must either dismiss the referral or set up a committee to consider whether the practitioner has engaged in inappropriate practice. Thus the second stage of the proceeding is the act of the Director setting up a committee. Pursuant to s93 of the Act the Director must set up the committee unless:

"(a) the Director is satisfied that there are insufficient grounds on which a Committee could reasonably find that the person under review has engaged in inappropriate practice in connection with the referred services; or

(b) the Director has disqualified the person under review under section 92."

10. Where the result is that the Director sets up a committee, s94 requires that notice of the decision to that effect must be given to the practitioner. The Director must appoint various persons in accordance with s95 of the Act as the committee. There is a procedure under s96, not relevant in the present case, whereby the person under review may challenge the appointment of a particular committee member.

11. The third step is the convening of the meeting of the committee, dealt with in s97. Such a meeting must be convened within fourteen days after the appointment of the committee members. The committee exists in essence to hear relevant evidence and to take submissions. For this purpose it is obliged to give notice to the person affected by its hearing; s102 of the Act. The person under review is entitled to attend the hearing, although that person is not entitled to be represented by a lawyer.

12. There are detailed provisions in the Act regulating the conduct of the hearing, the giving of evidence and the like. A committee member in the performance of his or her duties is given the same protection and immunity as a justice of the High Court. Curiously, persons (ie non-lawyers) appearing to represent the person whose conduct is the subject of the inquiry, are given the same protection and immunity as barristers would have in proceedings in the High Court.

13. Relevant to an argument which will shortly be noted, s106H authorises the committee to base its findings, wholly or partly, by reference to a sample of the referred services; s106H(1). The committee's determination concludes with a written report setting out its findings in accordance with s106L(1). A copy of the committee's

report is required to be given to the person's whose conduct is under review: s106R(1). If the report contains a finding of inappropriate practice in connection with some or all of the referred services, the final stage in the proceeding is for a determining officer to make a draft determination, in essence a recommendation of one or other of the penalties specified in s106U. These range from a mere reprimand by the Director to a pecuniary penalty, revocation or suspension of the Medicare Provider Number, or to full disqualification in respect of the provision of services. There is no appeal provided for against the ultimate determination which takes effect.

14. The person under review is entitled, under s106S, to make written submissions suggesting changes to the draft determination and ultimately the determining officer makes a final determination of the penalty attaching as a consequence of the inappropriate conduct that has been found.

15. For the purposes of the present interlocutory proceedings, senior counsel for the applicant relies upon five submissions, each of which it is said raises a substantial question for trial, thus providing foundation for the grant of interlocutory relief. For convenience I shall state and at the same time discuss each of the five matters briefly.

1. THE CONSTITUTIONAL ARGUMENT

16. The Constitutional argument can be put quite shortly. The submission is that the committee's inquiry into whether a practitioner has been involved in inappropriate conduct carrying with it penalties and the prospect of loss of the statutory right to a Medicare benefit for treating a patient, necessarily involves the ascertainment of legal rights and obligations such that it involves the exercise of the judicial power of the Commonwealth.

17. Counsel for the respondents concedes that in this respect an arguable issue arises. One might be justified in concluding that the respondents' case is indeed quite strong. However, it is submitted on behalf of the respondents that the Constitutional issue does not, of itself, warrant the granting of interlocutory relief, a matter to which I shall return in considering the balance of convenience.

18. It should be mentioned that notices have been given under s78B of the Judiciary Act that the proceedings will involve a matter arising under the Constitution and involving its interpretation. For the present no response has been received to the s78B notice.

2. DENIAL OF NATURAL JUSTICE

19. Senior counsel for the applicant accepted, for the purposes of the present argument, that the statutory scheme which I have outlined above would not, if looked at alone, suggest that there was any obligation to afford to a medical practitioner natural justice at the stage of a reference by the Commission under s86(1) of the Act, or the setting up of a committee under s93 of the Act. It is well accepted law that whether a decision-maker is required to afford to a person natural justice and if so the content of what is required to constitute natural justice will involve a question of construction of the particular legislation under which the decision is being made. The point is made clearly in the judgment of Mason J in *Kioa v West* (1995) 159 CLR 550 at 584-5 where his Honour said:

"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

... Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. ... What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting...".

20. Where a statute provides for a hearing and provides for detailed steps leading up to that hearing, it would be unusual to conclude that the legislature intended that procedural fairness would need to be given to an applicant at a stage earlier than the hearing of the proceeding, for it is at that stage that the applicant is required to know the case against him or her and to put such submissions as are merited to the decision-maker.

21. In *Edelston v Health Insurance Commission* (1990) 27 FCR 56, Dr Edelston sought to argue in respect of a precursor to the present legislation, that natural justice should be afforded at a time when a decision was made to refer a matter to a committee to consider whether Dr Edelston might have rendered excessive services. It was clear that the rules of natural justice applied to the hearing before such a committee. His argument was unsuccessful and the case would provide

strong authority against the submission that natural justice should have been afforded to Dr Artinian prior to the committee hearing.

22. Conscious of this difficulty, senior counsel for Dr Artinian sought to rely upon statements said to have been made by or on behalf of the Commonwealth or the Commission which, it was submitted, raised in Dr Artinian a legitimate expectation. The first document relied upon was an excerpt from a newsletter from the Commission dated 2 June 1995 which discussed the amendments to the Health Insurance Act concerned with establishing the Professional Services Review. Inter alia, the newsletter said:

"The principles on which the counselling procedure is based are:

- . the process should be timely and fair;
- . the practitioner should receive a clear statement of the concerns of the HIC and evidence on which those concerns are based."

This is expanded subsequently in the article as follows:

"Where the HIC has a concern about a practitioner, a letter will be sent to the practitioner outlining the HIC's concerns and requesting an interview. The practitioner is not obliged to see a medical adviser ..."

23. It is said that no clear statement of the concerns of the Commission and evidence upon which those concerns was based was ever given to Dr Artinian. Whether this is correct as a matter of fact I do not pause to determine. Counsel for the respondents did not suggest that it was incorrect.

24. The second matter relied upon is to be found in a document headed "Procedures for Meetings Between Advisers and Practitioners and Subsequent Reporting" said to be a document emanating from the Commission. In it the following passage appears:

"It is procedurally unfair to leave the practitioner wondering, in some cases for many months, as to what the outcome of this meeting was, without any notification, be it no further action, review at some time in the future or submission to the delegate."

The reference to "meeting" is a reference to a meeting between the practitioner on the one hand and a Commission adviser, at which the Commission's concerns are to be put.

25. The submission is that despite the statement contained in the document, many months in fact did elapse between the meeting held with Dr Artinian and the Commission adviser before Dr Artinian learned the outcome. Again no factual material is pointed to by the respondents to suggest that a significant time period did not elapse. A chronological record included in the papers discloses that an interview with Dr Artinian took place on 28 June 1995 and it was not until September 1996 that Dr Artinian was invited to make submissions concerning the setting up of a committee.

26. In support of the claim of denial of natural justice, senior counsel for Dr Artinian relied upon the decision of the Full Court of this Court in *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383 in which it was held that where the Minister for Arts and Territories had promised an independent, impartial and thorough assessment of the merits of competing commercial proposals, that assurance gave rise to a legitimate expectation that it would be honoured and that no decision would be made in favour of mining of a particular area without such an independent, impartial and thorough assessment of proposals. It will be noted that in *Century Metals* there was no relevant statutory context requiring the giving of procedural fairness at a subsequent hearing, such as exists in the present case. The Full Court, comprising Fisher, Wilcox and Spender JJ, said (at 408-9):

"However, the absence of a statutory provision imposing a duty of procedural fairness is not necessarily fatal to the appellant's invocation of such a duty. Obligations to accord procedural fairness are rarely imposed by statute, in express terms. Although many of the authorities speak of the obligation as being one implied by the statute, the fact is that the doctrine of procedural fairness has been developed by the judges, in an attempt to shield from unfairness those potentially affected by the exercise of certain legal, including statutory, powers. That doctrine propounds that, unless there is some relevant statutory exclusion, and there is none in the present case, procedural fairness applies to cases falling within specific fact situations. The material question is not whether some reference to procedural fairness can be found in a relevant statute; but, rather, whether the decision of Mr Yeomans to recommend the Elders proposal and the decision of the Minister to accept that recommendation and to enter negotiations with Elders fall within any of the specified fact situations. ..."

27. Their Honours subsequently refer to some passages in the judgment of Mason J in *Kioa v West* where the notion of "legitimate expectation" was discussed, concluding that in the circumstances procedural

fairness had been denied where the legitimate expectation raised by the Minister's statement had not been fulfilled.

28. Neither counsel could refer me to any case where procedural fairness was said to arise outside the terms of a statute where the statute itself by implication required procedural fairness to be given at a subsequent stage. So, one could say that the applicant's case on procedural fairness is arguable, in the sense that it is not precluded by authority. However, one could hardly say that the applicant has a strong case. Indeed, quite to the contrary. Apart from the decision in *Edelston*, to which I have already made reference, it would seem most peculiar that a statement made by a decision-maker could impose upon that decision-maker an obligation to accord procedural fairness where the statutory context in which the decision-making was to occur did not impose any such obligation. However, in the sense that almost any matter may be arguable unless there is authority against it, it can be said that the applicant has raised a question for decision.

3. WHETHER THE COPY OF THE NOTICE OF REFERRAL WAS GIVEN WITHIN TIME

29. It will be recalled that under s88(1) of the Act the Commission was required to send to Dr Artinian a copy of the referral within 48 hours of sending that referral to the Director. The referral to the Director was dated 30 September 1996. The letter enclosing a copy of the notice of referral was, so the Commission wrote in the letter to Dr Artinian's solicitor, sent on 2 October 1996. Thus if the referral by the Commission to the Director was sent on the date which the letter of referral bears, s88(1) was not complied with. It is strongly arguable that if s88(1) was not complied with, the procedure thereafter would be invalid. This is in contradistinction to failure to comply with other time limits relevant to referrals, see for example s89(2), s94(4), s97(4) and s106R(2) of the Act, each of which specifically ensure that invalidation does not result from a failure to comply with a particular time limit.

30. At this stage, no evidence has been adduced by the respondents. It may well emerge that the letter bearing date 30 September was not in fact sent until 1 October, in which event the time limit under s88(1) will have been complied with. However, what I have written above indicates that there is a question of fact to be determined, raising an arguable issue for the applicant.

4. WHETHER THE REFERRAL COMPLIED WITH S87(1) IN SPECIFYING SERVICES

31. The document of referral under s86 of the Act described the referred services in the following terms:

"For the purposes of section 87(1) of the Act, this referral relates to all services rendered by Dr Artinian from his practice locations in the State of New South Wales during the period of 1 January 1995 to 31 December 1995, inclusive."

32. It is submitted that so to define the services to which the referral relates, is to fail to comply with the provisions of s87(1) which requires that the referral specify one or both of specified services or services of the kind referred to in s87(1)(b). It is said that to name all the services in a period is not to specify "specified services". It would seem fairly obvious that the referral did not seek to specify or to make a specification in accordance with s87(1)(b).

33. The word "specify" has its ordinary English meaning as stated in the Macquarie Dictionary of "to mention or name specifically or definitely; state in detail". What is required, if a referral is to specify services, is that the referral be precise or particular about which services it refers to. It would probably not be a sufficient compliance with s87(1), for example, if the referral were to be as general as to refer to all services whatsoever carried out by the practitioner.

34. However, it is said on behalf of the respondents that the referral does not refer to all services carried out by the practitioner but rather to all services carried out by him in a particular period of time, namely the period from 1 January 1995 to 31 December 1995 inclusive.

35. For my part, I do not see why s87(1) should be construed as not permitting a specification of the services performed by a practitioner on a particular day, a particular week or in a particular month. If this is so, I can see no reason why it would be invalid to specify the proceedings in a particular year. Put in another way, the argument for the applicant can hardly be said to be strong, although put the other way it can hardly be said to be unarguable.

5. THE USE OF STATISTICS

36. On behalf of the applicant it is submitted that the Commission in referring to the Director and the Director in acting under s93 of the Act, took into account irrelevant matters being Dr Artinian's statistical standing in comparison to other practitioners.

37. So far as emerges in the material before me, it is clear that Dr Artinian came to the notice of the Commission, at least in recent times, as a result of "service patterns in his profile". When Dr Artinian's practice was compared with the practices of other active general practitioners in Australia, it was noticed that Dr Artinian provided substantially more services in a year (23,706) than 99% of all active general practitioners in Australia. The 99 percentile was in fact 16,961. While general practitioners on average spent 39 hours per week in contact with patients (and worked 55 hours per week), Dr Artinian it would seem averaged 464 services per week with 70 hours of total patient contact per week, seeing an average of 6.5 patients per hour. These and other figures might well lead to the conclusion either that Dr Artinian would be so exhausted from seeing a large number of patients as not to give his patients appropriate medical attention or alternatively was misstating the number of patients he had personally seen or the time in which he spent with them.

38. An interview was ultimately held between Dr Artinian and medical advisers at which certain Provider summary statistics were discussed and the concerns of the Commission that the volume of patients being treated was inappropriate was made clear to Dr Artinian.

39. The submission, as I understand it, is that the Commission or the Director, as the case may be, were not entitled to take into account these statistics. There is some suggestion in the submission that statistics were the only matters taken into account and that the record of interview and a subsequent recommendation by Dr Whitby, a general practice consultant, recommending that it was appropriate that Dr Artinian be referred to the Director of Professional Services Review, were not taken into account. Factually, there is no support for that submission.

40. It seems to me almost unarguable that the Commission was not entitled to take into account the statistical material in determining whether or not to refer Dr Artinian's conduct in connection with his rendering of services, to the Director. The time spent by Dr Artinian, even if considered without reference to the time spent by other practitioners, would seem enough to raise questions for consideration. When, however, the time he spent is compared with time spent by other practitioners, the point is even more obvious. No doubt it is possible that there could be good explanations. But this is not to say that the statistical material would be irrelevant in considering the issue under s86.

41. It is interesting to note that in Dr Edelston's case a statistical

analysis was undertaken of Medicare claims arising out of Dr Eddelston's practice as compared to other practitioners and that the Full Court did not regard this material as in any way irrelevant. Indeed, the Court referred to the "unusual patterns of practice" and the disparity which the results of Dr Eddelston's practice had in comparison with that of others (see at 61). In considering a submission that reference to the statistical material was reference to impermissible considerations, Northrop and Lockhart JJ said "The submission is untenable". Their Honours continued (at 71):

"In our opinion Dr Nearhos, when exercising his powers under reg 3(2)(b) on behalf of the Commission; Dr Dash, as delegate of the Minister, when referring the matters concerning Dr Edelston to the Committee under s82; and the Committee, when exercising its powers under s94 of the Health Insurance Act, are not limited to a consideration of the services rendered to a particular patient with respect to specifically defined symptoms, disease or injury. If there is a pattern of services rendered by Dr Eddelston to a large number of patients which is unusual in relation to the pattern of services which it is considered are likely to be provided by the average general practitioner during the same or substantially the same period in a similar location, that is a legitimate matter to consider in deciding whether there may be evidence of the rendering of excessive services."

42. Their Honours made reference as well to the decision of Freeman v McCubbery (1985) 5 FCR 367, a decision of Northrop J subsequently upheld on appeal as clear authority against the argument of counsel for the appellant.

43. In my view the present submission is equally untenable. There is absolutely no substance at all in the argument that reference can not be made to the statistical material. Not only is that material relevant but it may also, in a particular case, be highly cogent of inappropriate conduct.

BALANCE OF CONVENIENCE

44. On behalf of the applicant it was submitted that the balance of convenience favoured the granting of interlocutory relief.

45. As has been pointed out on more than one occasion, there is a relationship between the strength or weakness on the one hand of the issue to be tried raised by an applicant, and the degree of balance of convenience required to be shown before interlocutory relief is granted. The two matters are not mutually exclusive: Trade Practices

Commission v Santos Ltd (1992) 38 FCR 382 at 392.

46. The applicant's strongest case lies in the Constitutional argument. However, where interlocutory relief is sought pending the determination of a challenge to the Constitutional validity of a statute, the Court will approach the question on the basis that the impugned law is valid unless and until it is shown to be invalid. The test to be applied is that suggested by Mason CJ in *Australian Capital Television v Commonwealth of Australia* (1992) 104 ALR 389 at 393, quoting from his Honour's previous judgment in *Castlemaine Tooheys Limited v South Australia* (1986) 161 CLR 148 at 155-6:

"In the absence of compelling grounds, it is the duty of the court to respect, indeed, to defer to, the enactment of the legislature until that enactment is adjudged ultra vires."

47. Senior counsel for Dr Artinian could not enunciate any compelling grounds which would justify my departing from the ordinary course and granting interlocutory relief before the question of validity had been determined.

48. Of the other issues which have been raised before me, the strongest issue is that concerned with the timing of the forwarding to Dr Artinian of the copy of the notice of referral. None of the other matters raised can be said, even if they do raise an arguable issue, to raise an issue of any substance.

49. In my view therefore, it is incumbent upon Dr Artinian to show a clear balance of convenience in favour of injunctive relief to succeed. This is particularly so where a statute imposes strict time limits for procedural steps to be taken and injunctive relief would interrupt (and delay) the implementation of those procedural steps.

50. Up to the point where the review committee publishes its report, there is little prejudice to Dr Artinian. The only prejudice that is pointed to is the time that he will be required to spend in submissions (with a resultant loss of income) and the cost of any representation (not being legal) or legal advice which he may need to obtain during the period of the committee's determination. In my view, such prejudice as there may be to Dr Artinian in time and/or cost could not outweigh the prejudice to the respondents in the proceedings being delayed pending the determination of the merits of the case and in the statutory timetable being interrupted.

51. Different considerations might arise at the time of publication of the report. Should the committee make adverse findings, the making

public of those findings might very well impugn upon Dr Artinian's character. No doubt more serious prejudice could arise to Dr Artinian in the event not only that the committee made adverse findings against him, but there is recommended by way of ultimate penalty his disqualification or suspension from being entitled to a Medicare Provider Number, thus depriving his clients of Medicare benefits. But these matters remain in the future.

52. It may very well be that the consequences to Dr Artinian, should there be a recommendation resulting in his ceasing to be entitled to a Medicare Provider Number, would be so extreme that the Court might grant an injunction restraining that penalty from being implemented pending the merits of the application to the Court being determined and this, notwithstanding that the strength of Dr Artinian's case, may not be thought to be substantial. But the proceedings are a long way away from that. It may well be expected that the merits of the case would be determined early in the new year and considerably before any report is published by the committee. Should there be a delay in a hearing on the merits of the present application, then Dr Artinian could apply again for interlocutory relief, having regard to the circumstances as then exist. However, for the present, I am of the view that Dr Artinian has not shown that the balance of convenience so favours him as to outweigh the prejudice to the respondents in not permitting the committee to proceed with its deliberations. I would accordingly refuse interlocutory relief and order Dr Artinian to pay the respondents' costs of the motion for that relief.
