PROFESSIONAL SERVICES)
REVIEW TRIBUNAL) No. 3 of 2001

BETWEEN: HILDEGARD MARIA CHRISTINA DAMATO

Applicant

AND: CHARLES MASKELL-KNIGHT

Respondent

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

DATE: 27 June 2002

DECISION

The determination made herein by the respondent and dated 6 April 2001 is affirmed.

Alan R Neaves (sgd)
President

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REASONS FOR DECISION

THE TRIBUNAL:

Nature of the Proceeding

The matter before the Tribunal is the review, upon the request of Dr Hildegard Maria Christina Damato ("the applicant") of the final determination relating to the applicant made by Charles Maskell-Knight ("the respondent") and dated 6 April 2001. The matter arises under provisions of the Health Insurance Act 1973 (Cth)("the 1973 Act"), the Health Insurance Amendment Act (No1)1997 (Cth)("the 1997 Act") and the Health Insurance Amendment (Professional Services Review)Act 1999(Cth)("the 1999 Act") to which reference will be made later in these reasons. At the outset, however, it is to be noted that, although Part VA of the 1973 Act pursuant to which this Tribunal was

established and its proceedings regulated was repealed by item 63 of Schedule 1 to the 1999 Act (a provision which commenced on 1 August 1999), item 65 of that Schedule (which also commenced on that date) provides, inter alia, that the repeal does 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 the 1973 Act as in force immediately before the commencement of Schedule 1 to the 1999 Act continues to apply in respect of any such matter. It was not contended by either party that the present matter is other than such a matter.

The Applicant

2. The applicant obtained her primary medical qualification from the University of Munich in 1967. She was a resident medical officer at St. Joseph's Hospital, Sydney from 1968 to 1971 and at Auburn District Hospital from 1971 to 1974. Since 1974 she has carried on a general medical practice at 86 Percival Road, Stanmore which is also her residential address. She became a vocationally registered general practitioner on 1 December 1989.

The Referral

3. On 21 May 1997, Dr A.J. Parkes, who described himself as 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 Hildegard Maria Christina Damato in relation to whether she has engaged in inappropriate practice, in connection with the rendering and initiating of services, as defined by the Act pursuant to subsection 86(1) of the Act". In signing the document, Dr Parkes purported to act, not on his own behalf or on behalf of the Commission, but on behalf of the Managing Director of the Commission to whom, so the document said, the Commission had delegated its powers under subsection 86(1) of the 1973 Act.

4. As to the validity of the referral and what was done pursuant to it, reference should be made to item 5 of Schedule 1 to the 1997 Act which came into operation, so far as that item is concerned, on 6 November 1997. That item inserted in section 86 of the 1973 Act the following subsection:

> "(5) If, after 30 June 1994 but before the commencement of this subsection, a member of the Commission's staff (within the meaning of the Health

Insurance Commission Act 1973) purported to refer conduct of a person to the Director under this section, then for all purposes:

(a) the referral is taken to be, and always to have been, made by the Commission; and

(b) all proceedings, matters, acts and things taken, made or done (or purporting to have been taken, made or done) because of the referral are taken to have, and always to have had, the same force and effect as they would have, or would have had, if the referral in fact had been made by the Commission."

5. The document identified the referred services (see subsection 87(1) of the 1973 Act) as "all services rendered and initiated by Dr Damato from her practice location in the State of New South Wales during the period of 1 July 1995 to 30 June 1996, inclusive". Her practice location was identified as 86 Percival Street, Stanmore.

6. The reasons for the decision to refer were stated in paragraph C of the document in the following terms:

> "The Health Insurance Commission is concerned that Dr Damato's high average number of services per patient may be excessive. In addition, the Health Insurance Commission is concerned that the high proportion of long and prolonged consultations and home visits rendered by Dr Damato may be inappropriate and may not be reasonably necessary for the care of her patients.
>
> 1. High Average Number of Services per Patient:
>
> During the referral period Dr Damato provided 7,917 services of which 5,272 were surgery consultations and 2,622 home, hospital, institution, nursing home and emergency visits. Dr Damato has an average of 6.48 services per patient, which was more than the average services per patient provided by 95% of all active vocationally registered general practitioners in Australia. The Health Insurance Commission believes that some of the services rendered by Dr Damato are excessive and may not be reasonably medically necessary for the care of her patients.
>
> 2. High Level C and D Consultations and Home Visits:
>
> In the referral period 1 July 1995 to 30 June 1996, Dr Damato provided 7,917 services of which 7,894 were consultations, including nursing home, hospital and home visits. Approximately 24.8% (1,963) of all consultations were long consultations (item 36) and 5.97% (472) were prolonged consultations (item 44). This places Dr Damato above the 95th percentile for both long and prolonged consultations when compared to other active vocationally registered practitioners in Australia. During the referral period Dr Damato provided only 2 brief consultations (item 3).

> Dr Damato provided 549 standard home visits (item 24), 1,070 long home visits (item 37) and 290 prolonged home visits (item 47) during the referral period. This amounts to 1,909 home visits or 24.18% of all attendance items provided by Dr Damato, substantially higher than 99% of all other vocationally registered general practitioners in Australia. Dr Damato's level C home visits (1,070) and level D home visits (290) is substantially higher in proportion to her number of level B home visits (549).

For these reasons the Health Insurance Commission has formed the view that Dr Damato's conduct in connection with the rendering of Medicare services may constitute inappropriate practice."

7. The document then set out further material relating to the applicant and her practice under the following headings:

- Background of Dr Damato
- Health Insurance Commission Assessment
- Details of Health Insurance Commission Concerns
- Other Information of Dr Damato's Practice
- Chronological Record of this Referral.

8. Annexed to the referral document was a summary of the referred material together with 3 attachments and 6 reports. The attachments were described as:

- Census data
- Explanation of Artificial Neural Network
- Journal entries and extracts.

The 6 reports were described as:

- Daily item report - PIRD
- Monthly item report - PIRT
- Top 40 multiple servicing report
- Estimated time report - P/time
- Pharmaceutical benefits report
- Pathology, Diagnostic Imaging and Specialist Referral reports and graphs.

9. A copy of the referral document and its annexures was sent to the applicant who was, by notice dated 21 May 1997, invited to make written submissions to the Director of Professional Services Review within 14 days from the date of the notification stating why the Director should dismiss the referral without setting up a Committee (see subsection 88(2) of the 1973 Act). By letter dated 6 June 1997 addressed to the Director of Professional Services Review, the applicant responded to the invitation. The letter

emphasised that the majority of her patients were of ethnic descent and asserted that they were very demanding and required lengthy and repeated consultations regarding their health. The letter also gave a brief outline of the condition of four of the most frequently visited patients.

Professional Services Review Committee

10. On 18 March 1999, the Director of Professional Services Review, Dr A.J. Holmes, signed an instrument under sections 93 and 95 of the l973 Act setting up Professional Services Review Committee No 84 ("the Committee") to consider whether the applicant had engaged in inappropriate practice.

11. The Committee comprised a Chairperson and two members. The Chairperson was described in the instrument setting up the Committee as a Deputy Director within the meaning of Part VAA of the 1973 Act and a medical practitioner. Each of the two members was therein described as a general practitioner.

Preliminary Consideration by Committee

12. In its preliminary consideration of the referral the Committee determined that it was necessary to hold a hearing into the matter and to proceed by way of a suitable statistical sampling methodology. The Committee determined that it would proceed in accordance with the sampling methodology set out in the attachment to a letter dated 24 March 1999 sent to the Director of Professional Services Review by Professor D. Nicholls of the Department of Statistics and Econometrics within the Faculty of Economics and Commerce of the Australian National University. That letter contained the following paragraphs:

> "The approach should be applied in 'straight forward' cases, that is in cases where there is perceived inappropriate practice in the case of individual classes of services. Even then care must be taken to ensure basic statistical principles are adhered to, for example the samples are chosen in a random manner and, if two or more types of service are of concern, the samples chosen must be independent of each other.
> The approach adopted in these directions has been designed to be simple and easily understood. By taking this approach it is then a straightforward matter, having determined the amount of inappropriate practice, to quantify the amount of reimbursement due as a result of this inappropriate practice"

13. Professor Nicholls set out the sampling methodology in the following terms:

“PROFESSIONAL SERVICES REVIEW SCHEME - DIRECTIONS AS TO SAMPLING

1.1 If a referral relates to one or more specified classes of services that may be of concern, the Commission of its own initiative or at the request of the DPSR or a PSRC, may supply a random sample (the ‘preliminary random sample’) drawn from each of the classes included in the referral.

1.2 For a class of services specified in the referral, the formula for calculating the appropriate sample size (n) of the preliminary random sample is

$$n = N/\{1+0.01(N-1)\}$$

where N = Class size. When n is calculated if it is not a whole number it is to be rounded up to the next whole number.

1.3 The size of the preliminary random sample (n) is the size necessary to predict with 95% confidence that the percentage of inappropriate practice derived from the sample will be within ± 10% of the actual percentage in the total class of services of interest, at a hypothesized incidence of inappropriate practice of 50% (the incidence requiring the largest sample).

1.4 If the Committee proposes to make a finding based on statistical sampling, the Committee should examine a sample of approximately 30 services (the ‘exploratory sample’) from the preliminary random sample and determine whether or not each of these services constitutes inappropriate practice. The Committee must then calculate the percentage of services in the exploratory sample that constitute inappropriate practice and, if required, round down this percentage to the nearest whole number to give the ‘rounded percentage’ (p)

1.5 In cases where a selected service cannot be successfully matched with the records of the person under review that service should be excluded from the analysis. The percentage in clause 1.4 should then be based on the sample size minus the number of mismatches. At the very minimum the sample size must be no less than 25. The Committee has the option of selecting and examining further services to make up for any actual or possible mismatches, without any compulsion to examine 30 services.

1.6 If the percentage worked out in the way set out in clause 1.4 is less than 20%, no further statistical inferences are to be made concerning the referral.

1.7 If the rounded percentage is 20% or greater, the Committee must examine further cases from the preliminary random sample until it has examined a random sample of size m (the 'final random sample') where

$$m = A/B$$

with $A = N\{4d(1-d)+0.01\}$
$B = \{4d(1-d)+0.01N\}$
and $d = 0.01p$,
N = Class size,
p = Percentage of services that represent inappropriate practice (rounded down to the nearest whole number if necessary).

1.8 If the size of the final random sample m is less than or equal to the size of the exploratory sample (say 30), then the size of the final random sample is taken as the size of the exploratory sample (ie m = (say) 30).

1.9 The Committee must determine whether each individual service included in the final random sample constitutes inappropriate practice, and work out the percentage of services in that sample (rounded down to the nearest whole number if necessary) that constitutes inappropriate practice.

1.10 The percentage worked out in the way described in clause 1.8 [sic] must then be reduced by 10 percentage points. The resulting percentage must be taken to be the percentage of services (of the same kind as the class of services being considered and which were included in the referral) that constitute inappropriate practice.

1.11 If there were a number of mismatches which resulted in the final sample size being reduced, the percentage of inappropriate practice would be determined from this reduced sample. The 10% reduction referred to in clause 1.10 would be replaced by

$$100\{\sqrt{(C/D)}\}\ \%$$

where $C = 4d(1-d)(N-s)$
$D = N(s-1)$
and s= size of the reduced final sample
$d = 0.01q$
N = Class size
q = Percentage of services based on the size of the reduced final sample that represents inappropriate practice (rounded down to the nearest whole number if necessary).

1.12 While clauses 1.1-1.11 refer to classes of services either initiated or rendered (which may include individual item and/or multiple item episodes), the sampling procedure is not limited to classes of services. For example, the procedure may be applied equally as well to classes of patients.

Notes:

[1. Call the percentage determined in clause 1.9 'x'. To a confidence level of 95%, the percentage of services in the sample that constitutes inappropriate practice is within the interval (x±10)%. For the purposes of the Committee's findings, the lower limit of that interval is to be taken, that is (x - 10)%.

2. The use of the process is demonstrated in the example which follows. This is intended to be an illustration only and assumes the referral involves 500 services of the same item number and there were no mismatches in the exploratory sample.

Applying the formula in clause 1.2 the preliminary sample size is n = 84. The Committee will consider the firsts 30 services (the exploratory sample) and make a finding as to what number, if any, of those services were inappropriate.

If the Committee decides that less than 20% (ie less than 6 of the 30) were inappropriate, no conclusion can be drawn as the result will not be statistically valid.

If the Committee decides that 6 or more of the services were inappropriate, say 10 or 33.3%, this percentage is rounded down to the nearest whole number, that is 33%. From the formula in clause 1.7 with N = 500 and p = 33, the final sample size m = 76.

Given a sample of 30 has already been considered, the next 46 services should be selected from the remaining 54 services in the preliminary random sample of 84 services (ie {84-30}=54) to make up the final random sample and if it finds that 25 of the 76 services, ie 32%, were inappropriate the Committee can conclude that 22% (=32%-10%) or 110 of the 500 services were inappropriate.]"

14. The Committee decided to examine the applicant's conduct in connection with the rendering by her during the referral period of services under the following items in the General Medical Services Table, namely:

- Item 24 (Level B) home visit;
- Item 36 (Level C) consultation;
- Item 37 (Level C) home visit;
- Item 44 (Level D) consultation, and
- Item 47 (Level D) home visit.

The Daily Item Report (PIRD), being one of the reports annexed to the referral document shows the number of services rendered by the applicant during the referral period in respect of each of the above items was:

- Item 24 549
- Item 36 1,963

- Item 37 1,070
- Item 44 472
- Item 47 290

These figures are the "Class sizes" referred to in Professor Nicholls' sampling methodology.

15. At the material time an item 24 (Level B) home visit was a professional attendance by a general practitioner at a place other than consulting rooms, hospital, nursing home or institution involving taking a selective history, examination of the patient with implementation of a management plan in relation to one or more problems or a professional attendance of less than 20 minutes duration involving components of a service to which items 36, 37, 44, 47 or certain other items applied. A Level C consultation or home visit was a professional attendance by a general practitioner at consulting rooms (item 36) or at a place other than consulting rooms, hospital, nursing home or institution (item 37) involving taking a detailed history, an examination of systems, arranging any necessary investigations and implementing a management plan in relation to one or more problems, and lasting at least 20 minutes, or a professional attendance of less than 40 minutes duration involving components of a service to which items 44, 47 or certain other items applied. A Level D consultation or home visit was a professional attendance by a general practitioner at consulting rooms (item 44) or at a place other than consulting rooms, hospital, nursing home or institution (item 47) involving taking an exhaustive history, a comprehensive examination of multiple systems, arranging any necessary investigations and implementing a management plan in relation to one or more complex problems, and lasting at least 40 minutes or a professional attendance of at least 40 minutes duration for implementation of a management plan.

16. The Committee, by the application of the formula set out in paragraph 1.2 of Professor Nicholls' sampling methodology to each of the "Class sizes" referred to in paragraph 14 above, determined the appropriate size of the preliminary random sample in respect of the relevant class of services to be examined. The appropriate sample sizes so determined were:

Item	Class Size	Sample Size
Item 24	549	85
Item 36	1,963	96
Item 37	1,070	92
Item 44	472	83
Item 47	290	75

17. The Committee made arrangements with the Health Insurance Commission to be supplied with separate lists of services in respect of each of the five areas proposed to be investigated. The lists (which may be referred to as lists numbered respectively 1 to 5) identified:

- 85 item 24 services (List 1);
- 96 item 36 services (List 2);
- 92 item 37 services (List 3);
- 83 item 44 services (List 4); and
- 75 item 47 services (List 5),

all rendered by the applicant during the referral period. The entries on each list gave the name, address and date of birth of the patient and the date of the service. Each list was supplied in two formats – one in which the entries were sorted in the order in which the services had been randomly selected, the other in which the entries were sorted in alphabetical order by reference to the patients' names. The lists in which the entries were sorted in alphabetical order are not included in the material before the Tribunal. In each of the lists in which the entries were sorted in the order in which the services were randomly selected, the name of some patients appeared more than once. The name of some patients appeared in more that one list.

Hearing by the Committee

18. Pursuant to section 102 of the 1973 Act, the Committee, by a document dated 28 April 1999, gave the applicant notice of a hearing to be held on 1 June 1999. The notice stated that, if necessary, the hearing would be adjourned to a later date. The document required the applicant to produce by 5 pm on 10 May 1999 the documents referred to in Schedule 1 to the notice and to appear and give evidence at the hearing.

19. Upon the applicant's request, an extension of time to produce the documents was granted until 5 pm on 7 June 1999. An amended notice of hearing was subsequently issued, dated 25 May 1999. It gave the applicant notice that the hearing would take place on 15 June 1999 and, if necessary, on a later date.

20. The documents which the applicant was required to produce were described as:

> "All complete and original documents relating to the rendering of services by Dr Damato for the patients identified on the attached lists numbered 1 to 5.
>
> All practice appointment books, day books, diaries and attendance registers for Dr Damato during the Referral Period.

A Curriculum Vitae for Dr Damato."

21. The attached lists numbered 1 to 5 were identical to the lists referred to in paragraph 17 above except that the columns in those lists identifying the dates of the randomly selected services were omitted.

22. Schedule 2 to the Notice of Hearing gave the following particulars of the matter to which the hearing was to relate:

> "This hearing concerns your conduct in relation to services rendered by you during the Referral Period, from your practice location in the State of New South Wales. The issue to be determined is whether you have engaged in inappropriate practice in connection with the rendering of some or all of these services.
>
> Particulars of the Committee's concerns as at the date of this notice are:
>
> - whether you were able to provide an appropriate level of clinical input into the services rendered during the Referral Period, with particular reference to your rendering of the services covered by Medicare Benefits Schedule items 24, 36, 37, 44 and 47; and
> - whether the services that you rendered during the Referral Period were clinically relevant, that is, necessary for the appropriate treatment of the patients to whom they were rendered.
>
> Further concerns may emerge during the hearing. You will be made aware of any other concerns that arise and will be given adequate opportunity to address them."

23. The Notice of Hearing dated 28 April, 1999 was forwarded to the applicant under cover of a letter of the same date from the Secretary to the Committee. The letter provided the applicant with an outline of the proceedings before the Committee and included the following:

> "The Notice of Hearing also requires you, pursuant to section 105A of the Act, to produce certain documents. Please note that the words 'all complete and original documents' in Schedule 1 of the Notice of Hearing mean all original documents which relate to your treatment, during the Referral Period, of the patients listed and include clinical records, progress notes, specialist referral letters, specialist reports, pathology and diagnostic imaging results.
>
> The Committee hopes to return all of the documents to you as soon as they have been copied. To ensure that you have the same information as the members of

the Committee, you will also be provided with a separate set of the copied documents.

I should point out, however, that the return of the patient records is conditional upon your agreeing to bring with you, at any time during the hearing process that may be determined by the Committee, whichever of the records the Committee decides to discuss with you. In this respect, you will be informed in writing of those original records you would be expected to bring to the hearing on any particular sitting day."

24. The hearing by the Committee commenced on 15 June 1999 and continued on 16 July 1999, 27 July 1999 and 13 August 1999. On the first sitting day the applicant was accompanied by her legal adviser. On the subsequent sitting days the applicant was accompanied by her daughter.

25. At the commencement of the hearing on 15 June 1999 the Chairperson explained the procedure the Committee proposed to follow. Included in the exhibits tendered to the Committee on that day were:

- a copy of the letter dated 24 March 1999 from Professor Nicholls to the Director of Professional Services Review to which was attached Professor Nicholls' sampling methodology (see paragraphs 12 and 13 above);
- a copy of the letter dated 1 April 1999 from the Secretary to the Committee to the Health Insurance Commission requesting that the Committee be supplied with the lists referred to in paragraph 17 above; and
- a copy of the response dated 22 April 1999 from the Health Insurance Commission including copies of the lists referred to in paragraph 17 above in which the entries were sorted in the order in which the services had been randomly selected.

The Chairperson explained that, in accordance with the methodology outlined by Professor Nicholls, the Committee would be examining the applicant's conduct using exploratory samples of her services in the areas proposed to be investigated. The Chairperson further stated that, first, the Committee would look at the applicant's use of item 36, the long surgery consultation item, and, depending on the outcome of the Committee's finding in respect of the exploratory sample, the Committee might examine additional services in accordance with the methodology provided by Professor Nicholls.

26. Prior to 15 June 1999 the applicant had been supplied with a copy of the list numbered 2 identifying the 96 item 36 randomly selected services rendered by the applicant during the referral period, each entry in that copy of the list identifying both the

patient and the date of the service. Prior to the continuation of the hearing on 16 July 1999, the applicant was supplied, under cover of letters dated 29 June 1999 and 7 July 1999 respectively, with a copy of the list numbered 4 and the lists numbered 1, 3 and 5 identifying the services which the Committee proposed to investigate, the entries in those copies identifying both the patient and the date of the service. On each sitting day, namely 16 July 1999, 27 July 1999 and 13 August 1999 the Chairperson referred, in terms similar to those set out in the last preceding paragraph, to the procedure which the Committee proposed to follow, stating specifically that the procedure was in accordance with the methodology provided by Professor Nicholls.

27. At the conclusion of the hearing on 13 August 1999 the Chairperson informed the applicant that the Committee had decided not to proceed with the examination of the item 24 (Level B) home visits rendered by the applicant during the referral period.

28. During the hearing the Committee examined the applicant in relation to 30 services forming the exploratory samples from each of the groups of services rendered under items 36, 37, 44 and 47 and in relation to the additional services which the Committee calculated it was required, by paragraphs 1.7 and 1.8 of Professor Nicholls' methodology, to examine in respect of the group of item 44 services. In respect of the other three groups of services the Committee determined, correctly, that paragraphs 1.7 and 1.8 of Professor Nicholls' methodology did not require that additional services be examined.

29. By letter dated 25 August 1999 addressed to the applicant, the Chairperson outlined the Committee's concerns and offered the applicant an opportunity to call witnesses, to provide further evidence to the Committee or to submit written submissions. The solicitors for the applicant replied by letter dated 9 September 1999 informing the Committee that the applicant did not wish to call witnesses or provide further evidence. The solicitors contended, however, that a number of the concerns set out in the letter dated 25 August 1999 fell outside the scope of the referral.

30. Subsequently, under cover of a letter dated 15 February 2000 signed by the Secretary to the Committee, a copy of the Committee's draft report was provided to the applicant. The letter informed the applicant that, if she had any comments on the draft report or wished to make further submissions in relation to the Committee's findings, she should forward them, in writing, to the Secretary to the Committee before 5.00pm on 15 March 2000. The letter also contained the following:

> "With regard to the Committee's use of sampling, sections 106J(2) and (3) of the Act outlines [sic] your rights concerning sampling. I have attached a copy of the relevant extract from the Act as well as a copy of the sampling directions"

Attached to the letter was a copy of Subdivision C of Division 4 (sections 106G – 106K) of the 1973 Act and a copy of a document headed "Professional Services Review Scheme – Directions as to Sampling (No. 2)", being a document dated 31 January 1995 issued by the Minister for Human Services and Health and described as giving directions in accordance with advice received from the Australian Bureau of Statistics for the purposes of sections 106H and 106J of the 1973 Act. Some further reference will be made to these provisions later in these reasons.

31. The applicant responded by letter dated 10 March 2000 reading as follows:

> "Once again I have been invited to make further submissions regarding Report of Professional Services Review Committee No. 84.
>
> Unfortunately, I have little to add to what has already been said except to reiterate the fact that the year in referral, 1995 – 1996, has been for me one of the busiest years in memory. In fact, I had been working for many months up to 11pm and midnight.
>
> In the past, I have been commended by the AMA for outstanding services to the community. I never spared any energy for the dedication to my patients. With clement and inclement weather, I always did my duty at the extreme of my strength. It appears that my duty has been interfered with by the judgment of 'statisticians'.
>
> In the last twelve months due to my age and the number of patients who are now deceased (many because of chronical illnesses), my income has been reduced greatly.
>
> In respect to what has been said, I would like to put to the attention of the committee the submission written by Tress, Cocks & Maddocks [sic] dated 9 September 1999"

The submission by Tress, Cocks & Maddox, Solicitors for the applicant, is referred to in paragraph 29 above.

The Committee's Report

32. Pursuant to section 106L of the 1973 Act, the Committee gave the Determining Officer a written report dated 31 March 2000. The report stated the Committee's findings in the following terms:

> "In accordance with section 106L of the Health Insurance Act 1973 ('the Act'), the Professional Services Review Committee No. 84 finds that the conduct of the practitioner under review, Dr. Hildegard Maria Christina Damato, in connection with rendering of some of the services that were the subject of the referral from the Health Insurance Commission was, in the Committee's opinion, unacceptable to the general body of general practitioners practising in general medical practice in Australia.
> The Committee members are unanimous in these findings.
> Particulars of the services to which the Committee's findings relate are provided in the body of this report and at Appendices 1-4."

33. The Committee's conclusion as set out at the end of its report was as follows:

> "After considering the Referral and all the evidence before it and after applying its combined body of knowledge, the Committee has concluded that Dr Damato's conduct in relation to those services referred for consideration would be unacceptable to the general body of general practitioners practising in general medical practice in Australia.
>
> The Committee therefore concludes that Dr Damato has engaged in inappropriate practice, as defined in Section 82 of the Health Insurance Act 1973 in respect of
> - 83% of all MBS item 36 (Level C) consultation;
> - 90% of all MBS item 37 (Level C) home visit;
> - 81% of all MBS item 44 (Level D) consultation; and
> - 86% of all MBS item 47 (Level D) home visit
>
> rendered by Dr Damato during the Referral Period."

34. The findings made by the Committee at each step in the sampling methodology are summarised in the table below:

Methodology	Surgery Consultations		Home Visits	
	Level C Item 36	**Level D Item 44**	**Level C Item 37**	**Level D Item 47**
Class size	1963	472	1070	290
Sample size	96	83	92	75
Exploratory Sample (a) Number examined (b) Number inappropriate (c) Percentage inappropriate (rounded down)	 30 28 93%	 30 27 90%	 30 30 100%	 30 29 96%
Supplementary Sample (a) Number examined (b) Number inappropriate	 - -	 5 5	 - -	 - -
Total Sample (a) Number examined (b) Number inappropriate (c) Percentage inappropriate (rounded down) (d) Percentage rounded down and reduced by 10%	 30 28 93% 83%	 35 32 91% 81%	 30 30 100% 90%	 30 29 96% 86%
Extrapolation Number inappropriate in class size	1629	382	963	249

35. The Committee's report, after referring to the review process, the applicant's personal and practice details and the patient services rendered by her during the referral period, summarised the evidence on which the Committee's findings of fact were based. The report summarised the sampling methodology that was followed, explaining that, where it was not possible to match the Health Insurance Commission's services data against the medical records produced by the applicant, the Committee substituted, as the service to be investigated, the next name in the sampling order. Paragraph 12 of the report stated:

> "In considering whether the services rendered by Dr Damato may have been inappropriate and not reasonably necessary, the Committee considered in context:
>
> - the clinical content of each service;
> - whether that content satisfied the MBS item descriptors as in force at that time; and
> - the qualitative aspects of the service in the context of Dr. Damato's overall management of her patients."

36. Following reference to the requirements of items 36, 37, 44 and 47 in the General Medical Services Table, the Committee's findings in respect of the services examined are stated. In respect of the group of item 36 services examined the report stated (paragraph 21):

> "The Committee was unanimous in its finding that, in 28 (93%) of the 30 services examined, Dr. Damato had failed to provide an appropriate level of clinical input necessary to demonstrate the clinical relevance of those item 36 services. The services were excessive in relation to the presenting complaint; they contained little, if any, history, diagnosis, treatment and/or management plan. Furthermore in a number of instances, having regard to the evidence presented, the Committee was of opinion that a competent practitioner would have spent less than 20 minutes treating those patients. The services could not be considered as reasonably necessary for the care of her patients. In the Committee's opinion, Dr. Damato's conduct in connection with the rendering of those services would be unacceptable to the general body of general practitioners."

An almost identical statement was made in the report in respect of each of the other groups of items that were investigated, appropriate changes being made to the number of services examined, the number found to be inappropriate and the duration of the time interval forming part of the relevant MBS item descriptor (the report, paragraphs 27, 33 and 40). The Committee's findings are summarised in paragraphs 33 and 34 above. Appendices 1 – 4 of the report set out the Committee's findings in respect of each of the 30 randomly selected item 36, 37 and 47 services and the 35 randomly selected item 44 services investigated by the Committee. Further reference to those appendices will be made later in these reasons.

37. The report also expressed the Committee's concerns as to the applicant's clinical knowledge and competency, the state and content of the applicant's medical records and her understanding of her obligations under Medicare.

The Final Determination

38. On 6 April 2001, the respondent, who described himself as "Determining Officer by virtue of a Ministerial appointment made in accordance with section 106Q of the Act" signed a document described as "Final Determination, Section 106T, Health Insurance Act 1973". The document recited that the Committee had found that, in its opinion, the

applicant had engaged in inappropriate practice as defined in section 82 of the 1973 Act and directed that:

> "(1) in accordance with paragraph 106U(1)(a) of the Act, Dr Damato be reprimanded by the Director, Professional Services Review, or the Director's nominee;
>
> (2) in accordance with paragraph 106U(1)(b) of the Act, Dr Damato be counselled by the Director, Professional Services Review, or the Director's nominee;
>
> (3) in accordance with paragraph 106U(1)(c) of the Act, Dr Damato repay to the Commonwealth Medicare benefits totalling $54,260.65 being:
>
> (a) $27,041.40 in respect of 1,629 Medicare Benefit Schedule Item 36 services rendered by Dr Damato during the Referral Period;
>
> (b) $16,082.10 in respect of 963 Medicare Benefits Schedule Item 37 services rendered by Dr Damato during the Referral Period;
>
> (c) $6,742.30 in respect of 382 Medicare Benefit Schedule Item 44 services rendered by Dr Damato during the Referral Period;
>
> (d) $4,394.85 in respect of 249 Medicare Benefit Schedule Item 47 services rendered by Dr Damato during the Referral Period;
>
> and that any Medicare benefit that would otherwise be payable for these services cease to be payable;
>
> (4) in accordance with subparagraph 106U(1)(h) of the Act, Dr Damato be fully disqualified for a period of 4 months from the time when this determination takes effect."

Attached to the final determination was a statement of reasons. Also attached to the final determination was a statement setting out the calculations by which the respondent arrived at the amount of $54,260.65 referred to in Direction (3) of the final determination.

Request for Review of Final Determination

39. By letter dated 2 May 2001 addressed to the Minister for Health and Aged Care, Messrs Tress Cocks & Maddox, Solicitors, sought on behalf of the applicant a review of the final determination made on 6 April 2001. The letter set out 22 grounds on which the review was sought. Not all of the grounds were relied upon in argument before the Tribunal.

40. The request for a review of the final determination was subsequently forwarded to the President of this Tribunal.

Relevant Legislative Provisions

41. Prior to the date of the Committee's report (31 March 2000), the 1999 Act, to which some reference has already been made, came into operation. The amendments made by that Act to the 1973 Act included:

- a provision (see item 44 of Schedule 1) repealing section 106L (providing for the Committee to give to the Determining Officer a written report setting out its findings);

- a provision (see item 47 of Schedule 1) repealing section 106Q pursuant to which the respondent was appointed as the Determining Officer and repealing 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);

- 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 (to which some reference has already been made) 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 Commission to the Director of Professional Services Review appointed under section 83 of the 1973 Act and that the 1973 Act as in force immediately before the commencement of Schedule 1 to the 1999 Act continues to apply in respect of any such matter. As previously mentioned, it was not contended by either party that the matter presently before the Tribunal is other than such a matter.

42. 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) an Australian resident, an expression which is itself defined in section 3. The expression

"professional service" 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.

43. 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 1997 Act and the 1999 Act must be disregarded as those amendments do not apply to a matter, such as the present, which was referred under section 86 of the 1973 Act before the respective dates of commencement of those amending Acts. In what follows the provisions of the 1973 Act are stated in the form relevant to the resolution of the issues that arise in this review.

44. 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 general medical practice are to be taken to be specialists in that specialty.

45. Subdivision C of Division 4 of Part VAA provides that, in the circumstances there stated, a Professional Services Review Committee may, in making findings on the conduct of the person under review in connection with the referred services, base its findings wholly or partly on its findings on his or her conduct in connection with a sample of those services (subsection 106H(1)), provided the requirements of subsection 106H(2) are satisfied. Those requirements are that the sample must be produced in accordance with directions issued under section 106K and must only be used in accordance with those directions. Section 106J confers certain rights on the person under

review where the Committee proposes to make a finding based on use of a sample of services under section 106H.

46. 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.

47. 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 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).

48. Section 106U provides for the content of determinations. A determination must contain one or more of the prescribed directions. These include a reprimand, counselling, repayment to the Commonwealth of 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" and disqualification wholly or partially. Under subsections 106U(3) and (4) as amended by items 21 and 22 of Schedule 1 to the 1997 Act, a direction for partial or full disqualification (paragraphs 106U(1)(g) and 106U(1)(h)) must specify a period of disqualification of up to 3 years to start when the determination takes effect.

Role of the Tribunal

49. The role of the Tribunal (see section 116 of 1973 Act) is to review the final determination dated 6 April 2001. By virtue of section 119 of that Act, the Tribunal is required to consider the matter to which the determination relates having regard to the grounds set out in the request dated 2 May 2001, the documents forwarded by the Minister with the request and any addresses made to the Tribunal during the proceedings on the review and, where the determination consists of a final determination under section 106T, to 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. The Tribunal's role is not, however, 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. In reviewing the material that was before the Committee, the Tribunal having no power to receive further material, it is incumbent upon the Tribunal to exclude from its consideration any material that was otherwise relevant to an aspect of the investigation that the Committee was empowered to conduct but in relation to which there was a denial by the Committee of procedural fairness to the applicant. The Tribunal is also bound, as was the Committee, to confine its review to matters that are the subject of the referral.

Consideration of the Issues

50. Notwithstanding the prominence afforded during the hearing by the Committee to the methodology provided by Professor Nicholls (see paragraphs 25 and 26 above), the Committee's report made no specific reference to it. In particular, a copy of the methodology formed no part of the report. Somewhat curiously, however, paragraph 11 of that part of the Committee's report headed "Consideration of the Doctor's Conduct" stated:

> "As the Act required the Committee had regard to Subdivision C of Part VAA of the Act [sic], particularly section 106H, as it stood at the time of the Referral and made findings, in respect of each service, which are contained in Appendices 1 – 4 of this report."

The paragraph says no more than that the Committee "had regard" to Subdivision C of Division 4 of Part VAA of the 1973 Act. It falls short of saying that the Committee applied the provisions of that subdivision and makes no reference to the provisions of section 106K or to the Ministerial directions as to sampling set out in the document "Professional Services Scheme – Directions as to Sampling (No. 2)". A copy of the provisions of that subdivision and the Ministerial directions had, as previously noticed (see paragraph 30 above), been made available to the applicant but only after the Committee's draft report had been prepared and than only in the context of the rights conferred on a person under review where a Committee proposes to make a finding based on a sample of services under section 106H.

51. The respondent, in paragraph 3.2.8. of the statement of reasons attached to the

final determination echoed paragraph 11 of the Committee's report as set out above with the gloss that the Committee had applied Subdivision C of Division 4 of Part VAA of the 1973 Act, that the Committee's findings specified in a later paragraph of the statement of reasons had been based "on statistical sampling ('the Methodology') authorised by section 106H" and that the "Methodology" was outlined in paragraphs 3 to 18 of the report.

52. There are differences between the methodology prescribed in the directions issued by the Minister under section 106K and the directions set out in the methodology provided by Professor Nicholls. Having carefully considered the procedure which the Committee followed we are left in no doubt that the Committee did not proceed, and never intended to proceed, in accordance with Subdivision C of Division 4 of Part VAA of the 1973 Act. Had it done so, it would have been required:

- to have ascertained the size of the preliminary random sample for each class of services to be investigated by reference to paragraphs 2.1 and Table 1 of the Ministerial directions resulting in much larger sample sizes than those calculated by reference to the formula set out in paragraph 1.2 of Professor Nicholls' methodology;

- to have rounded down the percentage of services in each exploratory sample found to constitute inappropriate practice to the next lower multiple of 5% (paragraph 2.2 of the Ministerial directions) rather than, as it did, round down the percentage to the nearest whole number, as required by paragraph 1.4 of Professor Nicholls' methodology; and

- to have examined more than 30 services in the case of the group of item 36 services.

53. The procedures the Committee followed and the calculations it made were consistent only with the application of the methodology provided by Professor Nicholls.

54. It is established that the power to make findings based on samples provided for in Subdivision C of Division 4 of Part VAA was discretionary, a Committee being

empowered to reach findings based on a sample taken in accordance with those provisions, but was not required to do so: Adams v Young (1998) 83 FCR 248 at 284, 299; Retnaraja v Morauta (1999) 93 FCR 397 at 415, 416; and see Tankey v Adams (2000) 104 FCR 152 at 178 – 180. The Committee was entitled to adopt a different sampling procedure provided that the sample used was sufficiently broad to justify the ultimate conclusion that the applicant had engaged in inappropriate conduct: Retnaraja v Morauta ibid at 416. It was not contended either before the Committee or before this Tribunal that the Committee was not entitled to adopt an appropriate sampling procedure or that the methodology provided by Professor Nicholls was other than a statistically valid sampling procedure. It was not contended that that methodology failed to comply in any respect with generally recognised statistical standards.

55. Once it became apparent during the hearing by the Tribunal that the Committee had acted in accordance with the procedure provided by Professor Nicholls, counsel for the applicant submitted that the circumstance that the Committee had included in its report paragraph 11 as set out above and the further circumstance that paragraph 3.2.8 of the respondent's statement of reasons reflected an erroneous view of what the Committee had done provided a basis upon which the Tribunal should set aside the final determination.

56. In our opinion, there is no substance in that submission. The Tribunal's task is, subject to considering the other submissions advanced on behalf of the applicant, to consider whether the material to which the Tribunal may properly have regard justifies a finding of inappropriate practice on the part of the applicant and, if so, to determine the appropriateness of the directions set out in the final determination.

57. Counsel for the applicant submitted that the final determination should be set aside on the ground that, by reason of circumstances beyond the applicant's control, the Committee was not in a position to afford her a fair hearing. Attention was drawn to the effluxion of 21 months between 18 June 1997, being 28 days after the Director of Professional Services Review received the referral – see subsection 89(1), and 18 March 1999, the date on which the Director set up the Committee. It was submitted that by the time the applicant was required to discuss individual patients with the members of the Committee, three years had elapsed since the expiration of the referral period. It was

further submitted that, had there been no delay in the appointment of the Committee, the applicant's recollection might have been better and she might have been able to give better explanations to the Committee in respect of the various matters of concern that were put to her. The applicant, having responded by letter dated 6 June 1997 to the invitation to make submissions to the Director stating why the Director should dismiss the referral without setting up a Committee (see paragraph 9 above), was said to have formed the belief that a Committee was not to be set up and the investigation of her conduct was not to proceed further. Reference was also made to the fact that the applicant was not assisted by a lawyer at the hearings on 16 July 1999, 27 July 1999 and 13 August 1999.

58. We are unable to accede to those submissions. There was no evidence before the Committee and, therefore, no evidence before this Tribunal that the applicant was significantly disadvantaged by the effluxion of time between the referral period and the hearing by the Committee. In this connection we were referred by counsel for the respondent to the refusal by the Federal Court of Australia on 7 June 1999 (Whitlam J.) – Damato v Holmes [1999] FCA 758 – of the applicant's motion seeking an order restraining the Director of Professional Services Review and the members of the Committee from proceeding further with the referral. The considerations upon which counsel who then appeared for the applicant relied in support of the motion included "the potentially grave consequences for his client of adverse findings by the Committee, the implication into the legislative scheme of a reasonable time within which the decision to set up a Committee must be made, the period of time that had passed since the dates of the referred services, Dr. Damato's misapprehension that her explanations had been accepted, and the absence of a satisfactory explanation or justification for the delay on the part of [the Director]". The motion was refused on the ground that the applicant had not established that there was a serious question to be tried.

59. There was before the Committee and, in consequence, before this Tribunal, no evidence of any communication, written or oral, from the Director of Professional Services Review that could reasonably have led to the belief she was said to have formed that a Committee was not to be appointed and the investigation of her conduct was at an end. Nor was there any evidence of any inquiry by her or on her behalf to clarify the then present status of the investigation into her conduct during the

referral period or to ascertain whether the belief she was said to have formed was well founded.

60. It cannot be accepted, in the absence of relevant material; that the effluxion of time on which counsel for the applicant relied necessarily resulted in significant disadvantage or prejudice to the applicant. Nor can it be accepted that the fact that the applicant did not avail herself of the right to be accompanied by a lawyer on three days of the hearing resulted in such disadvantage or prejudice. The circumstances in which that situation came about have not been explained. However, it is clear that she had the benefit of legal assistance on the first day of the hearing and that her solicitors submitted lengthy comments in their letter dated 9 September 1999 in response to the letter dated 25 August 1999 (see paragraph 29 above) from the Committee. It is significant that the solicitors' letter raised no question of disadvantage or prejudice by reason of matters of the kind advanced by counsel in support of his submissions.

61. The primary submission advanced on behalf of the applicant was that the Committee inquired into, and made adverse findings on, matters that were irrelevant to its inquiry as being outside the subject matter of the referral. Counsel relied upon what the Committee referred to as its findings in relation to the exploratory samples examined by the Committee in respect of each group of services under investigation. Those findings, which are summarised in paragraph 34 above, included findings that the applicant had failed to provide an appropriate level of clinical input necessary to demonstrate the clinical relevance of the services, that services were excessive in relation to the presenting complaint, that they contained little, if any, history, diagnosis, treatment and/or management plan, and that the services could not be considered as reasonably necessary for the care the of the applicant's patients. Counsel also referred to paragraphs 44 – 46 of the Committee's report under the sub-heading "Clinical knowledge and competency." Paragraph 44 stated:

> "In relation to all the services examined, the Committee was concerned that Dr Damato's management of specific problems, her use of therapeutic agents and her management of patients with chronic illnesses was clinically inappropriate. The Committee was further concerned that Dr. Damato allowed patients to dictate the investigations and treatment they would prefer to have, even when this was

clinically inappropriate. In particular, the Committee was concerned with Dr. Damato's use of antibiotics (the indications, the agent chosen, the route of administration, the duration of therapy), her use of benzodiazepines, her management of chronic pain patients using narcotics, obese patients, her management of urinary problems and her management of diabetics, including her failure to make clear provision for ongoing care."

The following paragraphs of the report gave some examples of the concerns expressed in paragraph 44 and in paragraph 46 the Committee said:

> "It is the opinion of the Committee that rendering of clinically inappropriate services is as serious as rendering services that are not reasonably necessary for the proper care of the patient and such conduct would be unacceptable to the general body of general practitioners."

Counsel also relied on the opinions expressed by the Committee under the heading "Other concerns":

(a) that the applicant's clinical records were "seriously deficient in important, often critical, information essential for the proper management of patients, maintaining continuity of care and medico – legal protection";

(b) that the absence of a medical record could "seriously impair a practitioner's ability to manage his/her patients and could compromise patient care";

(c) that the applicant "did not fully understand her obligations under Medicare"; and

(d) that the applicant's "claiming for long and prolonged services was based purely on time spent at a given location and not on whether the service was clinically appropriate – containing sufficient clinical input to demonstrate whether the service was medically necessary".

62. In our opinion, the subject matter of the referral clearly entitled the Committee to examine, in respect of each of the services which were rendered by the applicant during the referral period and which were relevantly described as long and prolonged surgery

consultations and home visits:

- the quality of the service and the length of time spent by the applicant in providing the service;
- the medical necessity for the service;
- the appropriateness of the diagnosis made and the treatment prescribed;
- the competence of the applicant as a general practitioner and the extent of her knowledge; and
- the sufficiency of the applicant's clinical notes.

Support for our opinion is to be found in Tisdall v Health Insurance Commission [2002] FCA 97 at paragraphs 70 – 83.

63. A consideration of the transcript record of the hearing by the Committee satisfies us that the Committee was concerned to ascertain the nature and content of the services that were the subject of its questioning. It was in the course of that questioning that the members of the Committee informed themselves of the matters which led them to reach the findings and to express the concerns to which counsel for the applicant referred. The fact that, in dealing specifically with the services rendered to the patients identified in the random samples of services, the Committee asked questions from the answers to which it was able to assess the applicant's competence and the adequacy of her medical records does not have the consequence that the Committee's inquiry travelled beyond the subject matter of the referral.

64. We do not agree that the Committee embarked on an open-ended inquiry into the applicant's deficiencies as a medical practitioner or into the state of her medical records. Nor do we agree that the Committee's findings of inappropriate practice were based solely on those factors. They were but factors taken into account in reaching its ultimate conclusion.

65. We have previously referred (paragraph 34) to the number of services in the sample of services for each group of items under investigation that the Committee found to have been inappropriate. It was contended on behalf of the applicant that the material before the Committee did not support the conclusion of inappropriateness in the case of

11 of those services which counsel identified. In particular, it was submitted that the Tribunal should conclude that the relevant requirements for Medicare benefit payment had been satisfied. In identifying the 11 services in question we refer to the patients concerned only by his or her initials and have, after each patient's initials, referred to the date of the relevant service or services. Of the 11 services, three services (being those rendered to D.G. on 28 August 1995, N.H. on 14 September 1995 and L.M. on 22 August 1995) were services within the item 36 group, four services (being those rendered to M.N. on 24 May 1996, J.G. on 24 June 1996, A.F. on 15 April 1996 and J.T. on 11 September 1995) were services within the item 44 group and four services (being those rendered to M.S. on 1 September 1995 and 5 May 1996, L.G. on 12 December 1995 and E.B. on 12 October 1995) were within the item 47 group. No challenge was made to the findings by the Committee in respect of the services found to be inappropriate within the item 37 group.

66. We have carefully examined the whole of the material that was before the Committee in respect of each of the 11 services identified. We do not find it necessary to set out the substance of that material or to refer in detail to the matters on which counsel for the applicant and the respondent relied in respect of their respective contentions. Suffice it to say that, as a result of the review which the Tribunal has made of the Committee's findings in respect of each of those services, we agree, substantially for the reasons advanced by the Committee, with the findings expressed in their report. We should add that we are satisfied that the pattern of practice disclosed by the examination of the sample services would be replicated in the total class of services from which those samples were randomly selected.

67. It remains to consider the appropriateness of the directions in the final determination (see paragraph 38 above).

68. Counsel for the applicant submitted that the directions should be substantially modified. In particular, it was submitted that the direction for disqualification under paragraph (h) of subsection 106U(1) should be set aside or that the period of disqualification should be substantially reduced. Counsel put forward a number of considerations in support of this submission. It is sufficient to refer to the summary of the matters relied on as set out in counsel's written outline of submissions. The summary reads:

> "If the above arguments are rejected, the mitigating circumstances which should lead to far lower penalties include:
>
> a the effect of the various delays before the issue of the Determination on Dr. Damato;
>
> b the ongoing reduction in Medicare servicing noted in par. 4.8 of the [Satement of Reasons attached to the] Determination (and continuing for the calendar year ending 31 December 2000…);
>
> c the needs of Dr. Damato's patients (many of whom are elderly or do not have English as their primary language and are assisted by the availability of an 'old style' doctor prepared to make home visits);
>
> d the age and experience of Dr. Damato;
>
> e her awareness now of changes from the 1999 Act emphasising the need for more detailed clinical records;
>
> f the impact of disqualification on Dr. Damato, her family and particularly her patients and the local community she serves."

69. We have no doubt that these matters were present to the mind of the respondent when considering what directions should be given and that he gave such weight to them as he thought appropriate.

70. The findings that the Committee made of inappropriate practice reflect very serious concerns as to the conduct of the applicant in the conduct of her practice.

Nothing that has been put to the Tribunal convinces us that we should vary the directions given by the respondent.

Conclusion

71. For the reasons given above, the final determination made by the respondent on 6 April 2001 is affirmed.

Counsel for the applicant:	Mr. I.E. Davidson
Solicitors for the applicant:	Magney & Rhodes
Counsel for the respondent:	Ms C. Needham and Ms R.M. Henderson
Solicitors for the respondent:	Minter Ellison
Dates of hearing:	2 and 3 May 2002
Place of hearing:	Sydney
Date of decision:	27 June 2002

This and the preceding 31 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 27th day of June 2002.

DATED this 27th day of June 2002

Diane Popple (sgd)
Registrar