

PROFESSIONAL SERVICES)
REVIEW TRIBUNAL)

No. 4 of 2000

BETWEEN: **MALCOLM ADAMS TRAILL**
Applicant

AND: **IAN STEWART McRAE**
Respondent

TRIBUNAL: The Honourable A.R. Neaves, President
Dr P. Joseph, Member
Professor D. Tiller, Member

DATE: 28 May 2001

DECISION

The Determination made herein by the respondent and dated 12 October 2000 is affirmed.

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

PROFESSIONAL SERVICES) No. 4 of 2000
REVIEW TRIBUNAL)

BETWEEN: **MALCOLM ADAMS TRAILL**
Applicant

AND: **IAN STEWART McRAE**
Respondent

TRIBUNAL: The Honourable A.R. Neaves, President
Dr P. Joseph, Member
Professor D. Tiller, Member

DATE: 28 May 2001

REASONS FOR DECISION

THE TRIBUNAL:

Nature of the Proceeding

The matter before the Tribunal is the review, upon the request of Dr Malcolm Adams Traill (“the applicant”) of the final determination relating to the applicant made by Ian Stewart McRae (“the respondent”) and dated 12 October 2000. The matter arises under provisions of the Health Insurance Act 1973 (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although Part VA of the 1973 Act pursuant to which this Tribunal was established and its proceedings regulated was repealed by item 63 of Schedule 1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 by the Health Insurance Commission Act 1973 (Cth) to the Director of Professional Services Review appointed under section 83 of the 1973 Act and that the 1973 Act as in force immediately before the commencement of Schedule 1 to the 1999 Act continues to apply in respect of any such matter. It was not contended by either party that the present matter is other than such a matter.

The Applicant

2. The applicant graduated MBBS within Melbourne University in 1963. He was a Resident Medical Officer for 1 year at Footscray Hospital which provided his only formal training in general practice. He then became a Medical Officer at Repatriation General Hospital, Heidelberg where he was a trainee pathologist from 1965 to 1969. In the latter year he became a consultant pathologist at the Mental Health Authority where he remained until 1975. In 1971 he became a Fellow of the Royal College of Pathologists of Australasia.

3. In 1975 the applicant commenced a private pathology laboratory as a solo practitioner servicing Springvale and District Hospital and Dandenong Valley Private Hospital. In 1983 he diversified into industrial applications for high technology non destructive testing. He has been an Approved Pathology Practitioner since 1987. In 1988 he sold his laboratory to Glendon Diagnostics (Aust) Pty Ltd and held a salaried position with that company until 1989 when, in consequence of his inability to find a position in a pathology laboratory, public or private, he commenced to work as a general practitioner.

4. The applicant worked in a number of clinics but his employment with them was terminated because of conflicts over pathology arrangements dictated by management or over pay group linkage. In 1992 he commenced to work in the Premier Care Medical Centres operated by Australian Medical Developments Limited and he was so employed during the referral period. During that period the applicant also

maintained a small private practice from his home at East Kew. From 1990 onwards he had an arrangement with Dr Neil Trezise Pathology Services at 582 Heidelberg Road, Fairfield under which he supervised the performance of pathology tests and reports, visiting the laboratory on the way to and from the clinics where he worked.

5. The applicant became a vocationally registered general practitioner on 3 January 1993 under legislative provisions which allowed medical practitioners without specific formal training in general practice to be registered in certain circumstances. It appears that the applicant was accepted for registration on the basis of 4 years' general practice together with the fact that he had a specialist qualification as a pathologist.

6. The applicant was counselled on 6 September 1994 and 17 October 1995 by a Health Insurance Commission Medical Adviser.

The Referral

7. On 20 March 1997, Dr A.J. Parkes, who described himself as Medical Director and Manager, Professional Services Branch of the Commission, signed a document referring to the Director of Professional Services Review "the conduct of Dr Malcolm Adams Traill in relation to whether he has engaged in inappropriate practice, in connection with the rendering of services, as defined by the Act pursuant to subsection 86(1) of the Act." The 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.

8. 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.”

9. The document identified the referred services (see subsection 87(1) of the 1973 Act) as “services rendered by Dr Traill from his practice locations in the State of Victoria during the period of 1 July 1995 to 30 June 1996, inclusive”. Those practice locations and the code letter assigned to each were identified as:

- (a) 92 Main Street, Greensborough (Code A);
- (b) 10 Munro Street, East Kew (Code D);
- (c) 79 Stud Road, Dandenong (Code H);
- (d) 1019-1021 Plenty Road, Kingsbury (Code M);
- (e) 250 Childs Road, Mill Park (Code P);
- (f) Premier Care, 239 Clayton Road, Clayton (Code T);
- (g) 17 George Street, East Melbourne (Code U); and
- (h) 582 Heidelberg Road, Fairfield (Code Y).

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

“The Health Insurance Commission is concerned that Dr Traill may not be able to provide an appropriate level of clinical input when consistently rendering such a high volume of level B consultations (item 23).

....

In the referral period 1 July 1995 to 30 June 1996, Dr Traill provided 20,541 level B consultations (item 23). This places Dr Traill above the 99th percentile for level B consultations (item 23) when compared to all other general practitioners in Australia. 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 Traill's conduct in connection with the rendering of level B consultation items may constitute inappropriate practice."

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

- Background of Dr Traill
- Health Insurance Commission Assessment
- Details of Health Insurance Commission Concern
- Other Details of Dr Traill's Practice
- Chronological Record of this Referral.

12. Annexed to the referral document was a summary of the referred material together with 4 attachments and 6 reports. The attachments were described as:

- Past counselling report
- Census data
- Explanation of Artificial Neural Net
- Journal articles

The 6 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
- Diagnostic imaging, pathology and specialist referral reports.

13. The applicant was given an opportunity to make written submissions to the Director of Professional Services Review within 14 days from the date of the notification stating why the Director should dismiss the referral without setting up a Committee (see subsection 88(2) of the 1973 Act).

Professional Services Review Committee

14. On 6 August 1997, the Director of Professional Services Review, Dr A.J. Holmes, signed an instrument under sections 93 and 95 of the 1973 Act setting up Professional Services Review Committee No. 57 (“the Committee”) to consider whether the applicant had engaged in inappropriate practice.

15. The Committee comprised a Chairperson and two members. The Chairperson was described in the instrument 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 vocationally registered general practitioner.

Hearing by the Committee

16. Pursuant to section 102 of the 1973 Act, the Committee, by a document dated 10 September 1997, gave the applicant notice of a hearing to be held on 1 October 1997. The Notice of Hearing stated that, if necessary, the hearing might continue on 23 October 1997. The document required the applicant to appear and give evidence at the hearing and to produce the documents referred to in Schedule 1 to the notice. That Schedule described the documents to be produced in the following terms:

- “(1) All documents relating to the services rendered by Dr Malcolm Adams Traill during the Referral Period to the patients on the attached lists (Attachments A, B and C)
- (2) All documents relating to the services rendered by Dr Traill during the Referral Period to the patients numbered 1, 3, 8 and 11 on the attached list (Attachment D)

- (3) All documents relating to the services rendered by Dr Traill to the patients on the attached list (Attachment E)
- (4) All Dr Traill's Royal Australian College of General Practitioners' Quality Assurance and Continuing Medical Education records for the triennium which covers the Referral Period
- (5) All practice appointment books, day books, diaries and attendance registers for the Referral Period: 1 July 199t - 30 June 1996."

Attachment A to Schedule 1 identified by name the patients to whom the applicant was said to have rendered services from his practice location M, being 1019-1021 Plenty Road, Kingsbury, on 6 July 1995 (90 patients - 91 services) together with the relevant item number in the General Medical Services Table and the Medicare benefit paid in respect of each service. Attachment B to the schedule identified by name the 11 patients to whom the applicant was said to have rendered services from his practice location at 1019-1021 Plenty Road, Kingsbury on 5 November 1995 (11 services) together with the relevant item number in the General Medical Services Table and the Medicare benefit paid in respect of each service. Attachment C identified by name the patients to whom the applicant was said to have rendered services from his practice location P, being 250 Childs Road, Mill Park, on 5 November 1995 (93 patients - 102 services) together with the relevant item in the General Medical Services Table and the Medicare benefit paid in respect of each service. Attachment D to the schedule identified by name the 40 patients the services to whom were listed in the Monthly Items Report (PIRT) attached to the referral document together with the ranking of each of those patients in that list. Attachment E to the schedule named 21 patients, being the patients ranked 1 to 12 inclusive in the Top 40 multiple servicing report attached to the referral document.

17. Schedule 2 to the Notice of Hearing stated:

"This referral concerns your conduct in relation to whether you have engaged in inappropriate practice as defined in the Health Insurance Act 1973 in connection with the rendering of those services detailed below.

As detailed in the referral, for the purposes of section 87 of the Act, the referral relates to all services rendered by you during the referral period from your practice locations in the State of Victoria.”

18. The Notice of Hearing was forwarded to the applicant under cover of a letter dated 10 September 1997 from the Secretary to the Committee. The letter provided the applicant with an outline of the proceedings before the Committee and included the following:

“You will be asked to provide details of your professional training and experience. Among other things, the Committee will be interested in:

- your practice arrangements, i.e. type of practice/patients, staffing, financial and clerical arrangements;
- your high volume of rendered services, particularly level B consultations;
- absences from the practice, including holidays; and
- your understanding of your professional responsibilities under the Medicare programme.

The Committee will also seek your views of the referral and the matters the HIC took into consideration in forming its view that your conduct in connection with the rendering of level B consultations may constitute inappropriate practice.”

19. Pursuant to section 106B of the 1973 Act, the Chairperson of the Committee, by instruments in writing dated 10 September 1997 required the Proper Officer of Australian Medical Developments Limited, the company which operated the Premier Care Medical Centres, including those at Kingsbury and Mill Park, to produce to the Committee certain clinical records. One instrument required the production of:

“All documents relating to the services rendered during the Referral Period (1 July 1995 - 30 June 1996) to the patients on the attached lists (Attachments A, B, D and E).”

The other instrument required the production of:

“All documents relating to the services rendered during the Referral Period (1 July 1995 - 30 June 1996) to the patients on the attached lists (Attachments C, D and E).”

The Attachments A, B, C, D and E were copies of the attachments referred to in Schedule 1 to the Notice of Hearing given to the applicant.

20. By letter dated 26 September 1997, the applicant responded to the letter dated 10 September 1997 from the Secretary to the Committee. Attached to the letter was a lengthy submission to the Committee.

21. The hearing by the Committee took place on 1 October 1997. The applicant attended the hearing unaccompanied.

22. At the commencement of the hearing various documents were tendered in evidence and marked as exhibits. They included the clinical records provided by Australian Medical Developments Limited in response to the summonses under section 106B of the 1973 Act to which reference has already been made. The members of the Committee then questioned the applicant at some length on matters relevant to obtaining an understanding of the profile and pattern of his practice during the referral period. The Committee then discussed with the applicant his treatment of a number of patients in respect of whom the Committee had clinical records relating to their treatment.

23. After the close of the hearing the applicant made a written submission to the Committee dated 9 October 1997.

The Committee's Report

24. Pursuant to section 106L of the 1973 Act, the Committee gave to the Determining Officer a written report dated 26 November 1998.

25. After referring to the review process and to the applicant's personal and practice details and his working routine, the Committee referred to the level of patient services rendered by the applicant during the referral period in the following terms:

- “1. During the Referral Period, Dr Traill rendered 28,335 services to 11,585 patients at a Medicare Benefit cost of \$575,603.45 which placed him substantially above the 99th percentile (16,557 services) of all active vocationally registered general practitioners in Australia. Of these, 20,541 were level B consultations (item 23), which was also substantially above the 99th percentile for level B consultations (14,374 services).
2. The remaining services provided by Dr Traill in the Referral Period were covered by over 140 individual MBS items and included 6,049 pathology services to 1,413 patients. Other services provided by Dr Traill included:
 - 147 Level A surgery consultations;
 - 137 Level B home visits;
 - 132 Level C surgery consultations;
 - 8 Level C home visits; and
 - 142 specialist referred consultations.
3. Dr Traill also advised that he would consult 3 or 4 patients a day who were Workcover cases and that he would see no more than two Department of Veteran [sic] Affairs patients a week. These would be additional services to the Medicare related services referred to above.”

Over 99% of the applicant's services during the referral period were direct billed to Medicare.

26. Under the heading “Consideration of Dr Traill’s Conduct”, the report records findings to the following effect:

- That adequate and appropriate care was not achieved was demonstrated during discussions with the applicant and examination of the medical records.
- The applicant did not demonstrate appropriate follow-up of tests and did not maintain an appropriate recall system. When initiating treatment, he made no attempt to ensure that the patient received appropriate follow-up treatment or review and made no effort to monitor progress and, if necessary, adjust medication.
- His clinical management demonstrated flaws in his assessment and management of conditions presented to him. He did not demonstrate the standard of care expected of a general practitioner.
- The applicant did not record details of past history, present and previous medications, allergies and sensitivities, or relevant family history for the majority of patients consulting him for the first time. Generally he did not record details of the presenting problem.
- When ordering pathology tests, the applicant normally only signified this on the patient record as “Path” and gave no details as to the nature of, or reasons for the tests.
- The applicant’s medical records were not of appropriate quality to allow another practitioner to take over the management of the patient.

The Committee’s report then gives eight specific examples where the lack of adequate medical records had a negative impact on adequate patient follow-up or where an unsatisfactory level of clinical input and management was apparent. The eight patients concerned (whom we will identify only by their initials) were JS, TS, JV, MT, JP, PR, PB and TM.

27. The Committee rejected the assertions made by the applicant that his patients were “transients” and that he was to be regarded as a “locum tenens” only and that, in consequence, his responsibilities to his patients were different from those of the normal general practitioner. The Committee regarded the labelling of patients as transients as a device used by the applicant to justify a low level of clinical input, a lack of adequate record keeping and an unsatisfactory approach to patient management in terms of follow-up of diagnoses and treatment.

28. The Committee also rejected the applicant’s contention that he should not be treated as a general practitioner. The Committee also rejected his contention that he was entitled to claim Medicare benefits at the higher rates payable in respect of services rendered by a specialist where another general practitioner in the Premier Care Medical Centre discussed a patient with the applicant or asked the patient to see the applicant or where a consultant to whom the applicant had referred the patient directed the patient back to the applicant with a request that tests be ordered for the further management of the patient’s condition. Specific examples were identified by the Committee and a finding made that the applicant’s conduct in this regard would be unacceptable to the general body of medical practitioners in general practice.

29. A finding was also made by the Committee that the applicant’s conduct in billing item 23 (level B surgery consultation) where the time actually spent with the patient would not enable the necessary elements of an item 23 service to be carried out would be unacceptable to the general body of medical practitioners in general practice. Specific examples, which were said to be by no means exhaustive, were identified where the applicant’s conduct in billing item 23 was inappropriate, the Committee expressing the view that item 3 was the appropriate item. In the case of one patient the Committee concluded that certain consultations charged as item 23 were “unnecessary and did not warrant a Medicare benefit.” The patients concerned (whom we identify only by their initials) were MP, BK and KMcG. It is convenient to mention at this point that, at the relevant time, a level B consultation (item 23) was a professional attendance by a general practitioner at consulting rooms 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. In contrast, a level A consultation (item 3) was a professional attendance by a general practitioner at consulting rooms for an obvious problem characterised by the straightforward nature of the task that required a short patient history and, if required, limited examination and management.

30. The Committee was critical of the applicant's treatment with lithium (a drug used in the treatment of manic depression and a drug with known renal toxicity) of patients suffering from hepatitis C, multiple sclerosis and cancer. The Committee identified level B surgery consultations with a number of patients which, in the Committee's opinion, did not warrant the payment of Medicare benefits.

31. The Committee was also critical of the practice at the Premier Care Medical Centres at Kingsbury and Mill Park under which medical practitioners, including the applicant, signed blank Medicare Claim for Assigned Benefit Forms (DB1 Forms) which were then stored in bulk. Each of the forms included a declaration to be made by the practitioner who rendered the service that all information in the accompanying claim was true and that all services for which payment was claimed were provided by the practitioner or on his or her behalf. The effect of this procedure, the Committee concluded, was that the applicant was not taking responsibility for the direct bill claims submitted to Medicare on his behalf. The applicant's conduct in this regard would, in the Committee's opinion, be unacceptable to the general body of general practitioners. The Committee was, however, unable to relate this finding to any of the services it examined within the referral period.

32. The Committee's conclusion was expressed in these terms:

“After considering the Referral and all the evidence before it, and after applying its combined body of knowledge, the Committee has concluded that Dr Traill's conduct in relation to those services referred for consideration and specified throughout this report would be unacceptable to the general body of medical practitioners practising in general medical practice in Australia. The Committee therefore concludes that Dr Traill has engaged in inappropriate practice as defined in section 82(1)(a) of the Health Insurance Act 1973.”

The Final Determination

33. On 12 October 2000, the respondent, who described himself as “Determining Officer by virtue of a Ministerial appointment made in accordance with section 106Q of the Act” signed a document described as “Final Determination, Section 106T, Health Insurance Act 1973”. The document recited that the Committee had found that the applicant had engaged in inappropriate practice as defined in section 82 of the 1973 Act and directed that:

- “(1) in accordance with paragraph 106U(1)(a) of the Act, the Director of Professional Services Review or the Director’s nominee reprimand Dr Traill in relation to the matters specified in paragraphs 3.2.5, 3.2.6 and 3.2.9 of the attached statement of reasons;
- (2) in accordance with paragraph 106U(1)(b) of the Act, the Director of Professional Services Review or the Director’s nominee counsel Dr Traill in relation to the matters specified in paragraphs 3.2.5, 3.2.6 and 3.2.9 of the attached statement of reasons;
- (3) in accordance with paragraph 106(U)(1)(c) of the Act, Dr Traill repay to the Commonwealth Medicare benefits in the amount of \$1,103.15 as specified in Attachment 1 being:
 - (a) \$83.40 representing Medicare benefits for consultations to patient BK which the Committee found did not warrant payment of Medicare benefit; and
 - (b) \$1,019.75 representing the difference between the Medicare benefits for consultations to patients MP and KMcG which Dr Traill billed as Item 23 services and which the Committee found should have been billed as Item 3 services;and that any Medicare benefit that would otherwise be payable for the services cease to be payable;

- (4) in accordance with paragraph 106U(1)(g)(i) of the Act, Dr Traill be disqualified for a period of 3 years from the time when this determination takes effect in respect of the provision of all services to which an item relates in Group A1 of Part 2 of the General Medical Services Table; and
- (5) in accordance with paragraph 106U(1)(h) of the Act, Dr Traill be fully disqualified for a period of 2 years.”

Attached to the final determination was a statement of reasons.

34. Paragraphs 3.2.5, 3.2.6 and 3.2.9 of the statement of reasons were as follows:

“3.2.5 The Committee found Dr Traill’s conduct, in relation to the clinical input into services provided to the eight case examples set out in pages 12-16 of the Report, would be unacceptable to the general body of medical practitioners in general medical practice (Report p16).

3.2.6 The Committee considered that Dr Traill’s conduct, in billing Item 23 for the specific consultations referred to at pages 21-22 of the Report, where Dr Traill had not provided the appropriate level of clinical input, would be unacceptable to the general body of general practitioners (Report p22).

3.2.9 The Committee considered Dr Traill’s conduct in not taking responsibility for the direct bill claims submitted to Medicare on his behalf would be unacceptable to the general body of general practitioners. It did not relate this finding to any of the services examined within the Referral Period (Report p26).”

The patients referred to in paragraph 3.2.5 of the report are referred to in paragraph 26 of these reasons. As to the patients referred to in paragraph 3.2.6 of the report, see paragraph 29 of these reasons. As to paragraph 3.2.9 of the report, see paragraph 31 of these reasons. Attachment 1 to the final determination set out the calculations by

which the respondent arrived at the amounts of \$83.40 and \$1,019.75 (Directions (a) and (b) of the final determination refer).

Request for Review of Final Determination

35. By letter dated 13 November 2000 addressed to the Minister for Health and Aged Care, Messrs Tress Cocks & Maddox, Solicitors, sought on behalf of the applicant a review of the final determination made on 12 October 2000. The letter set out 31 grounds on which the review was sought. Not all of the grounds were relied upon in argument before the Tribunal.

Relevant Legislative Provisions

36. Between the date of the Committee's report (26 November 1998) and the date of the final determination (12 October 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 106Q pursuant to which the respondent had been appointed as the Determining Officer and repealing section 106R (providing for a copy of the Committee's report to be given to the person under review), section 106S (providing for the making of a draft determination) and section 106T (providing for the making of a final determination);
- Provisions (see items 48, 49 and 53 of Schedule 1) amending section 106U (providing for the content of determinations).

However, item 65 of Schedule 1 to the 1999 Act (to which some reference has already been made) provides that the amendments made by that Schedule do not apply in respect of a matter that, before the commencement of the Schedule, was referred under section 86 of the 1973 Act by the Commission to the Director of Professional Services Review appointed under section 83 of the 1973 Act and that the 1973 Act as in force immediately before the commencement of Schedule 1 to the 1999 Act continues to apply in respect of any such matter. As previously

mentioned, it was not contended by either party that the matter presently before the Tribunal is other than such a matter.

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

38. Part VAA creates a scheme under which a person’s conduct can be examined to ascertain whether inappropriate practice as defined in section 82 is involved and provides for action that can be taken in response to inappropriate practice (subsection 80(1)). In identifying the text of relevant sections within Part VAA of the Act, a number of amendments effected by the 1997 Act and the 1999 Act must be disregarded as those amendments do not apply to a matter, such as the present, which was referred under section 86 of the 1973 Act before the respective dates of commencement of those amending Acts. In what follows the provisions of the 1973 Act are stated in the form relevant to the resolution of the issues that arise in this review.

39. 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 purpose 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.

40. Subdivision C of Division 4 of Part VAA provides that, in the circumstances there stated, a Professional Services Review Committee may, in making findings on the conduct of the person under review in connection with the referred services, base its findings wholly or partly on its findings on his or her conduct in connection with a sample of those services (subsection 106H(1)), provided the requirements of subsection 160H(2) are satisfied.

41. Under section 106L, if the person under review was a practitioner and a specialist when the referred services were rendered or initiated, the Committee is required to give to the Determining Officer a written report setting out its findings on whether the practitioner’s conduct in connection with rendering or initiating the referred services was, in the Committee’s opinion, unacceptable to the general body of the members of the specialty in which the practitioner was practising at that time.

42. 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).

43. Section 106U provides for the content of determinations. A determination must contain one or more of the prescribed directions. These include a reprimand, counselling, repayment to the Commonwealth of the whole or part of the Medicare benefit that was paid in respect of services “in connection with which the person under review is stated in a report under section 106L to have engaged in inappropriate practice” and disqualification wholly or partially.

Role of the Tribunal

44. The role of the Tribunal (see section 116 of the 1973 Act) is to review the final determination dated 12 October 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 13 November 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 v Young (1988) 83 FCR 248 at pp 298-9; Mercado v Holmes [2000] FCA 620 at pp 14-16).

Consideration of the Issues

45. Counsel for the applicant submitted that the Committee's finding of inappropriate practice and the final determination could not be supported. He summarised his submissions as follows:

- (1) The final determination was based on criticisms which went beyond the matters that were the subject of the referral to the Committee.

- (2) The Committee upheld a complaint of failure to give appropriate care having regard to the number of services rendered without engaging in a proper sampling procedure guided by section 106H of the 1973 Act.
- (3) The Committee made general criticisms which do not adequately identify the services or groups of services to which they relate.
- (4) The Committee made adverse findings which had not first been identified and particularised to the applicant at a time allowing him to prepare a proper response according to the requirements of procedural fairness.
- (5) The Committee made adverse findings based on its own opinion on inappropriate practice rather than by reference to standards of practice identified as prevailing in the applicant's specialty and referable to the actual circumstances in which the services were rendered.
- (6) The Committee was not validly constituted under section 95 of the 1973 Act and was, consequently, incapable of making the peer judgment required by section 106L(1)(a) of that Act.
- (7) The Committee misunderstood, and its report gives a distorted impression of, the evidence given by the applicant, the Committee making adverse criticisms which should not be supported on their merits.
- (8) The Determining Officer misconceived his powers by attempting to extrapolate findings of culpability which were not supported by the Committee's report.
- (9) The Determining Officer had no power under paragraphs (g) and (h) of subsection 106U(1) of the Act to impose disqualifications exceeding 12 months and 6 months respectively.

- (10) Taking into account the limitations of the investigation by, and the report of, the Committee and the circumstances under which the applicant practised at the time, the sanctions imposed were disproportionate to his culpability and went far beyond what was appropriate.

In the course of his submissions counsel for the applicant made critical comments upon much of the Committee's report.

46. Counsel for the respondent made detailed submissions in support of the Committee's procedures and findings and submitted that the Tribunal should affirm the final determination made on 12 October 2000.

47. The initial question for the Tribunal is whether any of the material on which the Committee relied should not be taken into consideration by reason of it having been obtained in circumstances which denied procedural fairness to the applicant.

48. Pursuant to subsection 88(1) of the 1973 Act, the applicant had received a copy of the referral document and its various attachments which made it plain that the subject matter of the referral was the appropriateness of the clinical input by the applicant in rendering, during the referral period, the identified medical services. Some three weeks prior to the hearing by the Committee, the applicant received the notice of hearing dated 10 September 1997 issued under section 102 and the covering letter of the same date signed by the Secretary to the Committee. A schedule to the notice of hearing and the attachments referred to in that schedule identified by name each of the patients whose medical records were to be produced to the Committee.

49. By letter dated 26 September 1997 the applicant responded to the letter dated 10 September 1997. The applicant's letter and its attachments comprised some 90 pages. Included was a formulation of what the applicant regarded as basic issues and some 190 questions by which he sought to interrogate the Committee. Although many of the questions were argumentative and others irrelevant to any issue that the Committee had to determine, the nature and content of the questions demonstrates that the applicant was familiar with the contents of the referral document and its

attachments and was well aware of the subject matter to be investigated at the proposed hearing by the Committee.

50. The applicant, therefore, knew that the Committee would be examining the information contained in the referral document and he knew which medical records the Committee would be examining. Further, the referral was not the first notification that the applicant had received about the Commission's concern. He had been interviewed by a Health Insurance Commission Medical Adviser on two occasions concerning his practice - 6 September 1994 and 17 October 1995 - the latter date being within the referral period.

51. We are unable to accept the submission by counsel for the applicant that the Committee's proceedings were not procedurally fair. The applicant was, in our opinion, given appropriate notice of the matter to be investigated by the Committee, namely the appropriateness of his clinical input in rendering medical services during the referral period and he had a real opportunity to respond.

52. Two distinct but related themes permeate the applicant's written submissions to the Committee and his oral statements at the hearing and provided the foundation for some of the submissions made to the Tribunal by counsel for the applicant (see items 5, 6 and 10 in paragraph 45 above). The themes draw attention to the applicant's qualification in pathology and the circumstances in which the applicant practised at the Premier Care Medical Centres at Kingsbury and Mill Park during the referral period. The assertion was made that it was not in accordance with the relevant statutory provisions for his practice at those centres during the referral period to be judged by the Committee as it was constituted, namely by a Deputy Director of Professional Services Review and two vocationally registered general practitioners. The Committee should, it was submitted, have been constituted by a Deputy Director of Professional Services Review and two members with specialist qualifications in pathology. It was also asserted that the test to be applied in determining whether the applicant had, in rendering services at these centres in the referral period, engaged in inappropriate practice was not whether the conduct would be unacceptable to the general body of general practitioners who did not have specialist qualifications in

pathology and were not practising in circumstances similar to those in which the applicant practised at the relevant time.

53. In our opinion, neither of the propositions referred to can be accepted. Although the applicant variously described himself as a “Specialist General (Clinical) Pathologist”, as a “Specialist Physician (Pathology)”, as a “Consulting Pathologist” and as a “Consulting Specialist (General) Pathologist”, we have no doubt that, in rendering services during the referral period at the Premier Care Medical Centres at Kingsbury and Mill Park, the applicant was practising not as specialist pathologist but as a vocationally registered general practitioner. It follows that the test to be applied in determining whether the applicant had engaged in inappropriate practice is whether his conduct would be unacceptable to the general body of general practitioners.

54. In considering the other submissions of counsel for the applicant, some further reference must be made to the nature of the applicant’s practice at the Premier Care Medical Centres at Kingsbury and Mill Park and the background material relating to the services provided by the applicant at those centres as disclosed by the referral document and its attachments and the other material that was before the Committee.

55. The medical centres concerned provided an extended hours medical service staffed by medical practitioners who attended the centres on a rostered basis. In general there was no appointment system in place at either centre, patients being treated, except in emergency situations, in the order in which they attended the centre. Delays in treatment could occur depending on the number of patients attending at any particular time and the number of medical practitioners then on duty. Patients could request to be seen by a particular medical practitioner and, if that practitioner were on duty and available, the patient would be seen by that practitioner. Some patients who attended either of the centres did so on only one occasion. Other patients attended at one of the centres on a number of occasions, some on many occasions. A patient might be seen by a different medical practitioner on each attendance depending on the time of the attendance and the practitioners then on duty.

56. The applicant practised mainly at the medical centre at Kingsbury and in the period from 2 July 1995 to 7 January 1996 (both dates inclusive) he practised at the medical centre at Mill Park but almost exclusively only on Sundays. The Committee found that the applicant regularly worked at the medical centres for approximately 57 hours per week. He was rostered for duty from between 1 and 4 p.m. until 11 p.m. though he sometimes, particularly on Sundays, worked longer hours than those for which the roster provided.

57. Reference has previously been made to the fact that during the referral period the applicant rendered 28,335 services which included 20,541 level B consultations (item 23). A breakdown of those figures according to the practice location at which the services were rendered is shown in the following table:

Location	Services Rendered	Number of Consultations	Level B Consultations
Kingsbury	19,243	18,151	17,919
Mill Park	2,766	2,603	2,594
Treize Pathology, Fairfield	6,049	-	-
Other	277	233	28
Total	28,335	20,987	20,541

The difference between the number of consultations and the number of level B consultations as shown in the above table is accounted for by the following:

- In respect of Kingsbury, the difference of 232 is made up of 143 level A surgery consultations, 3 level B home visits, 81 level C surgery consultations and 5 level D surgery consultations.
- In respect of Mill Park, the difference of 9 is made up of 2 level A surgery consultations, 1 level B home visit and 6 level C surgery consultations.

58. The following table shows, in respect of each of the Sundays in the period 2 July 1995 to 7 January 1996, the number of services rendered by the applicant at the medical centre at Mill Park and the number of those services that are shown by the

Daily Items Report (PIRD) attached to the referral document as having been billed to Medicare as level B consultations (item 23):

Date	Number of Services	Level B Consultations	Date	Number of Services	Level B Consultations
2.7.95	92	89	8.10.95	108	104
9.7.95	90	87	15.10.95 *	-	-
16.7.95	88	83	22.10.95	84	81
23.7.95 *	18	17	29.10.95	120	113
30.7.95	115	108	5.11.95	102	92
6.8.95	83	75	12.11.95	87	86
13.8.95	103	99	19.11.95	110	100
20.8.95	141	129	26.11.95	110	100
27.8.95	87	83	3.12.95	87	80
3.9.95	90	80	10.12.95	107	98
10.9.95	91	89	17.12.95	104	96
17.9.95	111	102	24.12.95	94	88
24.9.95	82	78	31.12.95 *	59	55
1.10.95	101	94	7.1.96	105	100

* On these three dates the applicant is shown to have rendered 67, 60 and 69 services respectively at the medical centre at Kingsbury.

The above table shows that the applicant rendered a total of 2,569 services (including 2,406 level B consultations) at the medical centre at Mill Park on the Sundays listed.

59. The Daily Items Report (PIRD) also shows the number of services that the applicant rendered at the medical centre at Kingsbury on each day during the referral period. On 174 days the applicant rendered more than 60 services as shown in the following table:

Number of Services	Number of Days
61-70	78
71-80	51
81-90	22
91-100	20
101-110	3
	Total 174 days

60. The Committee was also able to obtain some insight into the applicant's approach to the conduct of his practice from statements that he made in his correspondence and in the submission to the Committee dated 26 September 1997. For example, in his letter dated 1 November 1995 addressed to the Health Insurance Commission Medical Adviser who interviewed him on 17 October 1995 he made statements to the following effect:

- He was obliged not to initiate any action that might reduce the image or profitability of the medical centres.
- The medical centres were to be emptied of patients as soon after closing time as possible and he followed this practice.
- Because management of the medical centres would not permit medical practitioners working in those centres to refer patients for pathology to other than a nominated pathology laboratory, he was unable to participate easily in any integrated involvement with the other medical practitioners at the centres.

61. The applicant's letter dated 26 September 1997 addressed to the Secretary to the Committee included the following statement:

"I have no practice in the clinics. In the relevant clinics I am employed to practice and am allocated rosters with or without other doctors to assist me. A high percentage of the patients are 'transients' - those who choose to use the clinic for out of hours services, or cannot obtain appointments to see their 'normal' doctor during working hours. Most are seen on a first come, first served basis, being the policy set by the management."

62. It is against a background exemplified by material including that referred to above that the Committee commenced to question the applicant concerning the general profile of his practice at the Premier Care Medical Centres. Although many

of the statements the applicant made to the Committee were not responsive to the questions asked of him, what does emerge is an understanding of the applicant's approach to the provision by him of medical services at the centres at Kingsbury and Mill Park. The Committee clearly found many of his statements illuminating and fully supportive of the concern that he did not provide the appropriate level of clinical input in respect of each and every service that he rendered.

63. In the course of his oral statements to the Committee at the hearing on 1 October 1997, the applicant made statements to the following effect:

- What's normal to you and what's normal to me are probably quite different. Most of the patients I see are probably out of standard working hours. They are transients.
- As a general rule I would do nearly all procedures and things without staff.
- The average duration of a consultation is a bit longer than eight minutes. When there has been a real very bad day I have crossed the six minute patient consultation but that is rare and I do not like it. In fact I am not terribly happy when I get faster than eight minutes.
- As far as I am concerned I do what is necessary at the time to solve their particular problem of the time. If they want to come back and see me at another time well that is their business. I very rarely tell patients to come back, unless it is clearly medically indicated. It is not my habit to direct the continuum to myself.
- The vast majority of the patients come in with a particular problem at the time for a quick fix, particularly out of hours.
- When pathology tests are ordered I usually just put "Path" in the file notes. Any other doctor who wishes to know what blood tests were ordered can telephone the laboratory I use and find out what has been ordered and what

has not been done. Very rarely would the subject be sufficiently urgent to require a full documentation.

64. During the course of his evidence before the Committee the applicant was asked to comment on the hepatitis C serology as a marker. His attention was directed to the circumstance that, notwithstanding his understanding that hepatitis C antibody does not ever disappear, he had in quite a number of cases ordered monthly hepatitis C antibodies. He said he had done this because he was treating the patients in question for hepatitis C with lithium. This statement led the Committee to seek further clarification from him as to the basis for treating those patients with lithium and with the ethical considerations involved in using an unproved treatment which could generate toxic side effects. The applicant also said he had prescribed lithium for patients suffering from cancer and multiple sclerosis.

65. Counsel for the applicant submitted that it was not open to the Committee to explore questions concerning the proper mode of treating patients with hepatitis C because the question was related, not to clinical input, but to clinical judgment.

66. In our opinion, the matter having come to the attention of the Committee in the circumstances mentioned, the Committee was clearly justified in treating it as a matter of serious concern. It was sufficiently related to the subject matter of the Committee's investigation to warrant the members of the Committee asking further questions about it and expressing an opinion as to its appropriateness. The question may well be asked whether, in terms of the definition of "clinically relevant service" in section 3 of the 1973 Act, the use of lithium in the treatment of a patient suffering from any of the conditions mentioned would be generally accepted in the medical profession as being necessary for the appropriate treatment of the patient. In our opinion, a negative answer must be given to that question. In any event, there is no support for the assertion that the findings of the Committee in respect of the other matters found adversely to the applicant were tainted by what it said in relation to the applicant's use of lithium.

67. The Committee expressly acknowledged in its report that it had not proceeded in accordance with the formal sampling procedures referred to in section

106H of the 1973 Act. It had before it, however, the medical records relating to more than 200 patients, those records relating to the services rendered to the identified patients throughout the referral period. The Committee continued its investigation by discussing with the applicant specific problems that the members of the Committee had identified as the result of examining those records, referring to the particular patients by name. Although only a limited number of patients were discussed with the applicant, those patients had presented with a variety of medical problems. It is reasonable to conclude that the Committee regarded the applicant's general evidence concerning the conduct of his practice as having been confirmed in material respects by the explanations he gave in relation to the specific patients upon whose treatment he had been asked to comment. In these circumstances the Committee no doubt considered it unnecessary to question the applicant about other patients at a further hearing. In this regard it is of some significance that, in the course of responding to questions about specific patients, the applicant repeated some of the general statements which he had previously made as to his mode of practice and which are referred to earlier in these reasons. He added a statement to the effect that he became bored if seeing less than eight patients an hour.

68. 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 his 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 his patients and that his conduct in connection with the rendering of some of the services the subject of the referral amounted to inappropriate practice within the meaning of that expression in subsection 82(1) of the 1973 Act.

69. From a careful consideration of the whole of the material that was before the Committee and taking into account the addresses made to the Tribunal, we are in substantial agreement with the criticisms that the Committee made of the manner in which the applicant conducted his practice. The rapid throughput of patients would,

of itself, clearly militate against adequate assessment being made of the patients seeking his care. Of great significance in this regard are the general statements concerning his practice to which reference has already been made. Also of great significance is the inadequacy of the notations he made in the medical records of the patients who consulted him. As the Committee noted, the notations were deficient in that in most cases there was no record of past history, present and previous medications, allergies and sensitivities or family history where relevant. Further, the notes generally did not record presenting problems or full details of the treatment advised or a proposed management plan. The inadequacy of the records, even as an aide memoire to the applicant, was apparent from the discussion concerning specific patients. Many of the explanations he offered were based not on any notation in the medical records of the patient but on the applicant's recollection of the patient concerned. It is sufficient to make the point to refer to three examples where the absence of an adequate notation is of particular significance. In the case of patient RJ for whom warfarin was prescribed, the dosage was not recorded at any stage even though the patient returned frequently for follow-up. In the case of patient JS, no detail was recorded of the cause of facial lacerations even though suturing was required and no mention was made of tetanus prophylaxis. In the case of patient JV, a child of two years with asthma in a potentially life threatening situation, the notes are totally inadequate.

70. The applicant sought to excuse the lack of adequate notations by referring to the patients as "transients". We have already referred to this assertion. We have no doubt that the general body of general practitioners would regard it as most important to have adequate notes about a new patient even if the practitioner senses that the patient may not attend again.

71. We also note that the case notes kept by the applicant are idiosyncratic: the applicant adopted a personal shorthand. However, even with such assistance as a record of the symbols used offered, the notes were not easily deciphered or interpreted.

72. What was recorded by the applicant clearly did not satisfy the three criteria for record keeping set out in the "1996 Entry Standards for General Practice"

developed and published by The Royal Australian College of General Practitioners, namely:

“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 management of the patient.”

The third of the above criteria is of particular importance in the present case as it was very likely that a patient attending on a subsequent occasion would be seen by a medical practitioner other than the applicant.

73. In the result, we have reached the firm conclusion that the applicant’s 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). We are, of course, unable, on the available material, to relate that conclusion to particular services rendered to identified patients (other than those identified by the Committee in its report) or to a specific proportion of the total number of services rendered by the applicant during the referral period at the Premier Care Medical Centres at Kingsbury and Mill Park. 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 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 283-4 and the decision in Tankey v Adams [1999] FCA 683 and, on appeal, [2000] FCA 1089 is consistent with that view. 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 inappropriate practice as defined.

74. It remains to consider the appropriateness of the directions set out in the final determination dated 12 October 2000. Those directions are set out in paragraph 33 of these reasons.

75. Counsel for the applicant submitted that the Determining Officer had no power to impose the periods of disqualification of 3 years under paragraph (g) of subsection 106U(1) and 2 years under paragraph (h) of that subsection. It was submitted that the maximum periods of disqualification were 12 months and 6 months respectively, those being the periods prescribed in the legislation as it stood during the referral period.

76. The legislative amendments increasing the maximum periods of disqualification, being amendments to subsections (3) and (4) of section 106U were effected by items 21 and 22 of Schedule 1 to the 1997 Act. That Act commenced on 6 November 1997. However, section 4 provided:

“The amendments made by items 1, 2, 3, 7, 12 and 13 of Schedule 1 do not apply to matters referred under section 86 of the Health Insurance Act 1973 before the commencement of this Act.”

77. In our opinion, the inclusion in the Act of the provisions of section 4 limited as those provisions are to the 6 items specified indicates a sufficient intention on the part of the Parliament that the other items in the schedule were to apply irrespective of the date on which the relevant matter was referred under section 86 of the 1973 Act.

78. The findings that have been made of inappropriate practice reflect very serious concerns as to the conduct of the applicant in carrying on his practice. Those concerns are not confined to the services rendered to the patients identified in the Committee’s report. The applicant has given no indication of his willingness to change his method of practice so as to accord more closely with what would be

acceptable to the general body of general practitioners. Nothing that has been put to the Tribunal convinces us that we should vary the directions given by the respondent.

Conclusion

79. for the reasons set out above, the final determination made by the respondent on 12 October 2000 is affirmed.

Counsel for the applicant:	Mr M. Smith
Solicitors for the applicant:	Tress Cocks & Maddox
Counsel for the respondent:	Ms F. Hampel Q.C. and Ms R. Henderson
Solicitors for the respondent:	Minter Ellison
Dates of hearing:	2 and 3 April 2001
Place of hearing:	Melbourne
Date of decision:	28 May 2001

This and the preceding 33 pages comprise the decision and the reasons for decision of the Professional Services Review Tribunal constituted by The Hon A.R. Neaves, Dr P. Joseph and Professor D. Tiller given on the 28th day of May 2001.

DATED this 28th day of May 2001.

.....
Registrar