

PROFESSIONAL SERVICES
REVIEW TRIBUNAL

No 2 of 1997

BETWEEN: **DR MONIER GAD**

Applicant

AND: **GAIL BATMAN**

Respondent

TRIBUNAL: The Hon A.R. Neaves, President
Professor D. Tiller, Member
Dr N. McH. Ramsey, Member

DATE: 15 July 1998

DECISION

The Determination made herein by the respondent and dated 12 May 1997 is set aside.

Alan R. Neaves (sgd)
(Alan R. Neaves)
President

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REASONS FOR THE DECISION

THE TRIBUNAL:

NATURE OF PROCEEDING

This matter comes before the Tribunal pursuant to the provisions of Division 3 of Part VA of the Health Insurance Act 1973 (cth) (“the Act”). Pursuant to subs 115(1) of the Act, the Minister for Health and Family Services has forwarded to the President the request made on behalf of Dr Monier Gad (“the applicant”) that the determination made by Ms Gail Batman (“the respondent”) and dated 12 May 1997 be referred to a Professional Services Review Tribunal for review. The respondent made the determination as the Determining Officer appointed under subs 106Q(1) of the Act. It was made pursuant to ss 106T and 106U of the Act.

HISTORY OF MATTER

2. On 18 December 1995, Dr R.P. Tomkins signed a document which under the heading “Referral” stated:

“On behalf of the Health Insurance Commission and pursuant to section 86 of the Health Insurance Act 1973 (“the Act”), I, Ronald Philip Tomkins, General Director and Manager, Professional Services Branch hereby refer to the Director of Professional Services Review the conduct of Dr Monier Gad in relation to whether he has engaged in inappropriate practice in connection with the rendering and invitation of services as defined in the Act.”

The document identified the referred services as “all services rendered and initiated by Dr Gad from his practice locations in the State of New South Wales during the period of 1 January 1994 to 31 December 1994, inclusive”. The reasons for the decision to refer were summarised in par 3 of the document in the following terms:

The Health Insurance Commission is concerned that Dr Gad would not be able to provide an appropriate level of clinical input when consistently rendering such high volumes of services. In addition, the Health Insurance Commission is concerned about the high average number of services per patient rendered by Dr Gad and his high level of requesting of pathology services per pathology patient.”

3. The document contained:

“4 High Volume of Rendered Services:

In the referral period 1 January 1994 to 31 December 1994, Dr Gad provided 18,678 services of which 17,014 (93.69%) were level B (items 23, 24, 35) placing Dr Gad above the 99th percentile of all active general practitioners in Australia. During this period Dr Gad provided between 61 and 80 services per day on 122 occasions, between 81 and 100 services per day on 4 occasions. The Health Insurance Commission believes that the appropriate level of clinical input could not be maintained for such a high volume of daily services on a regular and continuing basis.

5. High Average Number of Services per Patient:

In spite of almost - 90% of his patients being younger than 50, Dr Gad provided an average of 5.1 services per patient which is above the 91st percentile for all active general practitioners in Australia. It is noted that where practitioners provide a large number of services annually, it is common for the average annual number of services per patient to be less than 3. The Health Insurance Commission believes that some of the services rendered by Dr Gad would not be reasonably medically necessary for the care of his patients.

6. High Initiation of Pathology Services:

In the referral period Dr Gad also referred 656 patients (18%) of his patients to pathology with a total of 4,116 services being provided. Dr Gad requested an average of 6.2 pathology services for each patient referred, which is above the 95th percentile for all active general practitioners in Australia. Additionally he ordered an average of 4.5 pathology

services per episode compared with the average of 1.73 for all general practitioners in Australia. The Health Insurance Commission believes the rate of initiation of pathology services by Dr Gad is excessively high.”

4. Paragraph 7 of the document identified in 8 sub paragraphs the matters which the Commission took into account in forming a view about the inappropriateness of the applicant’s practice. The document contained:

“8. For these reasons, the Health Insurance Commission has formed the view that Dr Gad’s conduct in connection with rendering and initiating of services constitutes inappropriate practice.”

5. The document then set out further material relating to the applicant and his practice under the following headings and sub-headings:

- . Background of Health Insurance Commission Concerns -
 - . High volume of Rendered Services
 - . High average number of Services per Patient
 - . High initiation of Pathology Services per Pathology Patient
- . Other details of Dr Gad’s Practice -
 - . Diagnostic Imaging
 - . Specialist referrals
 - . Prescribing
 - . Flow on costs generated by Dr Gad
 - . Chronological record of this referral.

6. Annexed to the referral document were 7 attachments and 6 reports.

7. The circumstance that the referral was made by Dr Tomkins and not by the Health Insurance Commission itself does not render the referral invalid; see subs 86(5) of the Act, a provision which was insisted by item 5 in Schedule 1 to the Health Insurance Amendment Act (No 1) 1997 (Cth) and which came into operation on 6 November 1997.

8. On 30 January 1996, after the applicant had been given an opportunity to make written submission stating why the referral should be dismissed, the Director of Professional Services Review, Dr A J Holmes, signed an instrument under ss.93 and 95 of the Act setting up Professional Services Review Committee No 6 (“the Committee”) to consider whether the applicant had engaged in inappropriate practice. The Committee comprised a Chairperson and two members. The

Chairperson was described as a medical practitioner, each of the two members being described as a vocationally registered general practitioner.

9. The Committee held a hearing on 29 February 1996 and 21 March 1996 at which the applicant gave evidence (not on oath or affirmation) and addressed the Committee. He also provided documentary material to the Committee.

10. Subsequently, the applicant furnished to the Committee a written submission.

11. Pursuant to s.106L of the Act, the Committee gave to the Determining Officer, a position then held by Dr A. Adams, a written report signed by the Chairperson on 9 May 1996 and by the Members on 10 and 11 May 1996 respectively. The Committee unanimously found that "Dr Gad's conduct in relation to the referred services was unacceptable to the general body of the members of general medical practice".

12. Dr Adams, as the Determining Officer, treated the report as containing, in terms of subs 106S(1) of the Act, a finding that the applicant had engaged in inappropriate practice in connection with rendering or initiating some or all of the referred services and made a draft determination. The applicant was then afforded an opportunity to make written submissions suggesting changes to the draft determination. The applicant took advantage of that opportunity and his then solicitors furnished a written submission to the respondent under cover of a letter dated 10 January 1997.

13. On 12 May 1997, pursuant to s.106T of the Act, the respondent made a final determination in accordance with s106U. The final determination having recited that the Committee had found that the applicant had engaged in inappropriate practice as defined in s.82 of the Act, directed that:

- "I) in accordance with paragraph 106U(1)(b) of the Act, Dr Gad be counselled by the Director, Professional Services Review or the Director's nominee;
- ii) in accordance with paragraph 106U(1)(c) of the Act, Dr Gad repay to the Commonwealth the amount of \$228,152.95 being an amount equivalent to the Medicare benefits paid for 60% of the inappropriate services rendered during the period of the referral under items 3, 4m 23, 24, 36, 37, 44 and 47 in Group A1 of Part 2 of the General Medical Services Table, and that any Medicare benefit that would otherwise be payable for those services cease to be payable;
- iii) in accordance with paragraph 106U(1)(g)(I) of the Act, Dr Gad be disqualified for a period of 9 months to start when this determination takes effect in respect of the provisions of all services to which an item relates in Group A1 of Part 2 of the General Medical Services Table; and
- iv) in accordance with paragraph 106V(1)(b) of the Act, Dr Gad be fully disqualified for a period of 6 months to start when this determination takes effect".

It appears that the determination was forwarded to the applicant under cover of a letter dated 12 May 1997.

14. By Letter dated 6 June 1997 addressed to the Minister for Health and Family Services, the solicitors for the applicant requested, pursuant to s.114 of the Act, that the final determination be referred to a Professional Services Review Tribunal for review. The letter stated the following as the grounds on which the request was made:

- “1. There has been no effective referral pursuant to Section 86, especially as Section 87 was not complied with.
2. Statistical samples were wrongly relied upon as Section 106G was not complied with.
3. The Committee misapprehended its function in that it went beyond the question referred to it.
4. Natural justice was not affected by Dr Gad, as the Committee investigation went beyond the material referred to it.
5. The requisite degree of specificity, in terms of the overall percentage of services found to be excessive, and in terms of the repayment ordered to be made by Dr Gad, was not reached by the Committee or the Determining Officer or both.
6. On a proper construction of the Act, the same Determining Officer must perform all functions including those under Sections 106R, 106S and 106T. In this case the functions were split between Dr Adams and Ms Batman.
7. The Committee or alternatively the Determining Officer or both have exercised the judicial power of the Commonwealth without Constitutional power so to do.”

15. By letter dated 11 June 1997 addressed to the Minister for Health and Family Services the solicitors for the applicant sought to add two further grounds on which the request for review was made. The letter set out the further grounds as follows:

1. It was not open in Law for the Committee and the Respondent to find that the Applicant had engaged in inappropriate conduct merely from the facts that the number of patients seen by him was above the 99th percentile of that recorded for other General Practitioners during 1994, or that his average time spent with a patient was less than ten (10) minutes.
2. The penalties imposed so far as the disqualification and repayment of monies are concurred are excessive in all the circumstances.

On 22 August 1997, the request was forwarded to the President of this Tribunal.

Course of the Proceedings before the Tribunal

17. Prior to this matter being called on for hearing on 20 May 1998, Mrs R.M. Henderson of counsel had foreshadowed to the president and Dr Ramsey that a request would be made by the respondent that this Tribunal set aside the determination made on 12 May 1997 without the Tribunal proceeding to a hearing of the applicant's request for a review of that determination. This course was foreshadowed when a Tribunal differently constituted, but of which the President and Dr Ramsey were members, was dealing with another matter arising under part VAA of the Act. The course proposed followed consideration by the respondent of the judgement of the Full Court of the Federal Court of Australia in Adams v Yung (15 May 1998 - unreported).

18. When this matter was called on for hearing, Mr A.J. Rayment, instructed by Colin Daley Quinn, Solicitors, appeared for the applicant. Miss Henderson, instructed by the Australian Government Solicitor, appeared for the respondent. Mr R.W. White, instructed by Minter Ellison Solicitors, sought leave to appear as a friend of the Tribunal, stating that he did so on the instructions of the Director of Professional Services Review, Dr A.J. Holmes. Mr White indicated that he wished to address the Tribunal solely on the effect of the judgement of the Full Court of the Federal Court in Adams v Yung (supra). The application was opposed by Mr Rayment on a number of grounds. Ms Henderson informed the Tribunal that the respondent supported the application made by Mr White. She stated the respondent's position to be that, if the application made by Mr White "was successful", the respondent would reserve her position as to what she would do next but if that application were "unsuccessful", the respondent would be making a submission along the lines if that foreshadowed on the earlier occasion referred to above.

19. The course proposed by Ms Henderson was not acceptable to the Tribunal and she was pressed to clarify whether the respondent proposed to follow the foreshadowed course of action or to put submissions to the Tribunal in support of the determination made by her on 12 May 1997. An adjournment was granted on Ms Henderson's application so that she might take further instructions. Upon the resumption, Ms Henderson informed the Tribunal that she did not have firm instructions. The Tribunal then directed that the hearing proceed and Mr Rayment was invited to address the Tribunal. An application by Mr Rayment that the matter be adjourned indefinitely pending the outcome of any application that might be made to the High Court of Australia for leave to appeal from the judgement in Adams v Yung (supra) and, if such application were made and successful, until the High Court had given judgement on the appeal was rejected by the Tribunal. At Mr Rayment's request a short adjournment was granted to enable senior counsel, who had been briefed to appear on behalf of the applicant, could attend before the Tribunal.

20. Upon resumption, Mr I.D. Temby QC announced his appearance, with Mr Rayment, for the applicant. He then addressed the Tribunal.

21. At the conclusion of Mr Temby's oral submissions, he having been given leave to supplement those submissions in writing, the Tribunal invited Ms Henderson to address the Tribunal. After another short adjournment to enable Ms Henderson to take further instructions, Ms Henderson said:

“I must apologise. I am afraid I began a few moments ago on the assumption that I had certain instruction and I was mistaken. There is nothing I can put at the moment. I do not have the instructions which I need in order to put a case.”

The matter was then adjourned until the following day.

22. When the matter was called on for hearing on the following day, 21 May 1998, Ms Henderson was not present. Mr White announcing that Ms Henderson no longer appeared for the respondent and that he, instructed not by the Australian Government Solicitor but by Minter Ellison, Solicitors, appeared for the respondent. He reluctantly agreed, after being pressed by the Tribunal to do so, that the application he had made on the previous day for leave to appear as a friend of the Tribunal was withdrawn.

The Applicant

23. The applicant migrated to Australia in 1974 having completed three years medical studies at an Egyptian University. In 1976 he commenced studies at Sydney University where, after allowance for certain credits, he was enrolled as a second year student.

24. In March 1983, the applicant took up an internship at the Prince of Wales Hospital in Sydney and was conditionally registered to work as an intern. The applicant was fully registered in October 1986, having been required to complete three years as an intern.

25. The applicant has been recognised as a vocationally registered medical practitioner since February 1992.

26. During the referral period the applicant carried on a sole general practice at 4/3 Firth Street Arncliffe, a suburb of Sydney. He also rendered a limited number of services from premises at 292 Belmore Road, Riverwood, another suburb of Sydney. However, by the time the matter was heard by the Committee, the applicant had ceased to practice at Riverwood. Substantially all the Medicare services provided by the applicant during the referral period were billed directly to Medicare by the applicant and the relevant Medicare benefits were paid to him.

27. On 11 November 1994, that is during the period that became the referral period, the applicant was visited by a Health Insurance Commission Medical Adviser and a Compliance Pharmacist. The matters discussed were the large number of consultations, the high average number of services per patient, the high initiation of pathology and the prescribing of certain drugs.

Role of the Tribunal

28. The Tribunal's role is not confined to reviewing the appropriateness of the directions given by the respondent under s.106U of the Act but extends to a review on the merits of the material that was before the Committee and the Committee's findings as set out in its report. It is open to the Tribunal to take a different view from that taken by the Committee. It is not, however, written the functions of the Tribunal to consider and determine whether the report of the Committee should be set aside on the basis, if such could be established, that the conduct of the proceedings by the Committee was infected with legal error. The consideration and determination of that issue is a matter falling within the judicial power and is a matter for curial proceedings, not proceedings before an administrative body such as the Tribunal. However, in reviewing the material that was before the Committee, it is incumbent upon the Tribunal to exclude from its consideration any material which was otherwise relevant to an aspect of the investigation that was conducted by the Committee 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. What is said above is based on the Tribunal's understanding of what is said in the reasons for judgement of Burchett and Hill JJ. In Adams v Yung (supra).

The Legislation

29. According to its long title, the Health Insurance Act 1973(cth) is "An Act providing for Payments by way of Medical Benefits and Payments for Hospital Services and for other purposes." Part II of the 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. To interpret some of the expressions used on that subsection it is necessary to refer to the definition of those expressions in s.3 of the Act. The expression "eligible person" includes an Australian resident an expression which is still defined in s.3. The expression "professional service" includes a service (other than a diagnostic imaging service as defined) to which an item in the General Medical Services Table prescribed under s.4 of the Act relates, being a "clinically relevant service" that is rendered by or on behalf of a medical practitioner. A "clinically relevant service" is, so far as is 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.

30. Part VAA (ss80-106ZR) creates a scheme under which a person's conduct can be examined to ascertain whether inappropriate practice is defined in s.82 is involved and provides for action that can be taken in response to inappropriate practice (s.80). Section 82, in the form in which it stood prior to 6 November 1997, provided 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 subs 81(1) to mean a service for which, at the time it was rendered

or initiated, medicare benefit was payable and to include a prescribing of a pharmaceutical benefit by a medical practitioner. Prior to 6 November 1997, subs. 81(2) provided that, for the purposes of Part VAA, general medical practice was to be taken to be a specialty and medical practitioners practising in general medical practice were to be taken to be specialists in that specialty.

31. As has already been mentioned, under s.86 of the Act, the Commission may refer to the Director of Professional Services Review (“the Director”) the conduct of a person relating to whether the person has engaged in inappropriate practice in connection with rendering or initiation of services. It is sufficient of the referral specifies that it relates to services rendered or initiated by a practitioner that are services provided within a specified location (subs. 87(1)). The Director is required by subs 89(1) either to dismiss the referral (which he or she must do if satisfied that there are insufficient grounds on which a Committee could reasonably find that the person under review has engaged in inappropriate practice in connection with the referred services - s.91) or set up a Committee to consider whether the practitioner has engaged in inappropriate practice (which he or she must do unless satisfied that there are insufficient grounds on which a Committee could reasonably find that the person under review has engaged in inappropriate practice in connection with the referred services - s.93).

32. If a Committee is set up and it appears to it that the person under review may have engaged in inappropriate practice in connection with rendering or initiating the referred services, the Committee must hold a hearing at which evidence is given and documents are produced to it (s.101).

33. Prior to 6 November 1997, subdivision C of Division 4 of Part VAA provided that, in the circumstances there stated, the Committee might, 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 (subs.106H(1)). Sub division C of Division 4 of Part VAA was repealed with effect from 6 November 1997 (see Health Insurance Amendment Act (No1) 1997(cth), s.3 and item 12 in Schedule 1).

34. Under s.106L in the form which it took prior to 6 November 1997, was a practitioner and a specialist - when the referred services were rendered or initiated, the Committee was 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.

35. 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 s.106.U 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.

36. The provisions of Part VAA of the Act to which referral has been made were invited in the Act by the Health Legislation (Professional Services Review) Amendment Act 1994 (cth) and came

into operation on 1 July 1994. In support of the motion moved by him in the House of Representatives on 30 September 1993 that the Bill which proposed to insert Part VAA in the Act be read a second time, the Parliamentary Secretary to the Minister for Health made the following statements:

“The new measures in this bill are necessary because the existing mechanisms for dealing with over servicing have come under question and have not been shown to be effective ...

A major factor in the inability to improve penalties commensurate with the extent of a practitioner’s over servicing is the current lack of power to make decisions on the extent of over servicing on the basis of generalised evidence. At present judgement about over servicing can only be made on the basis of individual services, that is, recovery of benefits and the imposition of penalties can only be made in respect of each service separately determined to have been excessive.”

One of the provisions of the Act as it then stood that was repealed by the amending statute was the provision in s.104 that required that, in a case where the Committee, in its report, expressed the opinion that a practitioner had rendered excessive services (that expression being a reference to professional services being services in respect of which medicare benefit had become or might become payable and which were not reasonably necessary for the adequate medical care of the patient concerned (subs 79(1B)), the report identify those services.

37. It is apparent, however, from the judgement of the Full Court of the Federal Court of Australia in Adams v Yung (supra) that the amendments made by the Act of 1994 fell short of remedying the perceived mischief or defect for which the provision previously in force had not provided for the court there held that it is incumbent upon a Professional Services Review Committee set up under ss.93 and 95 of the Act, at least in a case where the conduct alleged to contribute inappropriate practice is expressed in terms of a concern that the practitioner would not be able to provide an appropriate level of clinical input when consistently rendering high numbers of services or when regularly working excessive hours, to relate any conclusion it reaches to inappropriate practice to specified services, being some or all of the services the subject of the referral. at pp. 18-19 of their joint reasons for judgement in that case, Burchett and Hill JJ said:

“It is true that the sampling procedure introduced in the 1993 Bill to which the Second Reading Speech was addressed, permits necessary extrapolation from a sample to the referred services. It does not follow from that that a committee is not required to reach an ultimate conclusion about specified services. Its task is to consider the matter in the referral which is the conduct in respect of specified services. Although no doubt inferences can be made from a sample to a totality of services, that does not take away from the requirement of the ultimate conclusion to relate the issue of conduct either to some or all of those services.”

The Concerns Directly Reported by the Reference

38. It has already been mentioned, the referral document identified the matters of concern to the Commission as being -

1. Whether an appropriate level of clinical input could be maintained when consistently rendering very high volumes of services.
2. The high average number of services per patient rendered.
3. The high level of requesting of pathology services per pathology patient.

To the material relating to these aspects of the applicant's conduct we not turn.

High Level of Services

39. During the referral period the applicant provided 18,678 services. Of these services, 18,143 were consultations, including home visits. From the referral document and its annexures the following details of the distribution of the consultation services (surgery, home and nursing home visits) for which the applicant claimed payment of Medicare benefits appear:

	Level A	Level B	Level C	Level D
Surgery	628	16,564	450	3
Consultations				
Home Visits	39	439	8	1
Nursing Home visits		11		
Total	667	17,014	458	4

The 18,678 services were provided to 3,661 patients.

40. At the relevant time a level A consultation was a professional attendance by a general practitioner for an obvious problem characterised by the straight forward nature of the task that required a short patient history and, if required, limited examination and management. A level B consultation was a professional attendance by a general practitioner 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 certain other items applied or an attendance on one or more patients at one institution on one occasion. A level C consultation was a professional attendance by a general practitioner involving taking a detailed history, an examination of multiple systems, averaging 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 certain other items applied. A level D consultation was a

professional service by a medical practitioner 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 service of at least 40 minutes duration for implementing a management plan.

41. An annexure to the referral document set out, in relation to each of 40 of the applicant's patients, the services claimed by the applicant to have been rendered to that patient during the referral period. The annexure shows that the number of level B consultations (items 23, 24) rendered to individual patients during the referral period ranged from 24 to 89. In request of 7 patients the number exceeded 50. In only 4 instances was the number of consultations less than 30.

42. The following table derived from an analysis of the annexure referred to, shows, in summary form, the number of level B consultations (items 23, 24) claimed to have been rendered to each of those patients:

Patient	Number of Consultations	Patient	Number of Consultations
1	89	21	36
2	80	22	33
3	74	23	38
4	67	24	38
5	58	25	35
6	52	26	37
7	51	27	36
8	47	28	36
9	50	29	33
10	49	30	30
11	41	31	33
12	45	32	27
13	44	33	32
14	41	34	33
15	24	35	30
16	34	36	30
17	41	37	31
18	38	38	29
19	29	39	30
20	40	40	33

Other material before the Committee enables a number of these patients to be identified but the clinical records for those patients are not amongst the clinical records that were before the Committee.

43. Another annexure to the referral document, described as “Daily Items Report”, showed, on a daily basis, the number of services claimed by the applicant to have been rendered. An analysis of the material produces the following table showing the number of days during the referral period on which the applicant claimed to have rendered 50 or more services:

Number of Services	Number of Days
50-59	62
60-69	66
70-79	55
80-89	19
90-99	10
100-105	4
---	216

44. Included in the annexures to the referral document was a document described as “Top 40 Family Servicing Report”.

45. The Committee also had before it the applicant’s clinical records for all patients seen by him on 7 September 1994 and summary sheets relating to 6 of the families listed on the document mentioned in the preceding paragraph. It must be said of that the clinical records produced do not for the most part record the history taken from the patient, the diagnosis made on the nature of any management plan formulated or implemented.

High Number of Services Per Patient

46. As appears earlier in these reasons, the Health Insurance Commission in the referral document (par 5) noted that, in spite of almost 90% of his patients being younger than 50, the applicant provided an average of 5.1 services per patient which was above the 91st percentile for all active general practitioners in Australia.

47. Material that was before the Committee in relation to this aspect of the matter is referred to in the earlier paragraphs of these reasons.

High Level of Pathology Services

48. The referral document listed all the pathology initiated by the applicant during the referral period. The pathology tests most frequently initiated are shown in the following table:

Item	Description	Services
65007	Full blood examination	487
66265	Serum B12 and folate	116
66291	Thyroid function	366
66341	Quantitative assay	450
69217	Urine culture	312
69243	Hepatitis B surface antigen	217
69265	Antibodies in Hepatitis C	306
73915	Patient episode initiation	870

In addition to the 366 occasions on which the applicant initiated thyroid function tests under item 66291, he initiated 50 thyroid function tests under item 66329 and 18 TSH tests under item 66327, making a total of 434 tests.

49. The Committee questioned the applicant particulars as to the extremely high number of thyroid function tests initiated during the referral period and as to his ordering of antibiotic sensitivity tests. The Committee also examined 113 urine sensitivities tests and 35 thyroid test results with the results not out in the Committee's report.

50. A group of medical practitioners with extensive experience of general practice could, from an examination and analysis of the material to which we have referred, draw an overall picture of the conduct of the applicant's practice during the referral period and discern its essential features. They could also consider how the conduct of the applicant in carrying on his practice in that fashion would be viewed by the general body of general practitioners. In particular, having regard to the high number of bevel B consultations and the frequency with which such consultations took place in the case of a substantial number of patients, such a group could reasonably conclude that the applicant was less than adequate care to his patients.

51. However, in the light of the judgment in *Adams v Yung* (supra) we can only conclude that the material that was before the Committee cannot be read as satisfying the statutory test of inappropriate practice as it does not descend to sufficient detail to permit identification in a justifiable way of the number or proportion of the relevant services rendered or initiated by the applicant that constitutes inappropriate practice as defined in s.82 of the Act.

The Determination

52. The operative test of the final determination made by the respondent on 12 May 1997 is set out earlier in these reasons. Directions were given under paragraphs (b), (c), (g), (I) and (h) of rules 1064(1) of the Act.

53. In the light of the conclusion that the material that was before the Committee does not support a finding that during the referral period the applicant's conduct amounted to inappropriate practice as defined in s.82 of the Act, the final determination must be set aside.

Conclusion

54. For the reasons set out above, we set aside the determination made by the respondent on 12 May 1997.

Counsel for the applicant : Mr I.D. Temby QC and Mr A.J. Rayment

Solicitors for the applicant : Colin Daley Quinn

Counsel for the respondent
on 20 May 1998 : Ms R.M. Henderson

Solicitor for the respondent
on 20 May 1998 : Australian Government Solicitor

Counsel for the respondent
on 21 May 1998 : Mr R.W. White

Solicitors for the respondent
on 21 May 1998 : Minter Ellison

Dates of hearing : 20 and 21 May 1998

Date of decision :

This and the preceding pages comprise the decision and the reasons for decision of the Professional Services Review Tribunal constituted by The Hon. A.R. Neaves, Professor D. Tiler and Dr N. McH. Ramsey given on the day of 1998.

Dated this day of 1998

Registrar

