

PROFESSIONAL SERVICES)
REVIEW TRIBUNAL) No: 1 of 2000

BETWEEN: **JESSICA SUK YIN HO**

Applicant

AND: **LOUISE HELEN**
MARGARET MORAUTA

Respondent

TRIBUNAL: The Honourable A.R. Neaves, President
Dr N.J. Radford, Member
Dr N. McH. Ramsey, Member

DATE: 27 November 2000

DECISION

The Determination made herein by the respondent and dated 10 March 2000 is set aside and in lieu thereof a Determination is made directing that:

1. in accordance with paragraph 106U(1)(a) of the *Health Insurance Act 1973* ('the Act'), the Director of Professional Services Review or the Director's nominee reprimand the applicant;
2. in accordance with paragraph 106U(1)(b) of the Act, the Director of Professional Services Review or the Director's nominee counsel the applicant;
3. in accordance with paragraph 106U(1)(c) of the Act, the applicant repay to the Commonwealth the amount of \$1761.70, being:
 - (a) \$258.40, being an amount equivalent to the Medicare benefits paid in respect of the eight services rendered during the referral period under item 30026 in the General Medical Services Table;
 - (b) \$410.20, being an amount equivalent to the Medicare benefits paid in respect of the eight services rendered during the referral period under item 30032 in the General Medical Services Table;
 - (c) \$957.90, being an amount equivalent to the Medicare benefits paid in respect of the 16 services rendered during the referral period under item 30117 in the General Medical Services Table;
 - (d) \$135.20, being an amount equivalent to the Medicare benefits paid in respect of the eight services rendered during the referral period under item 30219 in the General Medical Services Table;

and that any Medicare Benefit that would otherwise be payable for those services cease to be payable.

(Alan R. Neaves)
President

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REASONS FOR DECISION

THE TRIBUNAL

Nature of the Proceedings

1. The matter before the Tribunal is the review, upon the request of Dr Jessica Suk Yin Ho ('the applicant'), of the final determination relating to the applicant made by Louise Helen Margaret Morauta ('the respondent') and dated 10 March 2000. The matter is said to arise under provisions of the *Health Insurance Act 1993* (Cth) ('the 1973 Act'), the *Health Insurance Amendment Act (No.1) 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 under 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. Both the applicant and the respondent accepted that the matter presently before the Tribunal is such a matter.

The Applicant

2. The following statement with respect to the applicant's training and qualifications is taken from the report of the Professional Services Review Committee:

1. Dr Ho graduated from Monash University in 1979. In the following two years she did her internship at the Western General Hospital in Footscray and

undertook training under the Family Medicine Program (ten weeks in 1980 and three months in 1981). At the end of the 1981, Dr Ho became a partner in a family general practice at Bayswater. After dissolution of the partnership in 1983, Dr Ho left the practice and did full-time locum work until later 1985 when she became principal medical practitioner at the Rosebank medical Centre in Westall.

2. Dr Ho remained at the Rosebank Medical Centre until 10 May 1996 when she left to establish her own practice in Springvale. Dr Ho became a vocationally registered practitioner in 1990. She had also undertaken courses in occupational health (May 1982) and acupuncture (August 1985).'

The Referral

3. On 28 April 1997 Dr A.J. Parkes, who described himself as a 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 Jessica Suk Yin Ho in relation to whether she has engaged in inappropriate practice, in connection with the tendering of services, as defined by the Act pursuant to subsection 86(1) of the Act'.

The references to 'the Act' are references to the 1973 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 by Dr Ho from her practice locations in the State of Victoria during the period 1 July 1995 to 30 June 1996, inclusive'. Those practice locations were identified as Rosebank Medical Centre, 140A Rosebank Avenue, Clayton South and 362 Springvale Road, Springvale.
6. The reasons for the decision to refer we state in paragraph C of the document in the following terms:

'The Health Insurance Commission is concerned that Dr Ho may not be able to provide an appropriate level of clinical input when consistently rendering such a high volume of services.

1. High Volume of Rendered Services:

In the referral period 1 July 1995 to 30 June 1996, Dr Ho provided 19,749 services of which 211 were level A consultations (item 3) and 17,759 were level B consultations (item 23) and 813 level C consultations (item 36). Dr Ho's services were substantially above the 99th percentile of all active vocationally registered general practitioners in Australia (16,557 services). During this period Dr Ho provided between 61 and 80 services per day on 133 occasions, between 81 and 100 services per day on 53 occasions between 101 and 120 services on 5 occasions and between 121 and 140 services on 1 day... in her apparent average surgery working day. Time calculations based on the Entry Standards of the Royal Australian College of General Practitioners (RACGP) suggest that Dr Ho would have needed to spend between 10.2 and 23.3 hours of direct patient contact per surgery working day to provide quality care at a standard acceptable to the RACGP. The Health Insurance Commission believes that the appropriate level of clinical input may not be able to be maintained at this servicing rate on a regular and continuing basis.

For this reason, the Health Insurance Commission has formed the view that Dr Ho's conduct in connection with 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 Ho
 - Health Insurance Commission Assessment
 - Details of Health Insurance Commission Concern
 - Other details of Dr Ho's Practice
 - Chronological record of this Referral.
8. Annexed to the referral document was a summary of the referred material together with three attachments and 6 reports. The attachments were described as:
- Census data
 - Explanation of Artificial Neural Network
 - Journal Articles and Extracts
- The six reports were described as:
- Daily items report - PIRD
 - Monthly items 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. The applicant was, by letter dated 28 April 1997, given an opportunity to make written submissions to the Director of Professional Services Review with 14 days stating why the Director should dismiss the referral without setting up a Committee (see subsection 88(2) of the 1973 Act)

Professional Services Review Committee

10. On 22 April 1998, the Director of Professional Services Review, Dr A.J. Holmes, signed an instrument under sections 93 and 95 of the 1973 Act setting up Professional Services Review Committee No 75 ('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 of setting up the Committee as a Deputy Director of Professional Services Review and a medical practitioner, each of the two members being therein described as a medical practitioner. By reason of the circumstance that the applicant was a vocationally registered general practitioner, it was a requirement of the legislation (see subsection 95(5) of the 1973 Act in the form in which is stood prior to the amendment effected by item 7 of Schedule 1 to the 1997 Act and see section 4 of the latter Act) that the two members of the Committee other than the Chairperson be vocationally registered general practitioners. During the hearing by the Committee, all three members of the Committee stated that they were general practitioners and vocationally registered

Hearing by the Committee

12. Pursuant to section 102 of the 1973 Act, the Committee, by a document dated 11 May 1998, gave the applicant notice of a hearing to be held on 3 June 1998. The Notice of Hearing stated that, if necessary, the hearing would continue on a later date to be specified. The document required the applicant to appear and give evidence at the hearing and to produce the documents referred to in Schedule 1 to this notice. That schedule described the documents to be produced in the following terms:
 - '1. All documents relating to the rendering of services by Dr Ho during the Referral Period for the patients on the attached lists (Attachments A and B).
 2. All practice appointment books, day books, diaries and attendance registers for Dr Ho during the Referral Period.
 3. Any document relating to the hours actually worked by Dr Ho during the Referral Period.
 4. All Dr Ho's Royal Australian College of General Practitioners Quality Assurance and Continuing Medical Education records for the triennium which covers the Referral Period.'

Attachment A to Schedule 1 identified by name the patients to whom the applicant was said to have rendered services on 21 June 1996 (52 patients) together with the relevant item number on the General Medical Services Table and the Medicare benefit paid in respect of each service.

Attachment B to the schedule listed 10 patients, 5 of whom (members of one family) were ranked 1, and 5 of whom (members of another family) were ranked 16 in the top 40 multiple servicing report annexed to the referral document. Accompanying the Notice of Hearing was a letter dated 11 May 1998 signed by Mr Paul Willems, Secretary to the Committee, which explained that:

'the words 'all documents' in the Notice of Hearing mean all documents which relate to your treatment of the patients listed and include clinical records, progress notes, specialist referral letters, specialist reports and test results.'

The letter also invited the applicant to provide the Committee 'with any written material which you believe may be relevant to the matter before the Committee.'

13. The Notice of Hearing also gave particulars of the matter to which the hearing related in the following terms:

'This hearing concerns your conduct in relation to whether you have engaged in inappropriate practice as defined by the *Health Insurance Act 1973* in connection with all services rendered by you during the Referral Period from your practice locations in the State of Victoria.

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 to your patients during the Referral Period; 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 if other concerns arise.'

14. The hearing by the Committee took place on 3 and 24 June 1998.
15. At the commencement of the hearing various documents were tendered in evidence and marked as exhibits. One of these exhibits (Exhibit 5) is described as comprising 'the clinical records provided by Dr Ho'. As appears from the Committee's report (Section D, paragraphs 1-3), the Committee was unable to gain access to any clinical records in respect of patients seen by the applicant at the Rosebank Medical Centre, that is, during the period for 1 July 1995 to 10 May 1996 though the extent of those enquiries does not appear. The enquiries, however, did not discover the whereabouts of the records.
16. It further appears from the Committee's report that Exhibit 5 included clinical records in relation to each of the patients identified in Attachments A and B to Schedule 1 to the Notice of Hearing. Subsequently to the production of those documents to the Committee, the applicant made available clinical records relating to a limited number of other patients. However, by reason of the circumstance mentioned in the preceding paragraph, the clinical records produced by the applicant related, not to her treatment of the identified patients during the whole of the referral period, but only to the treatment of those patients after she commenced to practice at Springvale on 13 May 1996.
17. In addition to giving evidence before the Committee, the applicant forwarded to the Committee written submissions that were tendered in evidence on 3 June 1998 and further written submissions dated 23 June 1998, 30 Jul 1998 and 1 February 1999. She also tendered to the Committee a number of other documents.
18. During the course of the hearing, the Committee discussed with the applicant her treatment of a number of patients in respect of whom the Committee had clinical records relating to their treatment during the period after she commenced to practice at Springvale. The applicant sought to explain relevant entries in those clinical records

and, relying on her memory, sought to give additional evidence concerning the history and treatment of those patients.

19. In view of the absence of any clinical or other records for the period while the applicant was practising at the Rosebank Medical Centre, the Committee requested that she produce the clinical records of those patients treated at her Springvale consulting rooms on 7 and 11 June 1996. Notwithstanding that the applicant had previously made available to the Committee some clinical records that were not the subject of Attachments A and B to Schedule 1 to the Notice of Hearing, she declined to make available the further clinical records requested, stating that she was relying on legal advice that the Committee was not entitled to insist on the production of those records. The Committee did not press the matter further. In paragraph 10 of Section D of its report the Committee stated:

'Notwithstanding the limited clinical records that were available to it, the Committee concluded by the end of the second day of the hearing that it was able to draw valid conclusions from the records that had been examined and was discussed with Dr Ho.'

The Committee's Report

20. Pursuant to section 106L of the 1973 Act, the Committee gave to the Determining Officer a written report dated 19 March 1999.
21. After referring to the review process and to the applicant's training and qualifications, her practice environment, her practice organisation and her hours of work, the Committee recorded that during the Referral Period the applicant rendered a total of 19,749 services to 5,044 patients at a cost in Medicare benefits of \$420,243.90. The Committee also recorded that, of the 19,749 services, 17,759 were level B surgery consultations (item 23), 813 were level C consultations (item 36), 369 were pregnancy tests (item 73806), 215 were antenatal attendances (item 16500), 211 were level A surgery consultations (item 3) and 127 were acupuncture treatments (item 173).
22. The Committee's report also records (subsection C, para.3) that the Committee 'did not proceed in accordance with the formal sampling processes referred to in section 106 H of the Act'. That paragraph of the report continues:
- 'At the same time, the Committee did not confine itself to looking at services provided on any particular day/s, but examined the applicant's servicing of patients throughout that part of the Referral Period for which it was able to obtain clinical records...'
23. Within the general heading 'Consideration of the Doctor's Conduct', the Committee detailed the circumstances surrounding the fact that it was unable to access any clinical records of patients seen by the applicant at the Rosebank Medical Centre and then discussed the applicant's conduct under the sub-heading 'Volume of Services and Level of Care'. From its examination of the material before it, the Committee 'found it difficult to avoid the conclusion that Dr Ho routinely saw patients for a short period of time' and expressed belief that 'quality patient care could not be provided over the sustained period that Dr Ho rendered a high number of services (60 or more services per day on 84% of her working days) at the Rosebank Medical Centre'. The Committee also said that 'Dr Ho failed to convince the Committee that she possessed the exceptional skill level and ability that it believed would be required to provide

appropriate levels of care when consistently rendering a large number of services in very short periods'. The report adds : 'Indeed, the Committee was strongly of the view that Dr Ho could not have provided an appropriate level of clinical input into her consultations'. The Committee concluded:

'While the Committee accepts that Dr Ho may have worked longer than initially stated, the Committee remains of the view that the evidence points to Dr Ho's having consistently rendered brief consultations with questionable clinical input.'

24. The Committee's report then proceeds to discuss Dr Ho's conduct under the following sub-headings within the general heading 'Consideration of the Doctor's Conduct':

- Acupuncture
- Sterilisation Procedures
- Storage of Vaccines
- Prescribing of Restricted Pharmaceutical Benefits Items
- Quality of Medical Records
- Management of Patients with Chronic Conditions
- Clinical Management and Continuity of Care.

25. The Committee, under the sub-heading 'Summary', recorded its findings as follows:

'114. A recurring issue throughout the two days of hearing was whether Dr Ho could have provided more appropriate care of her patients if she had given each patient more time. In this respect, the Committee concluded that, in most instances, Dr Ho did not lack the knowledge to deal adequately with her patients but lacked time in which to apply this knowledge. The committee considered that the level of Dr Ho's patient care would rise considerable if she allowed more time for each consultation. At the same time, the Committee sees little prospect of this while Dr Ho continues to adhere to the belief that none of her treatments could be construed as inappropriate.

'115. In terms of its initial concerns about Dr Ho's practice outlined earlier in this report, the Committee finds:

- that in many instances, particularly on the days that she rendered in excess of 80 services per day, Dr Ho would have been unable to deliver an adequate level of care (indeed, it was considered impossible to deliver the number of consultations per day which she did, without inevitable fatigue and possible jeopardy of patient safety);
- that Dr Ho's conduct in the rendering of her acupuncture services was unacceptable;
- that Dr Ho's procedures for ensuring the storage of vaccines at a proper temperature was inadequate;
- that Dr Ho's knowledge of the requirements applying to the use of restricted pharmaceutical benefit items was inadequate;
- that Dr Ho's care of patients with chronic conditions was inadequate in certain circumstances;
- that Dr Ho's management of certain clinical conditions and her treatment of some patients was inappropriate; and
- that many of Dr Ho's patients were treated in an episodic manner and that she did not provide adequate continuity of care.

- '116. In regard to its concern that Dr Ho's clinical records did not always provide sufficient information to allow another doctor to take over the patient's management, the Committee found that, in any instances, her health summaries were inadequate and that the records were not comprehensive or well organised. However, Dr Ho's notes were usually legible and did provide some information for each consultation. Overall the Committee concluded that Dr Ho's record keeping would not be considered unacceptable by the general body of general practitioners in Australia.
- '117. The Committee noted that, to her credit, Dr Ho had taken certain steps to improve her practice (improved steriliser and improved records). However as Dr Ho appears unaware that many of her practices would be unacceptable by [sic] the general body of general practitioners, the Committee considers that Dr Ho requires counselling and remedial training. To the extent that Dr Ho's deficiencies can be attributed to her seeing too many patients per day, the Committee believes that a reduction in the number of patients seen would in itself improve her standard of care.'
26. The Committee concluded that the applicant had engaged in inappropriate practice as defined in section 82 of the 1973 Act. The specific services to which the Committee related its finding of inappropriate practice are:
- All acupuncture treatments (item 173 in the General Medical Services Table) rendered by the applicant to her patients during the referral period.
 - Consultations on specified dates in May and June 1996 with 15 identified patients.
 - All the services rendered by the applicant during the referral period under the items in the General Medical Services Table numbered 30026, 30032, 30117 and 30219, being services that required the use of sterilised surgical equipment.

The Final Determination

27. On 10 March 2000, the respondent, who described herself 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), the Director of Professional Services Review or the Director's nominee reprimand Dr Ho;
- (2) in accordance with paragraph 106U(1)(b), the Director of Professional Services Review or the Director's nominee counsel Dr Ho;
- (3) in accordance with paragraph 106U(1)(c), Dr Ho repay to the Commonwealth Medicare benefits totalling \$4,104.85 being:
- (a) \$2,343.15 for all 127 Medicare Benefits Schedule item 173 services rendered by Dr Ho during the Referral Period
 - (b) \$258.40 for all 8 Medicare Benefits Schedule Item 30026 services rendered by Dr Ho during the Referral Period
 - (c) \$410.20 for all 8 Medicare Benefits Schedule Item 30032 services rendered by Dr Ho during the Referral Period;
 - (d) \$957.90 for all 16 Medicare Benefits Schedule Item 30017 services rendered by Dr Ho during the Referral Period; and

- (e) \$135.20 for all 8 Medicare Benefits Schedule Item 30219 services rendered by Dr Ho during the Referral Period;

and that any Medicare benefit that would otherwise be payable for the services cease to be payable.'

Attached to the final determination was a statement of reasons.

28. It appears from the statement of reasons that the Determining Officer did not take into account the Committee's find in respect of the applicant's storage of vaccines because of her understanding that the applicant had taken any remedial steps in that area. It further appears from that statement that, in the absence of any indication by the Committee of the extend to which its findings under the sub-headings 'Management of Patients with Chronic Conditions' and 'Clinical Management and Continuity of Care' extended to the applicant's practice for the entire referral period, the Determining Officer decided not to impose either a period of disqualification or repayment of Medicare benefits.

Request for Review of Final determination

29. By letter dated 10 April 2000 addressed to the respondent, Messrs Harvey Bruce & Co, Solicitors sought on behalf of the applicant a review of the final determination made on 10 March 2000. The letter set out 13 grounds on which the review was sought. At the hearing, counsel for the applicant informed the Tribunal that the applicant did not rely upon the grounds numbered 5, 10, 11, 12 and 13. The grounds relied up are as follows:

1. The determining officer erred in deciding, in accordance with section 160U(1)(a) of the Act, that the practitioner should be reprimanded by the Director of the Professional Services Review.
2. The determining officer erred in deciding, in accordance with section 106U(1)(b) of the Act, that the practitioner should be counselled by the Director of Professional Services Review.
3. The determining officer erred in decided, in accordance with section 106U(1)(c) of the Act, that the practitioner should be ordered to repay to the Commonwealth all or any sums of money referred to in paragraph 3 of the determination.
4. The committee's decision that the practitioner had engaged in inappropriate practice was against the evidence and the weight of the evidence.
5. ...
6. The committee, in arriving at its opinion that the practitioner had engaged in inappropriate practice in the referral period, failed to give any or any adequate consideration to the fact that it (and the practitioner) were unable to access any of the patient or other records of the practitioner's practice at the Rosebank Medical Centre.
7. The committee, in arriving at its opinion that the practitioner had engaged in inappropriate practice in the referral period in relation to

the provision of acupuncture services acted against the evidence and the weight of the evidence.

8. The committee, in arriving at its opinion that the practitioner had engaged in inappropriate practice in the referral period in relation to the provision of acupuncture services, failed to apply the appropriate standard viz, whether the general body of general practitioners practicing in Australia would consider the practitioner's conduct unacceptable.
9. The committee, in arriving at its opinion that the practitioner had engaged in inappropriate practice in the referral period in relation to her sterilisation practices, acted against the evidence and the weight of the evidence. In particular and without limiting the generality of the foregoing the committee had no evidence that the practitioner's sterilisation procedures had resulted in transmission of infection from patient to patient.'
30. The request for a review of the final determination was subsequently forwarded to the President of this Tribunal.

Relevant Legislative Provisions

31. Between the date of the Committee's report (19 March 1999) and the date of the final determination (10 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 47 of Schedule 1) repealing section 106(q) pursuant to which the respondent had been appointed as the Determining Officer and repealing section 106R (providing 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, the parties accepted that the matter presently before the Tribunal is such a matter.

32. 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 services 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' (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.

33. 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 (sub section 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.
34. 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.
35. Subdivision V 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 finding 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.
36. 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 finding 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 practicing at that time.
37. 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).
38. 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 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.

Role of Tribunal

39. The role of the Tribunal (see section 116 of the 1973 Act) is to review the final determination dated 10 March 2000. 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 10 April 2000, 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 (see *Adams vs Tung* 1998) 83 FCR 248).

Consideration of the Issues

40. At the forefront of his submissions counsel for the applicant referred to the conclusions as to the conduct of the applicant reached by the Committee in its report in relation to the matters dealt with by the Committee under the following sub-headings within the general heading 'Consideration of the Doctors Conduct':

- Acupuncture
- Sterilisation Procedures
- Management of Patients with Chronic Conditions
- Clinical Management and Continuity of Care.

It was not disputed that the Committee was entitled to take under consideration each of the matters dealt with by the Committee under those sub-headings and it was not suggested that there had been a denial by the Committee of procedural fairness to the applicant.

41. After making submissions in relation to those aspects of the matter, counsel for the applicant turned to what the Committee had said in its report under the sub-heading 'Volume of Services and Level of Care' and in the relevant part of the summary of its findings. We propose to deal with this aspect of the matter before considering other issues. Although some reference has already been made to what the Committee relevantly said in its report, the text of paragraphs 19-22 of the report should be set out in full. The Committee there said:

- '19. In light of the above, the Committee found it difficult to avoid the conclusion that Dr Ho routinely saw patients for a short period of time. Although Dr Ho insisted that she was about to carry out competent patient care, including preventative medicine and chronic care with attention to psycho-social issues

(allowing her patients to talk and then counselling them), it is apparent from the statistics that this would have been virtually impossible.

- '20. Apart from its concerns about the brevity of her consultations, the Committee was also concerned about Dr Ho's physical and emotional ability to provide an appropriate level of clinical input. The Committee believe that, in seeing very large number of patients, Dr Ho could reasonably be assumed to have suffered from chronic fatigue. In July and August 1995, it was not unusual for Dr Ho to see more than 90 patients per day on consecutive days. While acknowledging that treating between 70 and 80 patients on an occasional day was quite feasible, the Committee considered that doing so consistently (on around 54% of her working days) must have cause fatigue and in inevitable deterioration in practice standards. Dr Ho noted in her submissions that the President of the Royal Australian College of General Practitioners had been reported as saying: 'It might be possible working very hard to see 80 patients some times, but not all the time'. In this regard, the Committee believe that quality patient care could not be provided over the sustained period that Dr Ho rendered a high number of services (60 or more services per day on 84% of her working days) at the Rosebank Medical Centre.
- '21. A further aspect of Dr Ho's practice which concerns the Committee was her rendering of services on Saturdays. Although it was evident from the generally lower number of services rendered on Saturdays that she worked shorter hours on those days, Dr Ho still managed to render 60 or more services per day (in once instance 83 services) on 18 out of 49 Saturdays. Although Dr Ho did not state her normal working hours on Saturdays at the Rosebank Medical Centre, she did indicate that her Saturday hours at her Springvale practice were from 9.00am to 2.00pm, ie five hours. In this respect the Committee noted that on Saturday 25 May 1996 Dr Ho rendered 62 services a her Springvale practice. Of those services 57 were level B consultations (item 23), 3 were level C consultations (item 36), 1 was an antenatal attendance (item 16500) and 1 was a pregnancy test (item 73806).
- '22. Excluding the pregnancy test and the 3 level C consultations (which by the definition of the item would have taken at least one hour to provide), Dr Ho would have had four hours in which to render the 57 level B consultations and 1 antenatal attendance. If, as Dr Ho claimed, she did take an average of at least 10 minutes to render her consultations, it would be expected that the 57 level B consultations and the antenatal attendance would have taken her 9.6 hours. If she did them in four hours, she would have averaged 4.1 minutes per consultation (including the antenatal attendance), and this makes absolutely no allowance for even the briefest break from direct patient contact. On the evidence before it, the Committee found it difficult to take seriously Dr Ho's claims about the time she spent with her patients. Notwithstanding Dr Ho's submission of a laudatory self assessment of her practice standards, Dr Ho failed to convince to Committee that she possessed the exceptional skill level and ability that it believed would be required to provide appropriate levels of care when consistently rendering a large number of service in very short time periods. Indeed, the Committee was strongly of the view that Dr Ho could not have provided an appropriate level of clinical input into her consultations.
42. It was submitted on behalf of the applicant that, although she worked long hours on a fairly constant basis during the referral period, she did not compromise patient care by

doing so and that it was not appropriate to pass judgement on her simply by reason of the number of services rendered during that period. It was asserted that the examination that the Committee made of the treatment of a number of her patients did not reveal any serious deficiency in the way in which she treated those patients. It may be, so counsel submitted, that the time factor impacted upon the adequacy of the applicant's clinical records but not upon the appropriate care being rendered to her patients. There was, so it was said, little if any evidence before the Committee to demonstrate that she was giving inappropriate care to any patient. It was further submitted that the general proposition that, but reason of seeing large numbers of patients, the applicant was not giving good care to all of them was not necessarily made out by the material before the Committee.

43. We have examined the Daily Items Report (PIRD) annexed to and forming part of the referral document. That report shows that Medicare benefits were paid in respect of services rendered to patients by the applicant on 318 days during the referral period. The report also shows the total number of services rendered on each of those days, the nature of those services (identified by reference to the relevant item number in the General medical Services Table) and the number of services under each item. On 192 of those days, the applicant rendered more than 61 services as shown in the following table:

Number of Services	Number of Days
61-70	76
71-80	57
81-90	35
91-100	18
101-110	4
113	1
129	1
TOTAL 192	

44. Another of the annexures to the referral document, described as Estimated Time Report - P/T time, showed, in respect of each of the 318 days referred to above, the number of services rendered and an estimate (based on an estimate of the average time necessary to render each type of service while providing quality care) of the period of direct patient contact which the rendering of those services would have required. It appears from the Daily Items Report (PIRD) and the Estimated Time Report - P/Time that by far the largest proportion of services rendered on any day were level B surgery consultations (item 23). A level B surgery consultation was described in the General Medical Services Table as 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 1 or more problems, or a professional attendance of less than 20 minutes duration involving components of a service to which certain other items applied. In respect of each level B surgery consultation, the Estimated Time Report - P/Time assigns an estimate of 10 minutes.
45. An analysis of the information contained in the Estimated Time Report - P/Time shows that the rendering of the services shown in the Daily Items Report (PIRD) necessitated very long hours of direct patient contact, very often on consecutive days. What was involved is illustrated by the following instances selected at random.

Number of Services	Day and Date	Estimated Time	
		Hours	Minutes
62	Tuesday 4 July 1995	10	24
69	Friday 1 December 1995	11	15
75	Monday 6 November 1995	13	1
78	Wednesday 3 April 1996	13	9
84	Tuesday 11 June 1996	13	58
90	Monday 30 October 1995	14	52
93	Tuesday 22 August 1995	15	14
100	Tuesday 19 September 1995	16	4

46. The following table shows, in respect of the two weeks commencing on Monday, 21 August 1995, the number of services rendered by the applicant and the hours of direct patient contact which, according to the Estimated Time Report - P/Time, would have been required to render those services while providing quality care.

Day and Date 1995	Number of Level B Consultations	Total Number of Services	Estimated Time	
			Hours	Minutes
Monday 21 August	100	106	17	8
Tuesday 22 August	87	93	15	14
Wednesday 23 August	79	88	14	34
Thursday 24 August	86	97	15	51
Friday 25 August	57	65	11	16
Saturday 26 August	61	67	11	26
Sunday 27 August	3	3	-	30
Monday 28 August	102	105	17	21
Tuesday 29 August	85	85	14	10
Wednesday 30 August	65	72	12	16
Thursday 31 August	73	77	12	52
Friday 1 September	85	101	16	56
Saturday 2 September	58	63	11	-

47. The estimated times set out in the above tables take no account of spent on matters other than direct patient contact. In particular, no allowance is made for pauses between patients, travelling time (including making house and nursing home visits), writing repeat prescriptions in cases where the patient does not re-attend the surgery, making and receiving telephone calls (patients and specialists), reading and considering pathology reports, keeping abreast of developments in relation to relevant therapeutic issues and taking breaks, albeit short, for coffee, lunch and other purposes. The applicant also made a particular point that she spent considerable time with patients educating them on the benefits of having their children immunised.
48. The applicant professed to having provided primary, comprehensive and continuing whole patient care and repeatedly asserted, when questioned, that she spent time with her patients, including time for counselling and giving them encouragement and support. However, even accepting that she worked long hours both at the Rosebank Medical Centre and at her practice at Springvale and making due allowance for her evidence that, during the referral period, much of the administrative work of the practice was performed by her husband (who was not medically qualified), we are satisfied that, in rendering the high number of services, often on consecutive days, which she did, it would have been impossible for the applicant to provide the appropriate clinical input for each and every one of her patients. We find ourselves in substantial agreement with

what the Committee said in the paragraphs of its report the text of which is set out above.

49. Another significant aspect of the matter in which the applicant carried on her practice is to be found in an examination of her clinical records. As has previously been mentioned, the Committee had before it a limited number of clinical records, but, on at least two occasions, the applicant assured the Committee that the clinical records that had been produced were typical of the way in which she kept her records and the way in which she dealt with her patients during the referral period.
50. Paragraphs 57-61 of the Committee's report comment upon shortcomings in the clinical records that had been discussed by the Committee with the applicant. Those paragraphs read:
- '57. The Committee found no provision in the clinical records for the monitoring of essential care such as pap smears, mammography, and lipid studies in cardiovascular patients. There was no apparent record of immunisation or any obvious system which would remind Dr Ho to regularly check patients with chronic diseases such as diabetes. If there was a record of these things being done, it was simply recorded in the chronological notes. Although generally required in diabetic management, blood sugar tests, glycoselated haemoglobin and referral to an ophthalmologist did not appear to be done at regular intervals for Dr Ho's diabetic patients. She had no specific summary of preventative measures carried out and no easy way of determining whether these were due or not.
58. Dr Ho did not use consistent summary record charts. Her recording of relevant details such as smoking and allergy history, past medical history, family history and social history were never consistently recorded [sic] although some of those items were recorded some of the time on some of the records. A difficulty for the Committee was that it was frequently unclear, when medications or problems were cited at the top of the chart, whether this referred to existing problems or previous problems, or at what stage they had been recorded.
59. The Committee found that, in several instances, Dr Ho's notes were insufficient to allow for the ongoing management of the patient by another practitioner, such [as] a locum doctor coming into the practice. The Committee frequently had to ask Dr Ho to clarify and interpret her records so that it could obtain meaningful clinical information in respect of particular patients ...
60. Relevant negative clinical findings and pertinent examinations and procedures were frequently not recorded in Dr Ho's notes. For example, there was no record of fluorescent staining having been performed for the eye condition of one patient This would have been an important step prior to the prescription of Prednisolone eye drops. As in a number of cases discussed with Dr Ho, she informed the Committee that she had done what was required but had not recorded it in her notes. Dr Ho also tended to state what she ' would have done' in particular circumstances rather than what she had actually done. The evidence that important procedures and examinations had been done was effectively missing. In defence of this Dr Ho said:
'You can only write as much as you can'.

61. The Committee considered it essential that pertinent details be included in the clinical records and that a lack of time was not an adequate excuse for not doing so.'

51. After referring to the standards for record keeping set out in the '1996 Entry Standards for General Practices' developed and published by the Royal Australian College of General Practitioners, the Committee said in paragraph 67 of its report:

'The Committee considered that Dr Ho's patient histories did not demonstrate the above three criteria. Patient histories were generally quite brief and the absence of health summaries which could be used effectively meant that the opportunity for meaningful continuity of care, comprehensive care, or unambiguous interpretation of the medical records was lacking. In relation to these criteria, the Committee believed that Dr Ho's records were inadequate.'

The three criteria referred to were:

'Each patient's medical record is comprehensive, well organised and legible.'

'The practice incorporates health summaries into active patient medical records.'

'Each patient's medical record contains accurate information about each encounter which is sufficient to allow another doctor to carry on the management of the patient.'

52. During the course of the hearing, the members of the Tribunal discussed with counsel for the applicant the sufficiency of the applicant's clinical records in relation to a number of patients. In almost every case discussed, counsel conceded that there were deficiencies in those records but, as already mentioned, he submitted that those deficiencies should not result in a finding that the applicant had failed to provide appropriate care for the patients concerned.

53. In the following paragraphs we refer to some instances in which there can be no doubt, in our opinion, that the applicant's clinical records are serious deficient. In discussing these instances we shall refer to the patient concerned only by his or her initials.

54. Patient G.C. presented on 4 June 1996. The clinical notes record to the following effect:

Feel congested in chest : dark sputum plus : examination of chest : creps plus at base of lungs.

The clinical records do not record any diagnosis but in her evidence before the Committee the applicant reconstructed that she had diagnosed bronchitis. She prescribed Brondecon and Rulide. However, there is nothing in the material to indicate that the applicant measured the patient's temperature, pulse, blood pressure or respiratory rate for the purpose of excluding a diagnosis of pneumonia as, in our opinion, she should prudently have done.

55. Patient L.C. presented on 10 June 1996 with, amongst other complaints, an eye problem, namely an inflamed right conjunctiva. The only information in the clinical records is a basic line drawing representing an eye with a squiggle at the bottom right of the drawing with an arrow and the word 'inflamed'. No diagnosis is recorded and there is no record of an examination of the eye to exclude a foreign body, nor a record of ocular tensions or staining to exclude herpetic ulceration. There is no mention of a past

or a family history of glaucoma. Predsol eye drops were prescribed for a period of 7 days. There is no record in the notes that the patient was required to attend for a further examination to monitor the effectiveness of the treatment. However, the patient presented again on 21 June 1996 but the notes in respect of that consultation contain no information as to the condition of the patient's right eye.

56. In our opinion, it is vital, in the case of a patient presenting with a unilateral red eye, to be absolutely positive as to the cause before prescribing eye drops and the condition needs to be followed up assiduously. Further, there is a very real danger in prescribing Predsol eye drops, a steroid, for a patient who presents with a unilateral red eye and in whom the practitioner cannot exclude glaucoma or acute infection.
57. Patients F.G and L.L. received acupuncture treatment at the Springvale surgery during the referral period, F.G. on 21 and 28 June 1996 and L.L. on 26 June 1996. The only notations in respect of the treatment of F.G. are 'Acupuncture to thoracic' and 'Acupuncture left knee'. There is no notation of any acupuncture point used nor any indication on any subsequent day of the response, if any, to the treatment. The applicant said that it was not her practice to record the acupuncture point or points used in any of the 127 acupuncture treatments she administered during the referral period. We shall say something more about the applicant's acupuncture treatments later in these reasons.
58. The clinical records give rise to even more serious concerns. The patient Q.F. presented with eczema around the umbilicus on 21 May 1996 and again on 21 June 1996. On the latter occasion the clinical records contain the notation 'Eczema around umbilicus now up'. The applicant prescribed Diprosone ointment, a steroid, and Flopen, an antibiotic which is capable of producing some serious side effects on occasions. The applicant sought to explain the prescription of Flopen on the basis that there was an increase in inflammation 'and possibly infection in the area'. The clinical records, however, contain no reference to any secondary infection in the area of the umbilicus and, as a post hoc rationalisation or justification of the prescription, the Committee was asked to infer that there was an infection present. This in our view correctly, it was not prepared to do. The circumstances also prompt the question whether it was appropriate to prescribe Diprosone (a steroid) if there was present an infection severe enough to warrant the prescription of Flopen, the combination not being a desirable one.
59. The patient G.C. (see paragraph 54 above) also presented on 21 June 1996 to receive the results of certain blood tests. The clinical notes record the results as haemoglobin 95 grams per litre, white cell count 7.1 and platelets 89. The notes continue : 'eats meat : no excess bleeding : ? haematological : discuss : refer B. Lim'. The applicant did not herself examine the patient on that occasion but was content to refer him to Dr Lim, who had previously seen him on other occasions, on the basis that Dr Lim would see him in 3 days' time. The applicant wrote to Dr Lim on 21 June 1996 but there is no indication in the material whether she received a letter or other communication from Dr Lim and, if so, what was the substance of its contents. The applicant sought to justify her decision not to examine the patient notwithstanding that he had a serious illness and had just received an abnormal blood test result. However, we cannot but agree with the Committee that it was not acceptable to wait 3 days before the urgency of the situation was assessed.
60. Patient A.C., aged 9 months, presented on 7 June 1996, according to the clinical records, with a running nose and coughing for a long time : vomiting that day : Orthoxical : no help : sleeping OK : loose motions. The records also show, on examination, chest clear, crepitations, pharyngitis, ear normal. A diagnosis of upper

respiratory tract infection is recorded and Ventolin and Demazin prescribed. The patient presented again on 21 June 1996, the clinical notes reading:

'Vomiting up milk, diarrhoea 2 days ago, now decreased, green-yellow colour. Given Gastrolyte. On examination chest clear, pharyngitis and teething : viral illness : lemonade diet-rice'.

There is no record of the patient's temperature or weight nor any assessment of the extent of the patient's dehydration. There is nothing to indicate that the applicant made the necessary observations or tests to rule out the possibility that the child was suffering from pneumonia which should have been a matter for real concern.

61. Patient L.L. (see paragraph 57 above) had a past history of diabetes and hypertension. She attended the applicant on 24 May 1996. Her blood pressure was very high at 190/100. She was also obese. The applicant prescribed Diabex and Daonil for the diabetes but the clinical records do not specify the strength of either drug. The patient visited the applicant on 3 later occasions during the referral period, namely on 6, 21 and 26 June 1996. The clinical notes do not record her blood glucose level is recorded in respect of any of the four occasions on which the patient was seen in May and June 1996. The applicant explained that the patient's compliance was very poor and her attendance erratic yet, with that knowledge, she did not take the opportunity presented to her on the occasions mentioned to check and monitor the patient's condition in the respects mentioned.
62. Patient K.S., who was a nurse, presented on 24 June 1996 with moderate to severe asthma. She had previously been taking Ventolin. On this occasion Prednisolone, an oral steroid, was prescribed. The patient was directed to take 50mg on 24 June 1996, 25mg on 25 and 26 June 1996 and 12.5mg on 27 and 28 June 1996. According to the applicant's evidence, the patient was to present again on 29 June 1996 but there is no notation to that effect in the clinical records and the patient did not attend on that day or for some 11 days thereafter. The clinical records do not indicate that the patient was advised, as she should, in our opinion, have been, that it was unwise to stop taking oral steroids without having available for use as a back up, if necessary, a steroid inhalant. According to the records the applicant not only did not give that advice but did not prescribe any appropriate steroid inhalant.
63. We have not found it necessary to discuss each of the consultations which the Committee specified in stating its conclusion that the applicant had engaged in inappropriate practice as defined in subsection 82(1) of the 1973 Act. It should not, however, be assumed that in every single case we take as critical a view as did the Committee.
64. The matters to which we have referred demonstrate that the clinical records during the referral period were inadequate to provide a sufficient aide memoire to the applicant as to what had occurred at a particular consultation let alone to provide sufficient guidance to another practitioner if called upon to continue the patient's treatment. More than one reason may be postulated to explain the deficiencies in the records but at least one possible explanation which, of course, the applicant did not advance, is the pressure of time resulting from her rendering such a high number of services per day. Such pressure might manifest itself either in a failure to carry out particular procedures or, having carried out such procedures, a failure to make an adequate notation of the salient points.

65. We agree generally with the comments of the Committee upon the general content of the applicant's clinical records as set out in paragraphs 57-61 of its report the text of which is set out above. Our comments on the records and those of the Committee serve to reinforce the view previously expressed (see paragraph 48) that the applicant could not provide, during the referral period, the appropriate clinical input for each and every one of her patients.
66. We are satisfied that a group of medical practitioners with extensive experience in general practice, such as the members of the Committee, could, from an examination of the material that was before them, draw an overall picture 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 her practice in that fashion would be viewed by the general body of general practitioners. The material before it was such that the Committee could reasonably conclude that the applicant was not, in every instance, providing a level of clinical input that was adequate for the proper care of her patients and that her conduct in connection with rendering some of the services the subject of the referral amounted to inappropriate practice within the meaning of that expression as defined in subsection 82(1).
67. A careful consideration of the matters to which we have referred earlier in these reasons has led us to reach a firm conclusion similar to that reached by the Committee. We are, of course, unable to relate that conclusion to particular services rendered to identified patients or to a specific proportion of the total number of services rendered by the applicant during the referral period. As von Doussa J explained in *Retnaraja v Morauta* (1999) 93 FCR 397 at pp.410-412, it is not necessary to do so : it is sufficient if the ultimate conclusion that a practitioner has engaged in inappropriate practice relates the conduct constituting the inappropriate practice to a finding that some of the services referred would be unacceptable to the general body of the members of the specialty in which the practitioner was practising at the relevant time. Beaumont J took a similar approach in *Adams v Yung* (1998) 83 FCR 248 at pp.283-284 and the decision in *Tankey v Adams* [1999] FCA 683 and, on appeal, [2000] FCA 1089 is consistent with that view, noting, however, that the figure of \$258,277.45 was fixed by the Determining Officer and not by the Committee as stated in paragraph 138 of the Full Court decision. The position is, of course, otherwise when consideration is being given to the exercise of the power conferred on the Determining Officer by paragraph (c) of subsection 106U(1). To enliven that power there must be a finding in the relevant report identifying by number, or by a percentage of a total, the services in connection with which the practitioner has engaged in appropriate practice as defined.
68. The Committee concluded that the applicant had engaged in inappropriate practice as defined in relation to all the acupuncture treatments, 127 in all, rendered by her to her patients during the referral period. In paragraph 30 of its report, the Committee said that, in respect of her failure to record the points used in her acupuncture treatments, the applicant's conduct would be unacceptable to the general body of general practitioners in Australia and that, accordingly, the applicant had engaged in inappropriate practice in connection with the rendering of acupuncture treatments to the patients F.G. and L.L. (see paragraph 57 above). The Committee went on to say (paragraph 31) that, in light of the applicant's admission that she did not record acupuncture points and that she had not updated her acupuncture skills since 1985, the same deficiencies that led to its finding of inappropriate practice in the two cases mentioned necessarily affected the quality of all the acupuncture services rendered during the referral period.
69. On her own admission, the applicant's knowledge of acupuncture is not extensive or encyclopaedic and, in the course of her evidence, she made the somewhat disturbing

statement that she used a particular acupuncture point because 'I find that this is the easiest for me when I do such limited acupuncture'. Nevertheless, as there were no standards prescribed for the employment of acupuncture procedures and no registration requirements for those practising in that area, we are of the opinion that the evidence before the Committee was not sufficient to warrant the conclusion that the applicant's conduct in conducting acupuncture procedures amounted to inappropriate practice. The failure to record the acupuncture points used, while an appropriate matter to be taken into account in assessing the overall picture of the applicant's practice, does not of itself establish that the carrying out of the services themselves amounted to inappropriate practice. We are, therefore, of opinion that there is no foundation for the direction of the Determining Officer that the applicant repay to the Commonwealth an amount equivalent to the Medicare benefits paid for all 127 Medicare Benefits Schedule Item 173 services rendered by her during the referral period. The Tribunal believes that guidelines for the performing of acupuncture and a system of accreditation of practitioners providing acupuncture services should be developed.

70. The final matter for consideration upon the Committee's report concerns the conclusion that the applicant had engaged in inappropriate practice as defined in relation to all the services rendered by the applicant during the referral period under the items in the General Medical Services Table numbered 30026, 30032, 30117 and 30219, those being services that required the use of sterilised surgical equipment.
71. The basis for the Committee's finding was the evidence before it that, in the Rosebank Medical Centre during the referral period, the applicant used a boiler steriliser, surgical equipment being boiled for 20 to 30 minutes, and that, in the Springvale practice during that period, she used an autoclave but did not, when sterilising equipment, use biological controls as a failsafe system designed to ensure the effectiveness of the steriliser. The Committee took the view that the sterilisation technique in use at Rosebank Medical Centre was inadequate for sterilisation, particularly in an age of AIDS and hepatitis, and that the use of that technique and the failure to use biological controls in the autoclave at her Springvale practice constituted a hazard to all patients on whom skin penetration procedures were performed.
72. We agree that the conduct of the applicant in carrying out sterilisation procedures in a manner which could not guarantee that the surgical equipment would be effectively sterilised amounted to inappropriate practice as defined and that there was an appropriate foundation upon which the Determining Officer could direct that the applicant repay to the Commonwealth an amount equivalent to the Medicare benefits paid in respect of the services mentioned.
73. It remains to consider the appropriateness of the directions set out in the final determination dated 10 March 2000.
74. The findings that have been made of inappropriate practice reflect quite serious concerns as to the conduct of the applicant in carrying on her practice. The applicant has given no indication of her willingness to change her method of practice so as to accord more closely with what would be acceptable to the general body of general practitioners. Nothing has been put to us which leads us to the conclusion that we should interfere with the directions that the applicant be reprimanded and counselled.
75. We are also of opinion that the direction for the repayment to the Commonwealth of an amount equivalent to the Medicare benefits paid in respect of the services rendered under the items in the General Medical Services Table numbered 30026, 30032, 30117 and 30219 should stand. As has already been said, there is, in our opinion, no

appropriate foundation for the direction that the applicant repay to the Commonwealth an amount equivalent to the Medicare benefits paid in respect of the services rendered by the applicant under item 173 in the General Medical Services Table.

Conclusion

76. For the reasons set out above, we set aside the final determination made by the respondent on 10 March 2000 and in lieu thereof make a determination directing that:
- (1) in accordance with paragraph 106U(a) of the *Health Insurance Act 1973* ('the Act'), the Director of Professional Services Review or the Director's nominee reprimand the applicant;
 - (2) in accordance with paragraph 106U(1)(b) of the Act, the Director of Professional Services Review or the Director's nominee counsel the applicant;
 - (3) in accordance with paragraph 106U(1)(c) of the Act, the applicant repay to the Commonwealth the amount of \$1761.70; being:
 - (a) \$258.40, being an amount equivalent to the Medicare benefits paid in respect of the 8 services rendered during the referral period under item 30026 in the General Medical Services Table;
 - (b) \$410.20, being an amount equivalent to the Medicare benefits paid in respect of the 8 services rendered during the referral period under item 30032 in the General Medical Services Table;
 - (c) \$957.90, being an amount equivalent to the Medicare benefits paid in respect of the 16 services rendered during the referral period under item 30117 in the General Medical Services Table; and
 - (d) \$135.20, being an amount equivalent to the Medicare benefits paid in respect of the 8 services rendered during the referral period under item 30219 in the General Medical Services Table;

and that any Medicare benefit that would otherwise be payable for those services cease to be payable.

Counsel for the applicant:	Mr S.L. Tatarka
Solicitors for the applicant:	Harvey Bruce & Co
Counsel for the respondent:	Ms R.M. Henderson
Solicitors for the respondent:	Minter Ellison
Dates of hearing:	22 and 23 August 2000
Place of hearing:	Melbourne
Date of decision:	27 November 2000

This and the preceding 23 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 N. McH. Ramsey given on the 27th day of November 2000.

DATED this 27th day of November 2000

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Registrar