

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

QG 192 OF 1997

ON APPEAL FROM THE PROFESSIONAL SERVICES REVIEW TRIBUNAL

BETWEEN: DR JEAN FERGUS McFARLANE
APPELLANT

AND: GAIL BATMAN
RESPONDENT

JUDGE: DRUMMOND J

DATE OF ORDER: 10 NOVEMBER 2000

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs of and incidental to the appeal, including reserved costs, if any.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

QG 192 OF 1997

ON APPEAL FROM THE PROFESSIONAL SERVICES REVIEW TRIBUNAL

BETWEEN: DR JEAN FERGUS McFARLANE
APPELLANT

AND: GAIL BATMAN
RESPONDENT

JUDGE: DRUMMOND J

DATE: 10 NOVEMBER 2000

PLACE: BRISBANE

REASONS FOR JUDGMENT

1 This is an appeal from a decision of the Professional Services Review Tribunal dated 4 November 1997. The Tribunal affirmed the final determination of a determining officer made under s 106T the *Health Insurance Act 1973* (Cth) on 23 April 1997 that "Dr McFarlane be disqualified for a period of 12 months from the time when this determination takes effect in respect of the initiation of all services to which an item relates in Groups P3 and P4 of the Pathology Services Table", and further ordered that "Dr McFarlane be fully disqualified for a period of 6 months from the time when this determination takes effect". This is due, in part only, to resolution of the present proceedings being delayed, at the joint request of the parties, until the Full Court's decision as to the lawfulness of the establishment of this Tribunal in *Tankey v Adams* [2000] FCA 1089 was delivered.

2 The appeal to this Court is limited by s 124A the *Health Insurance Act 1973* (Cth) to error of law in the Tribunal's decision. By the supplementary notice of appeal, Dr McFarlane asserts that the Tribunal's decision is flawed with three errors of law. The first contends that the Tribunal's decision was void because it involved exercise of the judicial power of the Commonwealth. That argument is no longer available in view of the decision of the Full Court of this Court referred to.

3 The second ground of appeal asserts that the Tribunal's determination was flawed with error of law constituted by its failure to give Dr McFarlane procedural fairness. Finally, it is alleged that the Tribunal's determination contained an invalidating error of law because it was based upon a misconstruction of the Professional Services Review Committee's report or based on a finding by that Committee which was itself void because of the absence of material to support the finding.

4 The thrust of the findings made at all levels - by the Professional Services Review Committee, the determining officer and then the Professional Services Review Tribunal - was that Dr McFarlane had engaged in conduct in the period between 1 January and 31 December 1994 that was unacceptable to the general body of general medical practitioners at the time constituted by her grossly excessive use of pathology referrals.

5 Dr McFarlane has appeared in the present proceedings to represent herself and has provided brief written contentions of fact and law. It is apparent from this statement of contentions that Dr McFarlane defends the manner in which she conducted her medical practice and rejects as unjustified the criticisms of it made by the various bodies that I have referred to, culminating in the decision of the Professional Services Review Tribunal. None of the issues that she seeks to ventilate in these contentions, however, involves any assertion of error of law on the part of the Tribunal or indeed on the part of any of the anterior decision-makers. As I have said, Dr McFarlane's assertions are that each of those bodies took a wrong view of the facts of the case in coming to conclusions adverse to her.

6 The only other issue that Dr McFarlane raised at the hearing was the contention that the members of the Professional Services Review Committee were inappropriately qualified to be able to form a reliable view of her professional conduct. Five medical practitioners constituted the Committee. The Committee was expanded beyond the normal size of a committee usually appointed to deal with such matters in so far as it included a specialist physician and a specialist pathologist. It is enough for this Court to say that whatever views Dr McFarlane may have about the professional competence of the members of that Committee to reach the determination they made, her challenges to the professional competence of the members of the Committee do not give rise to any error of law which invalidates the decision of the Tribunal, and it is the decision of the Tribunal alone which is before me for review.

7 There being no basis upon which, it seems to me, Dr McFarlane has attempted to identify invalidating error of law in the Tribunal's decision, the appeal will be dismissed.

8 The appellant will be ordered to pay the respondent's costs of and incidental to the appeal, including reserved costs, if any.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Drummond.

Associate: *Anne's Maury*

Dated: 17 November 2000

Counsel for the Appellant: The appellant appeared in person.

Counsel for the Respondent: Ms RM Henderson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 10 November 2000

Date of Judgment: 10 November 2000

FEDERAL COURT OF AUSTRALIA**McFarlane v Batman [2001] FCA 107**

ADMINISTRATIVE LAW – HEALTH – referral under the *Health Insurance Act 1973* (Cth) in relation to a general practitioner alleged to have engaged in “inappropriate practice” – appeal from primary judge confirming decision of the Professional Services Review Tribunal which confirmed determination made by a Determining Officer – whether appellant accorded procedural fairness by Committee and effect on Tribunal’s determination – whether primary judge erred in finding that the Tribunal’s determination was not void as being based on a misconstruction of the Committee’s report or upon a finding of the Committee which was void by reason of absence of material to support the finding – whether Tribunal required to examine individual transactions to determine whether or not the appellant engaged in inappropriate practices in initiating services

Health Insurance Act 1973 (Cth), ss 20BA, 82, 82(1), 86, 89, 106Q, 106T, 106U, 124A

Adams v Yung (1998) 83 FCR 248 at 297

DR JEAN FERGUS McFARLANE v GAIL BATMAN**Q 156 OF 2000****RYAN, DOWSETT & HELY JJ
23 FEBRUARY 2001
BRISBANE**

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

Q 156 OF 2000

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF
AUSTRALIA

BETWEEN: DR JEAN FERGUS McFARLANE
APPELLANT

AND: GAIL BATMAN
RESPONDENT

JUDGES: RYAN, DOWSETT & HELY JJ

DATE OF ORDER: 23 FEBRUARY 2001

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

Q 156 OF 2000

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF
AUSTRALIA

BETWEEN: DR JEAN FERGUS McFARLANE
APPELLANT

AND: GAIL BATMAN
RESPONDENT

JUDGES: RYAN, DOWSETT & HELY JJ

DATE: 23 FEBRUARY 2001

PLACE: BRISBANE

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a decision of Drummond J dismissing an appeal from a decision of a Professional Services Review Tribunal (the "Tribunal") constituted pursuant to the *Health Insurance Act 1973* (Cth) (the "Act"). Section 124A of the Act limited that appeal to questions of law. The Tribunal's decision, dated 4 November 1997, affirmed a decision of the present respondent dated 23 April 1997. That decision, in turn, was based upon the determination of a Professional Services Review Committee (the "Committee").

2 The Act provides for the appointment of a person to be known as the Director of Professional Services Review (the "Director"). Pursuant to s 86, the Health Insurance Commission may refer to the Director, any conduct by a medical practitioner which may constitute "inappropriate practice" in connection with the rendering or initiation of professional services for which Medicare benefits are payable. The expression "inappropriate practice" is defined in s 82 as follows:

- (1) *A practitioner engages in inappropriate practice if the practitioner's conduct in connection with rendering or initiating services is such that a Committee could reasonably conclude that:*
- (a) *if the practitioner is a specialist – the conduct would be*

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unacceptable to the general body of the members of the speciality in which the practitioner was practising when he or she rendered or initiated the services; or

(b) ...

3 For present purposes the word "specialist" includes a general practitioner. (See s 20BA.) Pursuant to s 89 the Director may appoint a Professional Services Review Committee to consider "whether the practitioner has engaged in inappropriate practice". The Committee must report to a Determining Officer appointed pursuant to s 106Q. One of the matters for report is whether the practitioner's conduct in connection with rendering or initiating the referred services was, in the Committee's opinion, unacceptable to the general body of the members of the speciality in which the practitioner was practising at the time. The Determining Officer must then make a determination in accordance with ss 106T and 106U. The practitioner may request the Minister to refer the determination to a Professional Services Review Tribunal. The decision of the Tribunal is subject to appeal to the Federal Court pursuant to s 124A.

4 The Health Insurance Commission referred a number of aspects of the appellant's practice to the Director including, in particular, the frequency with which she referred patients for pathology testing. These matters were accordingly referred to a Committee which eventually determined as follows:

The Committee having considered the referral documentation, statistical data supplied, the evidence given at the hearing and the submissions received from Dr McFarlane finds that her conduct with regard to the initiation of pathology services in the referral period is such that it would be unacceptable to the general body of medical practitioners.

5 Subsequently, the respondent (as Determining Officer) determined that:

- (i) *In accordance with paragraph 106U(1)(b) of the Act, Dr McFarlane be counselled by the Director, Professional Services Review or the Director's nominee in relation to each of the concerns expressed by the Committee; and*
- (ii) *in accordance with sub-paragraph 106U(1)(g)(i) of the Act, Dr McFarlane be disqualified for a period of twelve months from the time when this determination takes effect in respect of the initiation of all services to which an item relates in Groups P3 and P4 of the Pathology Services Table; and*
- (iii) *in accordance with paragraph 106U(1)(h) of the Act, Dr McFarlane be fully disqualified for a period of six months from the time when this determination takes effect.*

6 The appellant requested the Minister to refer the determination to a Tribunal for

review, and the Minister did so. The Tribunal affirmed the determination. The appellant then appealed pursuant to s 124A of the Act. The appeal was heard by Drummond J and dismissed. The appellant appeals from that decision, asserting that his Honour ought to have allowed the appeal on the grounds that:

- the Tribunal's decision to uphold the Committee's decision was "unsafe" because the Committee was under no obligation to afford procedural fairness to the appellant; and
- the Tribunal misconstrued the Committee's report or the Committee's findings were not supported by "material".

7 The appellant appeared for herself before us. Her oral submissions dealt primarily with two issues. Firstly, she asserted that her approach to the practice of medicine might be considered by some to be unconventional, and that she was being victimized for this, probably because it resulted in greater expenditure of public moneys through the Medicare system. The appellant asserted that to the extent that her practices are unconventional, they are nonetheless designed to prevent disease or to detect it at an early stage, so as to facilitate the maintenance and/or recovery of good health. The appellant considers that any restriction imposed upon her entitlement to refer patients for pathology testing is likely to be based upon financial considerations rather than considerations relevant to the proper practice of medicine. Undoubtedly, the lengthy process in which the appellant has been involved was, in part, designed to avoid the over-utilization of expensive services by medical practitioners where, according to good practice, such procedures are not indicated. Her second submission was that any such restriction might be contrary to the *Trade Practices Act 1974* (Cth). The present relevance of the *Trade Practices Act* was not further explained. Neither submission was relevant to the grounds of appeal.

8 The first ground of appeal concerns procedural fairness. The complaint is not that the appellant was denied procedural fairness before the Committee, but rather that it was unsafe for the Tribunal to affirm the Committee's decision given that the latter was not bound by the rules of procedural fairness. That assertion is not correct. This Court has held that the rules of natural justice apply to the proceedings of such a Committee. See *Adams v Yung* (1998) 83 FCR 248 at 297 (per Burchett and Hill JJ). That decision does not determine the requirements to be observed by the Committee in extending procedural fairness to a practitioner. However no specific criticism is made of the procedures adopted by the Committee. The appellant was heard, apparently at some length. She obviously had an

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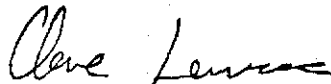
opportunity to respond to all of the allegations made against her. In those circumstances we cannot see that there was any failure to extend procedural fairness to her. There is nothing in the point.

- 9 The particulars of the second ground of appeal disclose that the appellant's complaint is that the Committee did not determine that identifiable and discrete "services" which she had initiated were "inappropriate". This complaint appears to be based upon a misunderstanding of the conduct which may attract the sanctions prescribed by the Act. Sub-section 82(1) is concerned with "inappropriate practice ... in connection with rendering or initiating services." The section addresses a practice rather than the circumstances surrounding a particular "initiation", in this case, referral to a pathologist. The Committee was obliged to examine individual transactions only to the extent necessary to determine whether or not the appellant was engaging in inappropriate practice in initiating services. A perusal of the Committee's determination suggests that the appellant was quite frank in disclosing the approach which she took to referring patients for pathology testing. Indeed, she took a similar approach before us. For this reason, the specific criticisms which appear in the various sub-paragraphs of the second ground of appeal are without substance.

- 10 The appeal must be dismissed with costs.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:



Dated: 23 February 2001

The Appellant appeared in Person:

Counsel for the Respondent:	Ms R M Henderson
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	15 February 2001
Date of Judgment:	23 February 2001