

PROFESSIONAL SERVICES
REVIEW TRIBUNAL

No 3 of 2000

BETWEEN: **MICHAEL JOSEPH CHRISTIE**

Applicant

AND: **LOUISE HELEN MARGARET
MORAUTA**

Respondent

TRIBUNAL: The Hon A. R. Neaves, President
Dr. N. J. Radford, Member
Dr. M. Williams, Member

DATE: 9 March 2001

DECISION

The proceedings for the review of the final determination made herein by the respondent on 26 May, 2000 are adjourned to a date to be fixed.

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Alan R. Neaves
President

BETWEEN: **MICHAEL JOSEPH CHRISTIE**

Applicant

AND: **LOUISE HELEN MARGARET
MORAUTA**

Respondent

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REASONS FOR DECISION

THE TRIBUNAL:

Introductory

The Tribunal, which was established under section 108, a provision within Division 2 of Part VA, of the Health Insurance Act 1973 (Cth), convened on 8 February, 2001 for the purpose of reviewing, in proceedings before the Tribunal, the final determination relating to Michael Joseph Christie (“the applicant”) made by Louise Helen Margaret Morauta (“the respondent”) under section 106T of the Health Insurance Act 1973 and dated 26 May, 2000. The Tribunal was convened consequent upon the President of the Tribunal having received from the Minister of State for Health and Aged Care (“the Minister”) a copy of a letter dated 29 June, 2000 addressed to the Minister by the solicitors for the applicant requesting the Minister “to refer the said determination to the Professional Services Review Tribunal”. The request was expressed to be made pursuant to sub-section 114 (1) of the Health Insurance Act 1973. The letter set out the grounds on which the request was made (paragraph 114 (2) (b)).

2. When the review was called on for hearing, counsel for the applicant informed the Tribunal that the request under section 114 of the Health Insurance Act 1973 had been withdrawn by the applicant the previous day and that, in consequence, it was not open to the Tribunal to review the final determination made by the respondent, Counsel submitted that the Tribunal could do no more than direct that the matter be removed from the list of matters for hearing by the Tribunal.

3. The Tribunal was also informed that counsel for the respondent proposed to submit an argument to the Tribunal that it had no authority to review the final determination on the ground that the request on behalf of the applicant that the

Minister refer the final determination to a Professional Services Review Tribunal was not served on the Minister within the period of 28 days allowed by paragraph 114 (2)(c) of the Health Insurance Act 1973.

4. The Tribunal heard argument on these threshold questions and reserved its decision thereon. For the purpose of considering these questions it is necessary to refer to the relevant legislative provisions and to make some reference to the history of the matter.

Relevant Legislative Provisions

5. At the outset it is to be noted that Part VA of the Health Insurance Act 1973 (“the 1973 Act”) pursuant to which the Tribunal was established and its proceedings regulated was repealed by item 63 of Schedule 1 to the Health Insurance Amendment (Professional Services Review) Act 1999 (Cth) (“the 1999 Act”), a provision which commenced on 1 August, 1999. Other amendments made by the 1999 Act to the 1973 Act included:

- a provision (see item 47 of Schedule 1) repealing section 106Q pursuant to which the respondent had been appointed as the Determining Officer, section 106R (providing for a copy of the Committee’s report to be given to the person under review), section 106S (providing for the making of a draft determination) and section 106T (providing for the making of a final determination); and
- provisions (see items 48,49 and 53 of Schedule 1) amending section 106U (providing for the content of determinations).

However, item 65 of Schedule 1 to the 1999 Act, which also commenced on 1 August, 1999, provides that the amendments made by that Schedule do not apply in respect of a matter that, before the commencement of the Schedule, was referred under section 86 of the 1973 Act by the Health Insurance Commission (“the Commission”) established by the Health Insurance Commission Act 1973 (Cth) to the Director of Professional Services Review appointed under section 83 of the 1973 Act and that, subject to certain transitional provisions not here relevant, the 1973 Act as in force immediately before the commencement of Schedule 1 to the 1999 Act continues to apply to any such matter. It may be accepted that the matter which the Tribunal was convened to hear on 8 February 2001 is such a matter.

6. Part II of the 1973 Act deals with “Medicare Benefits”. Subsection 10(1) provides that where medical expenses are incurred in respect of a professional service rendered in Australia to an eligible person, Medicare benefit is payable in respect of that professional service. The expression “eligible person” includes (see section 3) a service (other than a diagnostic imaging service as defined) to which an item in the General Medical Services Table prescribed under section 4 relates, being a clinically relevant service that is rendered by or on behalf of a medical practitioner. A “clinically relevant service” (see again section 3) is, so far as material for present purposes, a service rendered by a medical practitioner that is generally accepted in the medical profession as being necessary for the appropriate treatment of the patient to whom it is rendered.

7. Part VAA creates a scheme under which a person's conduct can be examined to ascertain whether inappropriate practice as defined in section 82 is involved and provides for action that can be taken in response to inappropriate practice (subsection 80(1)). In identifying the text of relevant sections within Part VAA of the Act, a number of amendments effected by the Health Insurance Amendment Act (No.1) 1997 (Cth) ("the 1997 Act") and the 1999 Act must be disregarded as those amendments do not apply to a matter which was referred under section 86 of the 1973 Act before the respective dates of commencement of those amending provisions. The date of commencement of the 1997 Act was 6 November, 1997. In what follows the provisions of the 1973 Act are stated in the form relevant to the resolution of the threshold questions before the Tribunal.

8. Section 82 provides that a practitioner engages in inappropriate practice if the practitioner's conduct in connection with rendering or initiating services is such that a Professional Services Review Committee could reasonably conclude that, if the practitioner is a specialist, the conduct would be unacceptable to the general body of the members of the specialty in which the practitioner was practising when he or she rendered or initiated the services. The expression "service" is defined in subsection 81(1) to include a service for which, at the time it was rendered or initiated, medicare benefit was payable. Subsection 81(2) provides that, for the purposes of Part VAA, general medical practice is to be taken to be a specialty and medical practitioners practising in a general medical practice are to be taken to be specialists in that specialty.

9. The Commission may, under subsection 86(1) refer to the Director of Professional Services Review the conduct of a person relating to whether the person has engaged in inappropriate practice in connection with the rendering or initiation of services. Under subsection 89(1), the Director must dismiss the referral or set up a Committee to consider whether the practitioner has engaged in inappropriate practice.

10. Section 95 provides for the establishment of Committees. Subdivision B of Division 4 of Part VAA regulates the proceedings of Committees. Meetings of a Committee must be held in private (subsection 98(2)). A Committee must hold a hearing if, after considering the matters that are the subject of the referral, it appears to the Committee that the person under review may have engaged in inappropriate practice in connection with rendering or initiating the referred services (subsection 101(2)). The person under review is entitled to attend the hearing and to be accompanied by a lawyer or another adviser but the person under review is not entitled to be represented at the hearing by a lawyer or another adviser. The person under review is entitled to question any person giving evidence at the hearing and to address the Committee (section 103).

11. Under section 106L, if the person under review was a practitioner and a specialist when the referred services were rendered or initiated, the Committee is required to give to the Determining Officer a written report setting out its findings on 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 specialty in which the practitioner was practising at that time.

12. If the Committee's report contains a finding that the person under review has engaged in inappropriate practice in connection with rendering or initiating some or all of the referred services, the Determining Officer appointed by the Minister under subsection 106Q(1) must make a draft determination in accordance with section 106U and, after giving the practitioner an opportunity to make written submissions suggesting changes to the draft, make a final determination in accordance with that section (sections 106S and 106T).

13. Section 106U provides for the content of determinations. A determination must contain one or more of the prescribed directions. The Determining Officer may direct that the practitioner be reprimanded or counselled, that the practitioner repay to the Commonwealth the whole or part of the Medicare benefit that was paid in respect of services "in connection with which the person under review is stated in a report under section 106L to have engaged in inappropriate practice", that the practitioner be disqualified in respect of the provision of certain services or that the practitioner be "fully disqualified". A direction that the practitioner be disqualified fully or partially must specify a period of up to three years "to start when the determination takes effect" (subsections 106U(3) and (4)).

14. Section 106V concerns the time when a final determination takes effect. It provides:

- "(1) Subject to subsections (2) and (3), the final determination takes effect 28 days after the Determining Officer gives a copy of it to the person under review.
- (2) If a request for review of a final determination under Division 3 of Part VA is lodged within the period allowed for such a request:
 - (a) the final determination does not take effect if it is set aside on the review; or
 - (b) if the final determination is affirmed or varied on the review, and no appeal against the decision is brought under section 124A within the period allowed for such an appeal – the final determination takes effect, or takes effect as varied, at the end of the period.
- (3) If an appeal against the decision on such a review is brought under section 124A within the period allowed for such an appeal:
 - (a) subject to subsection (4), the determination does not have effect until the appeal, and any further appeal or appeals, are determined; and
 - (b) upon the determination of the appeal, and any such further appeal or appeals, the determination takes effect as varied, or does not take effect, in accordance with the judgment or order on the appeal or further appeal or appeals.

- (4) If the appeal lapses or is withdrawn, the final determination takes effect when the appeal lapses or is withdrawn.”

15. By virtue of subsection 106ZR(1), a person must not disclose to another person, except in the circumstances prescribed, any of the deliberations or findings of a Committee or any information or evidence given to the Committee in the course of its deliberations. Section 106ZR however, does not apply to any matters disclosed in the course of proceedings under Part VA, that Part bearing the heading “Professional Services Review Tribunals” (subsection 106ZR (2)).

16. Part VA comprises sections 107 to 124A inclusive. Section 108 provides for the establishment of Professional Services Review Tribunals. A Tribunal is to consist of a President, being a person who holds or has held judicial office, and two members who, if the determination is a final determination under section 106T, must belong to the same profession as the practitioner who rendered or initiated the referred services to which the determination relates (paragraph 115 (2) (b)).

17. Section 114 provides:

- “114. (1) The person to whom a determination relates may request the Minister to refer the determination to a Tribunal for review.
- (2) The request by a person to whom a determination relates for the reference of the determination to a Tribunal for review:
- (a) shall be in writing signed by or on behalf of the person making the request;
 - (b) shall set out the grounds on which the request is made; and
 - (c) shall be served on the Minister written 28 days after the date upon which the notification of the determination is served on the person making the request.”

18. Subsection 115(1) provides:

- “115. (1) Upon receipt by the Minister of a request under section 114 for the review of a determination, the Minister shall forward the request to the President of a Tribunal, together with:
- (a) a copy of the reference that gave rise to the determination;
 - (b) a transcript of the proceedings at the hearing conducted for the purpose of that reference;
 - (ba) any exhibits, or copies of exhibits, received at the hearing conducted for the purposes of that reference;
 - (c) the report on that reference and any documents sent to the Minister with that report; and
 - (d) the determination”.

As the report on such a reference is to be given to the Determining Office and not the Minister (subsection 106L(1)), the reference in paragraph 115(1)(c) to the Minister should be read as a reference to the Determining Officer.

19. Where the President of a Tribunal receives under section 115 a request for the review of a determination, the President is required to “arrange for the determination to be reviewed in proceedings before the Tribunal” and, if the determination consists of a final determination under section 106T, to give to the Determining Officer and the person to whom the determination relates a written notice setting out the time and place so arranged (section 116).

20. Section 117 provides:

“117. (1) Where a person makes a request for the review of a determination:

- (a) the person may appear in person, or may be represented by another person, at the proceedings on the review arranged under section 116; and
- (b) if he appears, or is represented, at those proceedings – he or his representative shall be given the opportunity to address the Tribunal.

(2)

- (3) If the determination consists of a final determination under section 106T, the Determining Officer may be represented at the proceedings. If the Determining Officer is represented, his or her representative must be given the opportunity to address the Tribunal”.

21. Proceedings before a Tribunal are to be conducted with as little formality and technicality as a proper consideration of the matter before the Tribunal permits. The procedure of a Tribunal is, subject to the Act and the regulations, within the direction of the President. If the determination consists of a final determination under section 106T, the parties to the proceedings are the person who requested the review and the Determining Officer (section 118).

22. Subsection 119(1) provides:

“119. (1) A Tribunal that reviews a determination in accordance with a request:

- (a) shall consider the matter to which the determination relates having regard to the grounds set out in the request, the documents forwarded by the Minister with the request and any addresses made to the Tribunal during the proceedings on the review; and
- (b) shall, subject to subsection (2):

(i)

- (ii) if the determination consists of a final determination under section 106T affirm or set aside the determination, or set aside the determination and make any other determination that the Determining Officer is empowered to make under that section”.

23. A party to a proceeding before a Tribunal under Division 3 of Part VA (which includes sections 114 to 119 inclusive) may appeal, on a question of law only, to the Federal Court of Australia from any decision of the Tribunal in that proceeding (section 124A).

History of the Matter

24. On 16 December 1996, Dr. R. E. Newton, who described himself as Acting Medical Director and Manager, Professional Services Branch of the Commission, signed a document referring to the Director of Professional Services Review “the conduct of Dr. Michael Joseph Christie in relation to whether he has engaged in inappropriate practice, in connection with the rendering of services, as defined by the Act pursuant to subsection 86 (1) of the Act”. The referred services were identified as “all services rendered by Dr. Christie from his practice location in the State of New South Wales during the period of 1 January, 1995 to 31 December, 1995, inclusive”. The practice location was identified as 270 Victoria Avenue, Chatswood.

25. On 14 January 1997, the Director of Professional Services Review, Dr. A. J. Holmes, signed an instrument under sections 93 and 95 of the 1973 Act setting up Professional Services Review Committee No. 35 (“the Committee”) to consider whether the applicant had engaged in inappropriate practice.

26. A hearing was held by the Committee on 20 March 1997 and 17 April 1997. Subsequently the Committee gave to the respondent, as the Determining Officer, a written report dated 30 September 1997 setting out its findings on the question whether the applicant’s conduct in connection with rendering the referred services was, in the Committee’s opinion, unacceptable to the general body of the members of the specialty, namely general medical practice, in which the applicant was practising at the relevant time (subsection 106L (1)).

27. The respondent, as the Determining Officer, made a draft determination under section 106S relating to the applicant on 3 October, 1999 and a final determination under section 106T relating to the applicant on 26 May, 2000. The final determination directed that “in accordance with paragraph 106U(1)(a) of the Act, the Director of Professional Services Review, or the Director’s nominee, reprimand Dr. Christie”.

28. As has already been mentioned, by letter dated 29 June 2000 addressed to the Minister by the solicitors for the applicant, the Minister was requested “to refer the said determination to the Professional Services Review Tribunal”. The parties were given notice that the proceedings before the Tribunal would take place on 16 and 17 November, 2000. However, the solicitors for the applicant advised that they were unable to locate the applicant and, in the result, those dates were vacated and

arrangements made for the proceedings to take place before the Tribunal on 8 and 9 February, 2001.

The Issue Raised by the Applicant

29. Counsel for the applicant submitted that the applicant had a right to withdraw his request that the final determination dated 26 May 2000 be reviewed by a Professional Services Review Tribunal and that the exercise of that right required neither the assent of the respondent nor the leave of the Tribunal. It was further submitted that the right of withdrawal might be expressed as a right to withdraw the Minister's referral of the request to the Tribunal under section 115 or a right to withdraw the request made to the Minister under section 114. It was said that, although it is the Minister who is under a statutory obligation to forward the request to a Tribunal, the request for review remains a request made by the applicant; that the Minister has no right to seek a review by a Tribunal of a final determination made under section 106T; and that, in the present case, the Minister had not sought such a review.

30. The motivation for the withdrawal of the request for review was initially said to be the applicant's ill-health and a concern for the legal costs involved. However, it became apparent – and counsel was disarmingly frank about it – that the primary concern on the part of the applicant, once it became clear that the press had an interest in the matter, was to ensure that no hearing took place so that there would be no public disclosure of the factual material on which the findings of the Committee were based or the reasons which the Determining Officer gave to support the making of the final determination of 26 May, 2000.

31. Resolution of the issue raised by the applicant must begin with an acknowledgment of the general principle that, unless constrained by considerations effectively abrogating or fettering the right, a person who has made an application in a civil matter to a statutory tribunal has an inherent right to withdraw that application at any time before a decision is given, with the consequence that the application is no longer a subsisting or effective application and the tribunal is deprived of the power to make any order except, perhaps, where power is conferred on the tribunal to make incidental orders as to costs or the like. The answer to the question whether there are considerations effectively abrogating or fettering the right depends upon the proper construction of the statutory provisions setting up the tribunal and regulating its powers and proceedings. Cases in which these matters have been considered are R v Hampstead and St Pancras Rent Tribunal; Ex parte Goodman [1951] 1 KB541; Boal Quay Wharfingers Ltd v King's Lynn Conservancy Board [1971] 1WLR 1558; [1971] 3 All ER 597; Schipp v Herfords Pty Ltd [1975] 1 NSWLR 412; Hanson v London Rent Assessment Committee [1976] QB 394 and on appeal, sub nom Hanson v Church Commissioners for England [1978] QB823; Re Eastman and Department of the Treasury (Administrative Appeals Tribunal – unreported 17 August 1984); Re Stevenson and Commonwealth of Australia (1987) 7AAR 343; Re Queensland Nickel Management Pty. Ltd and Great Barrier Reef Marine Park Authority (No.3) (1992) 28 ALD 368; Minister for Immigration and Ethnic Affairs v Polat (1995) 37 ALD 394; and Uniden Australia Pty Ltd v Collector of Customs (1997) 74 FCR 190.

32. Considerations which may operate to abrogate or fetter the right of withdrawal are:
- (a) where the exercise of the right would cause consequent vexation to another party to the proceedings: Schipp v Herfords Pty Ltd [1975] 1 NSWLR412 per Samuels J. A. at p. 423;
 - (b) where the exercise of the right would prejudice the position of persons not party to the proceedings but who have an appropriate interest in the outcome: Hanson v London Rent Assessment Committee [1976] QB 394 per Lord Widgery C.J. at pp 400-401;
 - (c) where the dispute is one in which there is a public interest involved: Hanson v Church Commissioners for England [1978] QB 823 per Lord Denning M.R. at pp. 832-3, per Roskill L.J. at pp 835-6 and per Lawton L.J. at p839.

33. We turn now to a consideration of the relevant legislative provisions for the purpose of determining whether those provisions expressly or implicitly remove or restrict any right which the applicant might otherwise have had to withdraw the request for a review of the final determination made on 26 May 2000.

34. In Yung v Adams (1997) 80 FCR 453 Davis J said at p.459:

“The Federal Parliament has no general power to regulate the activities of medical practitioners. Therefore, under Pt VAA, the power to discipline in relation to ‘inappropriate practice’ must be understood as a power to discipline in relation to conduct which is related to the payments which are made by the Commonwealth under the Act by way of medical benefits and the like. Accordingly, the reference to ‘inappropriate practice’ in s. 82 refers to conduct in relation to which Commonwealth benefits were paid or payable and in respect of which the medical practitioner failed in some way to meet the standards of the general body of the members of the profession in which the services were rendered. The Commonwealth’s interest is to see that the services which are provided by a medical practitioner and for which a Commonwealth benefit is or may be claimed are services in respect of which the medical practitioner provides due care and skill, that a claim if made is brought under the correct item and that overservicing does not occur”.

And at p.472 his Honour, after referring to decisions of the High Court, said:

“As those cases show, directions under s 106U with respect to a reprimand, counselling, the repayment of benefits and disqualification are not imposed as a punishment. They are imposed with a view to protecting patients and the Commonwealth against abuse of the system”.

35. Reference has already been made to the provisions contained in Part VA and, in particular, to sections 116 and 119. It is clear from a number of decisions of the Federal Court of Australia that the role of a Tribunal established under that Part is not confined to reviewing the appropriateness of the directions given by the Determining Officer under section 106U but extends to a review of the material that was before the Committee and the Committee’s findings as set out in its report. It is also established

that such a Tribunal has no power to receive further material. Such a Tribunal is also limited in the orders it may make: it may affirm or set aside the determination, or set aside the determination and make any other determination that the Determining Officer is empowered to make under section 106T.

36. A final determination made under section 106T does not take effect immediately upon its making. Under subsection 106V(1) it will take effect, in the absence of review proceedings, 28 days after the Determining Officer gives a copy to the person under review. Subsection 106V(2) deals with the situation when a request for review is lodged within the period prescribed by paragraph 114(2)(c). Subsection 106V(3) deals with the situation if an appeal is subsequently brought under section 124A.

37. Subsection 106V(2), however, deals only with two situations. If, on the review, the final determination is set aside, the determination will never take effect. If, on the review, the final determination is affirmed or varied, it will take effect at the expiration of the period allowed for the institution of an appeal. If an appeal is instituted the determination will not take effect until the appeal and any further appeal are determined when it will take effect in accordance with the judgment on the appeal. However, if the appeal lapses or is withdrawn, the determination takes effect when the appeal lapses or is withdrawn (subsection 106V(4)).

38. It is of some significance for present purposes that, while the legislature has expressly recognised that a practitioner who has brought an appeal under section 124A has a right to withdraw the appeal, there is no such recognition of a right to withdraw a request under section 114 and, in consequence, no express provision as to the date of effect of the determination the subject of the request.

39. While it is of importance, in the case of a final determination containing any of the directions permitted by section 106U, to be able to ascertain with precision the date of effect of the determination, it is of critical importance in a case, unlike the present, where the determination directs full or partial disqualification. The period of such disqualification is, by subsections 106U(3) and (4), made to depend for its starting date upon the date "when the determination takes effect". The matter is of critical importance for the Commonwealth so that it may properly withhold Medicare benefits in respect of services the subject of the disqualification. It is also of critical importance to patients of the practitioner under review to know whether Medicare benefits will be payable in respect of services they seek and receive from the practitioner.

40. The consequence of a practitioner having an inherent right to withdraw, after the expiration of the 28 day period referred to in subsection 106V(1), a request made under section 114 would appear to be that the determination would never come into effect. Clearly, the Tribunal would, in the face of the provisions in section 119, have no authority to fix a date upon which the determination is to take effect.

41. It follows that, in order that an effective date of effect of the determination may be ascertained in accordance with section 106V, it is necessary that the Tribunal proceed with the review and make one of the orders for which section 119 provides.

42. In our opinion the considerations to which reference has been made lead to the conclusion that the provisions disclose an intention on the part of the legislature that a practitioner who has made a request under section 114 for the review of a final determination made under section 106T may not withdraw that request so as to preclude a Professional Services Review Tribunal from proceeding to review the determination. The contention put forward on behalf of the applicant is rejected.

The Issue Raised by the Respondent

43. Counsel for the respondent Determining Officer submitted that the Tribunal had no authority to review the final determination as, so it was asserted, the applicant's request for review was not served on the Minister within the period prescribed by paragraph 114(2)(c). That paragraph requires that a request for the reference by the Minister of a final determination made under section 106T to a Tribunal for review "be served on the Minister within 28 days after the date upon which the notification of the determination is served on the person making the request". Section 106UA provides that, as soon as possible after making a final determination, the Determining Officer is to give a copy of it to the person under review.

44. Counsel for the applicant took no part in the argument upon the contention raised by the respondent.

45. The case which the respondent sought to make was that a copy of the final determination was delivered to the Chatswood 24 Hour Medical Centre on 31 May 2000 and that, even if the applicant did not personally receive the copy until the following day, 31 May 2000 is the date from which the period of 28 days referred to in paragraph 114(2)(c) was to be calculated. To sustain that proposition counsel relied on section 28A of the Acts Interpretation Act 1901 (Cth) which, so far as material, provides:

"28A(1) For the purpose of any Act that requires or permits a document to be served on a person, whether the expression 'serve', 'give' or 'send' or any other expression is used, then, unless the contrary intention appears, the document may be served:

(a) on a natural person:

(i)....

(ii) by leaving it at ...the address of the place of...business of the person last known to the person serving the document; or

(b)....."

It followed, so it was submitted, that, as the last day for service on the Minister of the request for review was 28 June, 2000, the request was not served within the prescribed period.

46. Counsel for the respondent further submitted that the jurisdiction of the Tribunal depended upon the request for review having been made within the

prescribed period relying for this submission upon the reference in section 116 to the President of a Tribunal receiving “under section 115” a request for review and to the reference in subsection 115(1) to the receipt by the Minister of a request “under section 114”. It followed, so it was submitted, there being no statutory provision permitting an extension of the time prescribed by paragraph 114(2)(c), that the Minister was not authorised to forward to the President of the Tribunal the request for review made by the applicant and the Tribunal was not authorised to conduct the review.

47. If it be correct that the jurisdiction of the Tribunal to review the final determination made on 26 May 2000 depends upon it being established that the request for that review was not served on the Minister within the prescribed period, the question arises how the necessary material can be put before the Tribunal to establish the relevant facts on which the submission is based, thus enabling the Tribunal to, in effect, review the decision of the Minister (who is not, and cannot be made, a party to the proceedings before the Tribunal) that the request was one appropriate to be forwarded to the President of the Tribunal under section 115. Relevant to that issue is the absence from the statutory provisions of a power in the Tribunal to examine witnesses or receive documentary material other than the documents referred to in subsection 115(1), those documents clearly not including documentary material relevant to the question whether the request for review was served on the Minister within the prescribed period. The absence of a power to examine witnesses is reflected in the provisions of section 121 which, while giving protection to members of the Tribunal and persons representing another before the Tribunal, makes no reference to the protection of a witness: cf. subsection 106F(3) in the case of a person appearing as a witness before a Committee. Also significant is the absence of a power in the Tribunal to administer an oath or affirmation or issue a subpoena.

48. In our opinion, the jurisdiction of the Tribunal to review the final determination does not depend in any sense upon it being established that the request by the applicant was served on the Minister within the prescribed period. We take the view that the jurisdiction of the Tribunal arose when the President received from the Minister the request made by the applicant. It follows that we do not regard the words “under section 115” appearing in section 116 as sufficient to import into the parameters of the jurisdiction of the Tribunal the language of section 115 limiting, by reference to section 114, the requests which the Minister is bound to forward to the President of a Tribunal to those served within the prescribed period. That limitation is addressed to the Minister and, if the decision that the request was one that might properly be forwarded to the President of the Tribunal is to be challenged, that must be done in curial proceedings.

49. We are, therefore, of the opinion that the Tribunal has jurisdiction to review the final determination made on 26 May 2000.

Conclusion

50. For the reasons set out above:

- (a) the contention put forward on behalf of the applicant that the Tribunal may not, in the circumstances, proceed further with the review of the final determination made on 26 May, 2000 is rejected;
- (b) the contention on behalf of the respondent that the Tribunal has no jurisdiction to review the final determination made on 26 May, 2000 is rejected.

The proceedings before the Tribunal are adjourned to a date to be fixed.

Counsel for the applicant:	Dr. G. A. Flick SC and Mr. J. Fitzgerald
Solicitors for the applicant:	Abbott Tout
Counsel for the respondent:	Ms C. Needham SC and Ms R. Henderson
Solicitors for the respondent:	Minter Ellison
Dates of hearing:	8 and 9 February 2001
Date of decision	9 March 2001

This and the preceding 13 pages comprise the decision and the reasons for decision of the Professional Services Review Tribunal constituted by The Hon A. R. Neaves, Dr. N. J. Radford and Dr. M. Williams given on the 9th day of March, 2001.

Dated this ninth day of March 2001

Diane Popple
Registrar