

PROFESSIONAL SERVICES )  
REVIEW TRIBUNAL )

No 2 of 2001

BETWEEN: NAYAGAMPILLAY YOHENDRAN  
Applicant

AND: LOUISE HELEN MARGARET  
MORAUTA  
Respondent

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

DATE: 28 August 2001

### DECISION

The Determination made herein by the respondent and dated 29 January 2001 is set aside and in lieu thereof a Determination is made directing that:

- (1) in accordance with paragraph 106U(1)(a) of the Act, the Director, Professional Services Review, or the Director's nominee, reprimand the applicant;
- (2) in accordance with paragraph 106U(1)(b) of the Act, the Director, 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 \$116,162.05 being:
  - (a) \$32,433.90, being an amount equivalent to part of the Medicare benefits paid in respect of 2,962 services rendered during the referral period under item 23 in the General Medical Services Table;

- (b) \$5,023.20, being an amount equivalent to part of the Medicare benefits paid in respect of 299 services rendered during the referral period under item 36 in the General Medical Services Table where there was another service rendered to the same patient on the same day;
- (c) \$22,377.60, being an amount equivalent to part of the Medicare benefits paid in respect of 1,332 services rendered during the referral period under item 36 in the General Medical Services Table where no other service was rendered to the same patient on the same day;
- (d) \$12,776.50, being an amount equivalent to part of the Medicare benefits paid in respect of 110 services rendered during the referral period under item 11709 in the General Medical Services Table;
- (e) \$43,550.85, being amount equivalent to part of the Medicare benefits paid in respect of 413 services rendered during the referral period under item 11712 in the General Medical Services Table;

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

- (4) in accordance with subparagraph 106U(1)(g)(i) of the Act, the applicant be disqualified for a period of 12 months 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, the applicant be fully disqualified for a period of 6 months from the time when this determination takes effect.

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(Alan R. Neaves)  
President

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### **REASONS FOR DECISION**

#### **THE TRIBUNAL**

##### **Nature of the Proceeding**

1. The matter before the Tribunal is the review, upon the request of Dr. Nayagampillay Yohendran (“the applicant”), of the final determination relating to the applicant made by Louise Helen Margaret Morauta (“the respondent”) and dated 29 January 2001. The matter is said to arise 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 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. Yohendran graduated in Singapore in 1973 and did his internship in Outram Road General Hospital in Singapore, as well as in Tan Tock Seng Hospital in Singapore. He came to Australia in late 1974 and worked as a medical officer in Prince Henry Hospital in Sydney's eastern suburbs. He was also in 'the first batch to be trained in the Family Medicine Program'.
2. Between 1976 and 1977 Dr. Yohendran worked as a general practitioner, in partnership with his wife, at the Oatley Medical Centre. Between 1978 and 1988 he worked in partnership with another medical practitioner at Kingsgrove Medical Centre and since 1988 has been the principal and owner of the Leichhardt Medical Centre. Dr. Yohendran became vocationally registered in August 1991.”

During the referral period, the applicant rendered services from his practice at the Leichhardt Medical Centre.

## The Referral

3. On 17 November 1997, Dr. A.J. Parkes, who described himself as Manager, Professional Services Branch of the Health Insurance Commission (“the Commission”) and a delegate of the Commission, signed a document referring to the Director of Professional Services Review “the conduct of Dr. Nayagampillay Yohendran relating to whether he has engaged in inappropriate practice within the meaning of section 82 of the Act in connection with rendering and initiation of services”. The reference to “the Act” is a reference to the 1973 Act.

4. The document identified the referred services (see subsection 87(1) of the 1973 Act) as “services rendered and initiated by Dr. Nayagampillay Yohendran that were rendered and initiated during the 2 year period preceding the date of this referral and are:

- (i) services provided within a specified location or specified locations, namely  
Leichhardt Medical Centre  
18 Norton Street  
Leichhardt N.S.W. 2040
- (ii) services provided within a specified period, namely 1 January 1996 to 31 December 1996”.

5. A summary of the Commission’s concerns was set out in paragraph C of the document in the following terms:

### “1. High Volume of Rendered Services

In the referral period 1 January 1996 to 31 December 1996, Dr. Yohendran provided 15,247 services of which 132 were level A consultations (item 3), 10,803 were level B consultations (item 23) and 2,198 were level C consultations (item 36). Dr. Yohendran’s services are above the 98th percentile of all active vocationally registered general practitioners in Australia (14,535 services).

During the referral period Dr. Yohendran provided more than 60 services per day on 93 occasions in his apparent average surgery working day. Time calculations based on the Entry Standards of the Royal Australian College of General Practitioners (RACGP) suggest that Dr. Yohendran would have needed to spend between 10.2 and 16.7 hours per day of direct patient contact to provide quality care at a standard acceptable to the RACGP. The Report of Interview indicates that Dr. Yohendran practises between 42 and 70 hours per week which is approximately 6 to 10 hours per day.

The Health Insurance Commission is concerned that Dr. Yohendran may not be able to provide an appropriate level of clinical input when consistently rendering a high volume of services over long hours on a regular and continuing basis.

## 2. High Rate of Initiation of Pathology.

During the referral period 1 January 1996 to 31 December 1996, Dr. Yohendran referred 1,368 patients (26.7% of total patients) for pathology tests which resulted in 7,345 pathology services being initiated. The number of patients referred for pathology testing and the number of pathology services requested are above the 99th percentile when compared with all active general practitioners in Australia. The Health Insurance Commission believes the rate of initiation of pathology services by Dr. Yohendran is inappropriately high.

## 3. High Rate of Initiation of Diagnostic Imaging.

During the referral period, 1 January 1996 to 31 December 1996, Dr. Yohendran referred 1,065 patients (20.7% of total patients) for diagnostic imaging tests which resulted in 1,827 diagnostic imaging services being initiated. The number of patients referred for diagnostic imaging and the number of diagnostic imaging services requested are above the 99th percentile when compared with all active

general practitioners in Australia. The Health Insurance Commission believes the rate of initiation of diagnostic imaging services by Dr. Yohendran is inappropriately high.

#### 4. High Rendering of Items 11709 and 11712

Item 11709: During the referral period Dr. Yohendran rendered item 11709 (continuous ECG recording (Holter) of ambulatory patient for 12 or more hours) 147 times to 134 patients, placing Dr. Yohendran substantially above the 99th percentile (3) when compared with all active vocationally registered general practitioners in Australia ...

Item 11712: During the referral period Dr. Yohendran rendered item 11712 (multi channel ECG monitoring and recording during exercise) 687 times to 660 patients, placing Dr. Yohendran substantially above the 99th percentile (16) when compared with all active vocationally registered general practitioners in Australia ...”

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

- Background of Dr. Yohendran
- Health Insurance Commission Assessment
- Details of Health Insurance Commission Concerns
- Other Details of Dr. Yohendran’s Practice
- Chronological Record of this Referral.

7. Annexed to the referral document was a summary of the referred material together with 4 attachments and 11 reports. The attachments were described as:

- Past counselling reports
- Census data
- Explanation of Artificial Neural Network
- Journal articles and extracts

The 11 reports were described as:

- Daily Items Report (PIRD)
- Monthly Items Report (PIRT)
- Patient Provider Profile (PPP) - Items 11709 and 11712
- Multiple Servicing Report
- Summary of estimated time report
- Pharmaceutical Benefits Report
- Pathology, Diagnostic Imaging and Specialist Referrals listings
- Monthly Pathology Items Report (PIRT)
- Pathology Episode Report (PAER)
- Monthly Diagnostic Imaging Report (PIRT)
- Diagnostic Imaging Episode Report (DIER)

8. The applicant was given a copy of the referral document and its annexures and given an opportunity to make written submissions to the Director of Professional Services Review within 14 days stating why the Director should dismiss the referral without setting up a Committee (see subsection 88(2) of the 1973 Act). The applicant availed himself of this opportunity and furnished submissions dated 5 and 22 December 1997 to the Director of Professional Services Review.

#### Professional Services Review Committee

9. On 28 October 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. 116 (“the Committee”) to consider whether the applicant had engaged in inappropriate practice.

10. 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 general practitioner (see subsection 95(5) of the 1973 Act as amended by item 7 in Schedule 1 to the 1997 Act). It should here be recorded that Dr. A.R. Buhagiar, one of the two members appointed to the

Committee, died on 25 July 1999 after the draft report of the Committee had been agreed but before the final report was given to the Determining Officer. The applicant consented to the matter being completed by the Chairperson and the remaining member of the Committee.

#### Preliminary Consideration by Committee

11. In its preliminary consideration of the referral the Committee determined that it was necessary to hold a hearing into the matter. Pursuant to section 100 of the 1973 Act, the Chairperson of the Committee, with the approval of the Director of Professional Services Review, engaged a consultant “to provide appropriate advice as to a suitable statistical sampling methodology that would address the concerns raised by the Health Insurance Commission in its Referral of Dr. Yohendran’s conduct and that would satisfy the criticisms of the Federal Court in the Yung case”. The consultant chosen was Professor D. Nicholls of the Department of Statistics and Econometrics within the Faculty of Economics and Commerce of the Australian National University. The request to Professor Nicholls to provide advice to the Committee is dated 30 October 1998.

12. Professor Nicholls’ expanded advice to the Committee is dated 23 November 1998. That advice contained recommendations as to the areas of the applicant’s conduct that would warrant further investigation by the Committee. Those recommendations and the size of the group of services or, in the case of diagnostic imaging, the group of patients from which a random sample was to be selected were as follows:

#### “Item 23 (Level B)

There were a total of 10,803 item 23 consultations during the period of interest. More than 60 services per day were provided on 93 occasions and included a total of 5,022 item 23 consultations. This group of item 23 consultations (i.e. the group of 5,022) is an appropriate group from which to draw a random sample for investigation.

### Item 36 (Level C)

In this case the total number of item 36 services (2,198) should be considered as two separate groups. In the first instance the 1,850 services rendered as individual level C consultations should be considered and a random sample drawn from that group of services. In the second instance, the 348 episodes which consist of an item 36 combined with one or more other items should be considered. These 348 cases contain 223 episodes consisting of items 36/11712, three episodes of items 23/36/11712, one episode of items 36/11709/11712 and one of items 3/36/11712. It is important to consider the multiple service group separately as this combination is of concern particularly when item 36 consultations are for a minimum of 20 minutes duration. As a result two groups should be separately sampled here, one with a class size of 1850 and a separate independent group of class size 348.

### Item 11709

In this case the number to be sampled is the  $(147-18=)$  129 services of this item during the period of interest. There were 16 episodes of items 36/11709, one of items 36/11709/11712 and one of items 36/11709/30192. These 18 episodes have been included in the case of episodes of multiple items including item 36 above.

### Item 11712

This item was rendered on 687 occasions in 1996. Excluding those occasions when this item was rendered to the same patient at the same time as item 36 (these episodes have been included in the case of episodes including item 36 above) the number to be sampled here will be of size  $(687 - 228=)$  459. (There were 223 instances of items 36/11712 being rendered in a single episode, three episodes of items 23/36/11712, one episode of items 36/11709/11712 and one of items 3/36/11712, a total of 228).

### Diagnostic Imaging

The initiation of DI for 1,065 patients occurred during the period of interest and as such will represent the group from which a random sample will be selected.”

13. At the material time, 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 requires a short patient history and, if required, limited examination and management. 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 item 36 or certain other items applied. A Level C consultation (item 36) was a professional attendance by a general practitioner at consulting rooms involving taking a detailed history, an examination of multiple systems, arranging any necessary investigations and implementing a management plan in relation to one or more problems, and lasting at least 20 minutes, or a professional attendance of less than 40 minutes duration involving components of a service to which item 44 or certain other items applied.

14. Item 11709 involved continuous ECG recording (Holter) of ambulatory patient for 12 or more hours (including resting ECG and the recording of parameters, not in association with ambulatory blood pressure monitoring, utilising a system capable of superimposition and full disclosure printout of at least 12 hours of recorded ECG data, microprocessor based scanning analysis, with interpretation and report by a specialist physician or consultant physician. Item 11712 involved multichannel ECG monitoring and recording during exercise (motorised treadmill or cycle ergometer capable of quantifying external workload in watts) or pharmacological stress, involving the continuous attendance of a medical practitioner for not less than 20 minutes, with resting ECG, and with or without continuous blood pressure monitoring and the recording of other parameters, on premises equipped with mechanical respirator and defibrillator.

15. The Committee determined that, in proceeding with the examination of the applicant's conduct, it would adopt the six separate areas of concern, the "Class size" for each of those areas and the sampling methodology recommended by Professor Nicholls.

## Sampling Methodology

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

“Consider the total number of services (items or patients) of interest and denote this class size by  $N$ . If  $d$  represents the proportion of inappropriate services (with  $p$  the percentage of inappropriate services so that  $p = 100d\%$ ), there is a formula which relates the sample size (denoted by  $n$ ) to the population size. This formula determines the size of the random sample necessary to predict with 95% confidence that the proportion (or percentage) of inappropriate practice derived from the sample will be within  $\pm 100x\%$  of the true proportion. (Note that  $x$  is expressed as a proportion or fraction, e.g. if  $x = 0.1$  then  $100x\% = 10\%$ ).

That is, there is a relationship between class size ( $N$ ), sample size ( $n$ ) and the proportion of inappropriate practice ( $d$ ) such that one can be 95% confident that the proportion determined from the sample is within  $\pm 100x\%$  of its true value. This relationship is given by the formula -

$$n = \frac{N4d(1-d)}{4d(1-d)+x^2(N-1)} \quad (1)$$

(In this formula  $x^2$  denotes  $x$  raised to the power 2, i.e. ‘ $x$  squared’). If  $d = 0.5$  (i.e. 50% inappropriate practice - the incidence which requires the largest sample) and it is required to be able to predict with 95% confidence that the proportion derived from the sample will be within  $\pm 10\%$  ( $x = 0.1$ ) of the true proportion of inappropriate practice, then for a given class size  $N$ , from equation (1) above the sample size  $n$  is given by -

$$n = \frac{N}{1 + 0.01 (N-1)} \quad (2)$$

When  $n$  is calculated from equation (2) if it is not a whole number then it should be rounded up to the next whole number. For example, if (2) gave a value of 77.8 then the sample size chosen would be 78.

In practice to determine the level of inappropriate practice the following 5 step procedure should be followed for each group of services (items or patients) of interest -

1. For a given class size  $N$  determine the sample size  $n$  from equation (2) above (noting that this choice of  $d$  which represents 50% inappropriate practice requires the largest sample). For example, if the class size  $N = 500$ , then equation (2) gives  $n = 83.5$  so that the size of the random sample to be chosen is 84.
2. From the random sample obtained in step 1 (i.e. from the 84 in the sample), the Committee should select the first 30 such services (the exploratory sample) and determine as to what number, if any, of those services are inappropriate.
3. If the Committee decides that less than 20% (i.e. 6 of the 30) were inappropriate no further action should take place. In this case it is concluded that there is insufficient evidence to determine that inappropriate practice has taken place.
4. If the Committee decides that 6 or more, say 9 of the 30 services in the exploratory random sample are inappropriate, that is 30%, from formula (1) above with  $N = 500$ ,  $d = 0.3$  and  $x = 0.1$  the appropriate sample size is  $n = 73\dots$
5. Given a sample size of 30 has already been considered, the next 43 services should be selected from the remaining 54 services in the random sample of 84 services (i.e.  $84 - 30 = 54$ ). If it is deemed that 23 of the 73 services or 31.5% are inappropriate, the Committee can

conclude that 21.5% (31.5% - 10%) or 107 of the 500 services are inappropriate.”

17. Professor Nicholls also set out, in relation to each of the areas to be investigated, the sample size obtained by the application of formula (2) as follows:

Item No. or Patients	Class Size	Sample Size
Item 23 (Level B) - high volume days	5022	99
Item 36 (Level C) Multiple item service	348	78
Single item service	1850	95
Item 11709	129	57
Item 11712	459	83
Diagnostic Imaging Patients	1065	92

18. The following material is extracted from Professor Nicholls’ advice under the heading “Discussion”:

“As described above, it is proposed that 6 independent samples be considered, five based on services rendered and one (DI) based on patients.

Each of the 6 samples should be randomly selected from the total class size in each case.

In cases where a selected service cannot be matched with a doctor’s records then that service should be excluded from the analysis. The proportion of inappropriate services should then be based on the sample size minus the number of mismatches.

From each of the 6 samples selected in each case (e.g. 57 in the case of item 11709), an initial sample size of 30 should be randomly selected. If the initial sample size is less than 30 then the proportion can be calculated based on the obtained sample size. At the very minimum the sample size should be no less than 20, however.

It is worth noting that, if there were a number of mismatches, there will be some impact on confidence intervals, with a smaller sample being used. As a result the confidence intervals may be slightly wider. This is no problem provided any individual sample size is no less than 20. It will be possible to compute the appropriate 95% confidence interval and hence the lower bound as a measure of the degree of inappropriate practice.

If mismatches were, based on previous experience, seen to be a problem, one way to overcome this would be to select additional sample. For example, if experience indicates that 5% (or 15%) say of the sample was expected to be mismatched, then the respective sample sizes could be increased by 5% (or 15%) as the case may be. The exploratory sample would also be increased by 5% (or 15%) from 30 to 32 (or 35).

As long as the sample size is reasonable (greater than 20 but preferably 30 or more) for a given class size, sample size and proportion of units (items or patients) in the sample of interest which are regarded as inappropriate it will be possible to compute the length of confidence interval and hence the lower bound of that interval which is taken as the appropriate measure of inappropriate practice for the purpose of making decisions, including the quantification of the fees to be reimbursed, if that is relevant.

As an example from formula (1), if the class size (N), the sample size (n), the proportion of inappropriate practice (d) are known, then the width of the confidence interval (x) is given by -

$$x = \sqrt{\frac{4d(1-d)(N-n)}{n(N-1)}} \quad (4)$$

where  $\sqrt{Y}$  represents the square root of Y ...

Then expressing (4) in the form -

$$x = \sqrt{\frac{E}{F}} \quad (5)$$

where  $E = 4d(1-d)(N-n)$   
 $F = n(N-1)$   
 [the confidence interval 100x% can be calculated].

In the case of mismatches, if it is not appropriate to increase the sample size to take account of mismatches, this can be avoided by adjusting the sample size to take account of the mismatches and then determining the appropriate width of the confidence interval from which the lower bound of inappropriate practice is determined. For example, suppose for a class size of  $N = 500$  the exploratory random sample of 30 (chosen from the random sample of size 84) had 5 mismatches and of the remaining 25 in the sample there were 10 services deemed to be inappropriate. The proportion of inappropriate services in this exploratory sample is then -

$$d = \frac{10}{25} = 0.4$$

Then with  $N = 500$ ,  $d = 0.4$  and  $x = 0.1$ , formula (1) gives a sample size  $n = 81$ . From the remaining 54 services in the sample (i.e.  $84-30$ ) 51 must be chosen (i.e.  $81-30$ ). Suppose there were 10 mismatches in this 51, that is in the total sample of 81 there were 15 mismatches (there were 5 mismatches in the exploratory sample of 30). Then the actual sample size is 66 ( $81-15$ ). If in the sample of 51 there were 15 services deemed to be inappropriate then the total number of deemed inappropriate services in the sample of size 66 is 25 ( $10+15$ ). In this case the proportion of inappropriate practice is -

$$d = \frac{25}{66} = 0.378$$

In this case  $N = 500$ ,  $n = 66$  and  $d = 0.378$  so that from formula (5) above -

$$\begin{aligned} E &= 4d(1-d)(N-n) \\ &= 4 \times 0.378 \times (1-0.378) \times (500-66) \\ &= 408.16 \end{aligned}$$

and

$$\begin{aligned} F &= n(N-1) \\ &= 66 \times 499 \\ &= 32934, \end{aligned}$$

$$\begin{aligned}
\text{so that } x &= \sqrt{\frac{408.16}{32934}} \\
&= \sqrt{0.0124} \\
&= 0.111
\end{aligned}$$

That is  $100x\% = 11.1\%$  and so in this case the Committee can conclude that the level of inappropriate practice is  $26.7\%$  ( $37.8\% - 11.1\%$ ).

19. The Committee made arrangements with the Health Insurance Commission to be supplied with six separate lists of services, one list in respect of each of the six areas to be investigated. Each list set out details of the services which had been randomly selected to comprise the sample size calculated in relation to the particular area to be investigated by the application of formula (2) (see paragraph 17 above). Each list gave the name, address and date of birth of the patient and the date of the service. Each list was supplied in two formats - one in which the services were sorted in the order in which they had been randomly selected, the other in which the entries were sorted in alphabetical order by reference to the patients' names.

#### Hearing by the Committee

20. Pursuant to section 102 of the 1973 Act, the Committee, by a document dated 11 December 1998, gave the applicant notice of a hearing to be held on 22 January 1999. The Notice of Hearing stated that, if necessary, the hearing would continue on 5 February 1999 and on any further date determined by the Committee. The document required the applicant to appear and give evidence at the hearing and to produce to the Secretary to the Committee on 5 January 1999 the documents referred to in Schedule 1 to the notice. That schedule described the documents to be produced in the following terms:

“All documents relating to the rendering and initiation of services by Dr. Yohendran during the Referral Period for the patients on the attached lists (Attachment 1, which has 16 pages; Attachment 2, which has 13 pages; Attachment 3, which has 16 pages; Attachment 4, which has 10 pages; Attachment 5, which has 14 pages; and Attachment 6, which has 16 pages).

All practice appointment books, day books, diaries and attendance registers for Dr. Yohendran during the Referral Period.”

The Attachments to the Schedule bore the following headings:

Attachment 1 : 99 randomly selected services rendered to patients of Dr. Yohendran P/N 026288 during 01 Jan 96 to 31 Dec 96 having item 23 on the 93 days with over 60 services rendered.

Attachment 2 : 78 randomly selected services rendered to patients of Dr. Yohendran P/N 026288 during 01 Jan 96 to 31 Dec 96 having item 36 and any other items on the same day.

Attachment 3 : 95 randomly selected services rendered to patients of Dr. Yohendran P/N 026288 during 01 Jan 96 to 31 Dec 96 having item 36 without any other service.

Attachment 4 : 57 randomly selected services rendered to patients of Dr. Yohendran P/N 026288 during 01 Jan 96 to 31 Dec 96 having item 11709 without any item 36.

Attachment 5 : 83 randomly selected services rendered to patients of Dr. Yohendran P/N 026288 during 01 Jan 96 to 31 Dec 96 having item 11712 without any item 36.

Attachment 6 : 92 randomly selected patients during the period 01 Jan 96 to 31 Dec 96 having a diagnostic imaging item referred by Dr. Yohendran.

Each attachment showed the name, address and date of birth of each patient and the date of each service, the information corresponding with that set out in the lists referred to in paragraph 19 above. The entries in the attachments were arranged in alphabetical order by reference to the patients' names.

21. Schedule 2 to the Notice of Hearing stated:

“The hearing concerns your conduct in relation to services rendered and initiated by you during the Referral Period, from your practice location in the State of New South Wales. The issue to be determined is whether you have engaged in inappropriate practice in connection with the rendering or initiation of some or all of those services.

Particulars of the Committee’s concerns as at the date of this notice are:

- whether you were able to provide an appropriate level of clinical input into the services rendered during the Referral Period, with particular reference to your rendering of the services covered by Medicare Benefits Schedule items 23 and 36; and
- whether the services that you rendered and initiated during the Referral Period were clinically relevant, that is, necessary for the appropriate treatment of the patients to whom they were rendered or for whom they were initiated. This concern relates particularly to your rendering of services covered by Medicare Benefits Schedule items 11709 and 11712 and to your initiation of diagnostic imaging services.

Further concerns may emerge during the hearing. You will be made aware of any other concerns that arise and will be given adequate opportunity to address them.”

22. The Notice of Hearing was forwarded to the applicant under cover of a letter dated 11 December 1998 from the Secretary to the Committee. The letter provided the applicant with an outline of the proceedings before the Committee and included the following:

“The Notice of Hearing also requires you to produce certain documents. Please note 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

pathology and diagnostic imaging results. For example, you will be expected to provide the Committee with documentary evidence that your rendering of item 11709 services to those patients listed in Attachment D [sic] to the Notice of Hearing satisfied the requirement in the item description, namely: ‘with interpretation and report by a specialist physician or consultant physician’.

I will contact you prior to the date specified in the Notice to confirm the arrangements to collect the relevant documents. Please note that the Committee hopes to return all of the documents to you as soon as they have been copied.

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

To assist with the collation of the clinical records required by the Committee, I enclose a separate list (consisting of 4 pages) of those patients who appear on more than one of the six Attachments to the Notice of Hearing. The list also indicates the specific Attachments that [sic] the names of those patients appear. According to my calculations, the Committee’s requirement calls for the production of 441 patient records.”

23. The hearing before the Committee commenced on 22 January 1999 and continued on 5 and 26 February 1999 and 12 March 1999. Prior to the commencement of the hearing on 22 January 1999 the Secretary to the Committee had sent to the applicant by facsimile transmission on 14 January 1999 six lists identifying the patients to whom services had been rendered or initiated during the referral period and whose treatment the Committee proposed to discuss with the applicant during the hearing. The six lists represented the exploratory samples which step 2 of the methodology required the Committee to examine. In each case the exploratory sample was taken from the lists referred to in paragraph 19 above in the

format in which the services were sorted in the order in which they had been randomly selected. The details had then been re-arranged so that the patients' names appeared in alphabetical order. The Committee recorded the procedure that had been followed in the following paragraphs of its report:

“9. Following the copying of the clinical records, Dr. Yohendran was provided, by facsimile message on 14 January 1999, with six lists of approximately 30 patient names each (some patients appeared in more than one list or twice in a particular list), including the dates of service and the relevant item numbers. He was also informed that these were the patients and services that the Committee intended to discuss with him at the hearing.

10. The names of the patients in each of the six lists had been taken, in the order of random sampling, from the random samples provided by the Health Insurance Commission. Where the Committee had already detected a ‘mismatch’ (i.e. where Dr. Yohendran’s records were incomplete or where it was not possible to match the Health Insurance Commission’s service data against Dr. Yohendran’s records), it indicated that it had substituted the next name in the sampling order.”

24. At the commencement of the hearing on 22 January 1999 the Chairperson explained to the applicant (who was accompanied on that day and on subsequent hearing days by his wife, Dr Nirmala Yohendran, and his legal adviser) the procedure, including the essential features of the sampling methodology, the Committee proposed to follow. The applicant was provided with a copy of Professor Nicholls’ advice dated 23 November 1998. The applicant acknowledged that he understood the process and, while indicating that he had no objection to answering the Committee’s questions concerning the services he rendered or initiated in respect of the identified patients, he said he wished to seek advice concerning the sampling methodology. He did not, however, at any stage of the subsequent hearing question the methodology employed but, in a letter dated 7 April 1999 to the Committee in reply to a letter dated 18 March 1999 from the Committee, he said:

"On page 2 you refer to my response 'I do' in relation to your explanation of the general procedure to be followed by the Committee. Whilst I do not now seek to resile from my position I do however wish to state that I do not concede that the Determining Officer can extrapolate from the services specifically examined by the Committee to order that I repay monies relating to services not examined by the Committee."

25. During the hearing the members of the Committee examined the applicant in relation to each of the services in the exploratory samples drawn from each of the six groups under investigation and in relation to the additional services which the Committee calculated it was required, by the application of step 4 of Professor Nicholls' methodology, to examine in respect of the group of item 23 services, the group of item 36 services with no other item being rendered on the same day and the group of diagnostic imaging services initiated. In respect of the other three groups of services the Committee determined, correctly, that step 4 of the methodology did not require that additional services be examined. The applicant was given timely and appropriate notice of the additional services which the Committee proposed to examine.

26. It should be noted that, in respect of the group of item 23 services, the Committee calculated that it was required to examine an additional 51 services (making a total of 81 services). This number was, in fact, more than the number which would have been required if the calculation had been made in accordance with step 4 of the methodology. According to step 4, the number of additional services required to be examined was 34 (making a total of 64 services). The effect of the Committee examining more services than required by the methodology will become apparent later in these reasons.

27. In addition to examining the applicant the Committee heard evidence from Professor John Hickie, a consultant cardiologist.

28. At the conclusion of the hearing, the applicant requested that the Committee provide him with a clear statement of its concerns regarding his conduct. This was done in a letter dated 18 March 1999. The applicant responded to that letter by letter

dated 7 April 1999. To that letter the Committee replied by letter dated 21 April 1999.

29. On 12 August 1999 the Committee sent to the applicant a copy of a draft of its report and invited his comments. In response the applicant furnished a lengthy submission dated 12 October 1999. It was in this document that the applicant for the first time conceded that his conduct in rendering or initiating a substantial number of the services examined by the Committee was inappropriate.

### The Committee's Report

30. Pursuant to section 106L of the 1973 Act, the Committee gave the Determining Officer a written report dated 3 February 2000. In that report the Committee expressed its conclusion in the following 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. Yohendran's conduct, in relation to the referred services examined by the Committee, would be unacceptable to the general body of general practitioners practising in Australia.

The Committee therefore concludes that Dr. Yohendran has engaged in inappropriate practice as defined in section 82 of the Health Insurance Act 1973.”

The report also states that, in accordance with section 106L of the 1973 Act, the Committee finds that the applicant “has engaged in inappropriate practice in connection with the rendering and initiating of some of the services that were the subject of a referral from the Health Insurance Commission.”

31. The report commences with a reference to the review process, to the applicant's personal and practice details and his patient services and to the evidence on which the Committee's findings are based. The report then records the Committee's decision to follow the sampling methodology recommended by

Professor Nicholls and refers in some detail to the procedure which the Committee followed in applying the sampling methodology. After setting out the Committee's findings in respect of each of the six areas that were investigated, reference is made to the content of the post hearing submission from the applicant dated 7 April 1999 and the Committee's observations thereon and to the applicant's submission on the Committee's draft report and the Committee's response to the matters raised therein.

32. The detailed findings that the Committee made in respect of each of the services examined, together with some general comments in relation to the manner in which the applicant conducted his practice, the inadequacies in his clinical records and the credibility of the applicant as a witness are set out in Attachment 7 to the Committee's report. The findings made by the Committee at each step in the sampling methodology are summarised in the table below:

<b>Methodology</b>	<b>List 1 Item 23</b>	<b>List 2 Item 36 plus</b>	<b>List 3 Item 36 Alone</b>	<b>List 4 Item 11709</b>	<b>List 5 Item 11712</b>	<b>List 6 D.I.</b>
Class size	5022	348	1850	129	459	1065
Sample size (formula (2))	99	78	95	57	83	92
<u>Exploratory sample</u>						
(a) Number examined	30	30	29	30	28	29
(b) Number inappropriate	24	29	25	29	28	26
(c) Percentage inappropriate (rounded down)	80%	96%	86%	96%	100%	89%
<u>Supplementary Sample</u>						
(a) Number examined	51	-	17	-	-	8
(b) Number inappropriate	36	-	13	-	-	6
<u>Total Sample</u>						
(a) Number examined	81	30	46	30	28	37
(b) Number inappropriate	60	29	38	29	28	32
(c) Percentage inappropriate	74.07%	96.67%	82.60%	96.67%	100%	86.49%
(d) Percentage rounded down and reduced by 10%	64%	86%	72%	86%	90%	76%
<u>Extrapolation</u>						
Number inappropriate in class size	3214	299	1332	110	413	809

## The Final Determination

33. On 29 January 2001, 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) of the Act, Dr. Yohendran be reprimanded by the Director, Professional Services Review, or the Director’s nominee;
- (2) in accordance with paragraph 106U(1)(b) of the Act, Dr. Yohendran be counselled by the Director, Professional Services Review, or the Director’s nominee;
- (3) in accordance with paragraph 106U(1)(c) of the Act, Dr. Yohendran repay to the Commonwealth Medicare benefits totalling \$118,921.45 being:
  - (a) \$35,193.30 for 3,214 Medicare Benefits Schedule Item 23 services rendered by Dr. Yohendran during the Referral Period;
  - (b) \$5,023.20 for 299 Medicare Benefits Schedule Item 36 services, where there was another service rendered on the same day, rendered by Dr. Yohendran during the Referral Period;
  - (c) \$22,377.60 for 1,332 Medicare Benefits Schedule Item 36 services, without any other service being rendered on the same day, rendered by Dr. Yohendran during the Referral Period;

- (d) \$12,776.50 for 110 Medicare Benefits Schedule Item 11709 services rendered by Dr. Yohendran during the Referral Period; and
- (e) \$43,550.85 for 413 Medicare Benefits Schedule Item 11712 services rendered by Dr. Yohendran during the Referral Period

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

- (4) in accordance with subparagraph 106U(1)(g)(i) of the Act, Dr. Yohendran be disqualified for a period of 12 months 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. Yohendran be fully disqualified for a period of 6 months from the time when this determination takes effect."

Attached to the final determination was a statement of reasons. Also attached to the final determination was a statement showing how the amounts of Medicare benefits to be repaid had been calculated.

#### Request for Review of Final Determination

34. By letter dated 26 February 2001 addressed to the Minister for Health and Aged Care, Tress Cocks & Maddox, Solicitors, sought on behalf of the applicant a review of the final determination made on 29 January 2001.

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

### Relevant Legislative Provisions

36. Prior to the date of the Committee's report (3 February 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 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 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.

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, and a diagnostic imaging service (other than a service referred to in paragraph (f) of the definition of "professional service") that is a clinically relevant service 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 made by 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 commencement of the 1999 Act. It should also be noted that the amendments made by the 1997 Act are relevant: Section 4 of that Act has no application as the present matter was not referred under section 86 of the 1973 Act until after the commencement of the 1997 Act on 6 November 1997. 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 Committee could reasonably conclude that, if the practitioner rendered or initiated the referred services as a general practitioner, the conduct would be unacceptable to the general body of general practitioners. 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.

40. Under section 100, the Chairperson of a Committee may, with the approval of the Director of Professional Services Review, on behalf of the Commonwealth, engage as consultants to the Committee people who have suitable qualifications and experience.

41. Under section 106L, the Committee is required to give to the Determining Officer a written report setting out its findings on whether, in its opinion, the person

under review engaged in inappropriate practice in connection with the referred services.

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 partly. Under subsections 106U(3) and (4) as amended by items 21 and 22 of Schedule 1 to the 1997 Act, a direction for partial or full disqualification (paragraphs 106U(1)(g) and 106U(1)(h)) must specify a period of disqualification of up to 3 years to start when the determination takes effect.

#### Role of the Tribunal

44. The role of the Tribunal (see section 116 of the 1973 Act) is to review the final determination dated 29 January 2001. By virtue of section 119 of that Act, the Tribunal is required to consider the matter to which the determination relates having regard to the grounds set out in the request dated 26 February 2001, the documents forwarded by the Minister with the request and any addresses made to the Tribunal during the proceedings on the review and, where the determination consists of a final determination under section 106T, to affirm or set aside the determination, or set aside the determination and make any other determination that the Determining Officer is empowered to make under that section. The Tribunal's role, however, is not confined to reviewing the appropriateness of the directions given by Determining Officer under section 106U but extends to a review of the material that was before the Committee and the Committee's findings as set out in its report. In reviewing the material that

was before the Committee, the Tribunal having no power to receive further material, it is incumbent upon the Tribunal to exclude from its consideration any material that was otherwise relevant to an aspect of the investigation that the Committee was empowered to conduct but in relation to which there was a denial by the Committee of procedural fairness to the applicant. The Tribunal is also bound, as was the Committee, to confine its review to matters that are the subject of the referral.

### Consideration of the Issues

45. Before proceeding further, it should be recorded that it was not contended on behalf of the applicant that the Tribunal could do otherwise than conclude that the applicant's conduct in respect of some of the services rendered or initiated during the referral period amounted to inappropriate practice or that the Tribunal could do otherwise than affirm the directions made by the Determining Officer that the applicant be reprimanded and counselled. That this was the position reflected the circumstance that, in a submission put to the Committee by the applicant in response to an invitation to comment upon a draft of the Committee's final report, including a draft of the Committee's findings in relation to each of exploratory and supplementary samples examined by the Committee, the applicant accepted that his conduct in rendering 65 services under items 23, 36, 11709 and 11712 and in initiating diagnostic imaging services in respect of 12 patients amounted to inappropriate practice.

46. Counsel for the applicant informed the Tribunal that certain of the grounds expressed in the request for review of the determination made on 29 January 2001, namely the grounds numbered 1, 2, 14, 17, 20 and 21, were not pressed. The submissions he wished to put to the Tribunal on behalf of the applicant were not expressed in the language used in the request for review. The contentions he sought to raise were expressed in the following terms:

- "(i) The Tribunal should not be satisfied that Professor Nicholls' sampling methodology adopted by the Committee provided the appropriate response to the investigation of the Health Insurance Commission's referral in the present case since its grouping of services was based on

obscure premises and its staged sampling procedure carried a tendency to produce adverse outcomes.

- (ii) The Tribunal should not be satisfied that the methodology was or could be followed according to its terms ...
- (iii) The Tribunal should not be satisfied that each of the Committee's findings on the sampled services (other than those conceded by the applicant) was properly supported by probative evidence or was otherwise the preferable conclusion on the evidence.
- (iv) The Tribunal should set aside or substitute lesser monetary penalties in the light of its conclusions under (i), (ii) and (iii).
- (iv) The Tribunal should give greater weight to mitigating factors in relation to disqualifications than did the Determining Officer."

47. Counsel for the respondent raised as a preliminary matter the question whether the applicant was entitled, having regard to the grounds on which the request for review was made, to rely before the Tribunal on contentions (i) and (ii) above. Reliance was placed on the decision of Davies J in McIntosh v Minister for Health (1987) 17 FCR 463 at 465 and on what was said by Pincus J in Taylor v Minister of State for Health (1989) 23 FCR 53 at 55. While acknowledging that the grounds set out in the request for review are to be read beneficially, it was submitted that those grounds could not properly be read as encompassing the matters sought to be raised by contentions (i) and (ii).

48. In reply, counsel for the applicant relied upon the grounds in the request for review numbered 5, 15, 18, 19 and 24. Those grounds read:

- "5. The Committee failed to investigate all the referred services, but based its findings and report on a sample of services which it was not lawfully able to do.

15. Other than as conceded by Dr. Yohendran the material before the Committee does not allow or require, on the required standard of satisfaction, any finding that Dr. Yohendran's conduct in connection with rendering all or any of the referred services was unacceptable to the general body of the members of his specialty or profession.
  18. In imposing directions under s.106U(1) the Determining Officer is limited to a consideration of only the particular services examined by the Committee.
  19. The Determining Officer erred in making directions pursuant to s.106U(1) by having regard to services not examined by the Committee.
  24. The determination was not otherwise the correct or preferable exercise of the powers conferred by ss106T and 106U".
49. Counsel accepted that the Tribunal was limited in its consideration of the matter to the grounds set out in the request for review and conceded that the language in which those grounds were expressed lacked precision and did not specifically refer to the matters he wished to raise under contentions (i) and (ii). Counsel submitted, however, that the language in which those grounds were expressed was capable of encompassing those contentions.
50. In order that the Tribunal might fully appreciate the specific matters on which the applicant relied as falling within the general language of contentions (i) and (ii), a ruling upon the respondent's preliminary objection was deferred and counsel for the applicant was permitted to develop the submissions he wished to make in support of those contentions.
51. Counsel for the applicant, abandoning ground numbered 5 in the request for review to the extent that it speaks to the contrary, accepted that it was open to the Committee to approach the investigation it was required to conduct by applying a statistically valid sampling procedure. However, he submitted that the methodology

the Committee used, being that recommended by Professor Nicholls, can be seen, in the light of the conclusions that the Committee reached by its application, as a methodology which will not support the extrapolation to the whole of the class of services from which the exploratory and, when required, the supplementary sample services were randomly selected of the percentage of inappropriate services reached by the examination of those randomly selected sample services.

52. Two aspects of the methodology followed by the Committee were relied upon in support of the contention (contention (i)) that the methodology did not provide “the appropriate response to the investigation of the Health Insurance Commission’s referral in the present case”. The first of these aspects focused on the groups from which the random samples were drawn and, in particular, on the group of item 23 services on the 93 high volume days (List 1), the two groups of item 36 services (Lists 2 and 3) and the group of diagnostic imaging services initiated (List 6). In relation to the group of item 23 services, it was submitted that, when regard was had to the diversity of the failings on the part of the applicant which the Committee identified and which led it to conclude that the applicant’s conduct in relation to those services amounted to inappropriate practice, no unifying element could be discovered that was common to all the sampled services found to be inappropriate and which would allow extrapolation from the sampled services to the 5,022 services within that group. A similar submission was made in respect of the other three groups.

53. The second aspect focused on the requirement of the methodology that, having determined, by examination, that the percentage of inappropriate services in the exploratory sample is 20% or more, a calculation should be made using formula (1) to determine whether any, and, if so, how many, additional services (the supplementary sample) were to be examined. The Tribunal was invited to infer that the circumstance that the percentage of inappropriate services found in the exploratory sample would govern whether any, and, if so, how many, additional services were required to be examined provided an incentive, or the perception of an incentive, influencing the judgment of the Committee in favour of finding a high percentage of inappropriate services in the exploratory sample or in favour of not acceding to the submissions of the applicant upon the Committee’s draft report that the draft findings of inappropriate practice be reversed.

54. For the purpose of considering contention (ii), it is necessary to refer to the statement in Professor Nicholls' advice that there is a relationship between class size (N), sample size (n) and the proportion of inappropriate practice (d) such that one can be 95% confident that the proportion determined from the sample is within  $\pm 100x\%$  of its true value and that that relationship was given by formula (1). It followed that if x was taken to be 0.1, the proportion derived from the sample would be within  $\pm 10\%$  of the true proportion of inappropriate practice. To give effect to this the methodology required that the percentage of inappropriate services in the sample examined be reduced by 10% in order to arrive at the percentage to be used for the purpose of extrapolation to the total number of services in the relevant class or group. The figure of 10% was referred to as the "confidence interval". It is also necessary to refer to that part of Professor Nicholls' advice under the heading "Discussion" which is set out earlier in these reasons (see paragraph 18).

55. Counsel for the applicant submitted that formula (1) became inapplicable or inappropriate in relation to the group of item 36 services combined with one or more other items rendered on the same day (List 2), the group of 11709 services (List 4) and the group of item 11712 services (List 5). In relation to the first two of these groups, it was submitted that the upper confidence level determined by the application of formula (4) exceeded 100%, that this was an impossible value and the methodology breaks down because of the small number of cases judged acceptable. In relation to the third of these groups, it was submitted that the method of calculating a confidence interval using formula (4) breaks down because all the sampled services were judged to be unacceptable.

56. In relation to the group of item 36 services with no other item being rendered on the same day (List 3) and the group of diagnostic imaging services initiated (List 6), it was submitted that the application of formula (1) produced an insufficiency in the sample examined by the Committee. In respect of both of those groups it was submitted that the Committee should have examined a larger sample in order to ensure that the width of the confidence interval did not exceed  $\pm 10\%$ . This result was obtained by applying formula (1) for a second time (it having already been applied at

step 4 of the methodology - see para 16 above), that is, after the percentage of inappropriate services in the combined exploratory and supplementary samples drawn from each group had been determined.

57. In our opinion the grounds in the request for review relied upon by counsel for the applicant are expressed in language that, even construed beneficially, is not sufficient to permit the contentions (i) and (ii) to be advanced before the Tribunal. Ground 5 in the request for review (see paragraph 48 above), the ground principally relied on by counsel for the applicant, was, in our opinion, directed only to the question whether it was lawful for the Committee to embark upon any sampling procedure. It may be that the language in which the ground is expressed reflects the circumstance that the sampling procedure for which the repealed Subdivision C of Division 4 of Part VAA of the 1973 Act provided was not available in this case. Emphasis is placed on the suggested need for the Committee to investigate all the referred services. No reference is made to the methodology recommended by Professor Nicholls and adopted by the Committee and no hint is given that that methodology failed to comply in any respect with generally recognised statistical standards, a proposition which, if pursued, would ordinarily involve expert testimony. Although it cannot be conclusive of the matter, it is significant that no challenge to the particular methodology was raised before the Committee.

58. The other grounds relied upon do not carry the matter any further. Ground 15 in the request for review (see paragraph 48 above) is directed to a different issue, namely the review on the merits of the actual findings made by the Committee upon the services in the exploratory and supplementary samples that the Committee specifically examined. Grounds 18, 19 and 24 go to the powers of the Determining Officer and are consequential upon the earlier grounds in the request for review on which counsel relied.

59. However, having heard full argument on contentions (i) and (ii) it is appropriate that we record our opinion on the arguments presented.

60. As to contention (i), the Tribunal is satisfied, contrary to the submission of counsel for the applicant (see paragraph 52 above), that it is reasonable to conclude

that, in relation to each of the following groups, namely the group of item 23 services on the 93 high volume days (List 1), the two groups of item 36 services (Lists 2 and 3) and the group of diagnostic imaging services initiated (List 6), the pattern of practice disclosed by the examination of the sample services would be replicated in the total class of services from which those samples were randomly selected.

61. In relation to the second aspect of the methodology on which counsel relied (see paragraph 53 above), the Tribunal does not see any proper basis for inferring, and is not prepared to infer, that the Committee's ultimate findings were in any way influenced, or could reasonably be perceived to have been influenced, by the circumstance that the percentage of inappropriate services found in the exploratory samples would govern whether any, and, if so, how many additional services were to be examined.

62. As to contention (ii) (see paragraphs 46, 54-56) above), we are of opinion that the circumstance that, in relation to the group of item 36 services combined with one or more other items rendered on the same day (List 2) and the group of 11709 services (List 4), the upper bound of the confidence interval determined by the application of formula (4) exceeded 100% did not have the result that the methodology broke down. As Professor Nicholls makes clear in his advice to the Committee, it is only the lower bound of the confidence interval that is of significance.

63. We are also of opinion that, in relation to the group of 11712 services (List 5), the circumstance that all the sampled services were judged to be unacceptable does not affect the applicability of the methodology used.

64. We are also satisfied that the methodology followed by the Committee did not require that, in relation to the group of item 36 services with no other item being rendered on the same day (List 3) and the group of diagnostic imaging services initiated (List 6), formula (1) be again applied after the percentage of inappropriate services in the combined exploratory and supplementary samples drawn from each group had been determined. In our opinion, in a case where the total sample examined fell below 30 (as it did in relation to the two groups mentioned) the methodology permitted, if it did not require, that a calculation be made in accordance

with Professor Nicholls' formula (4) to ascertain whether the width of the confidence interval exceeded 10% and, in the event that it did so, to reduce the percentage of inappropriate services in the total sample examined not by 10% but by the percentage so calculated.

65. Applying formula (4) in the case of each of the two groups mentioned results in the confidence interval being  $\pm 11\%$ . As appears from the table in paragraph 32 above the Committee found that the percentage of inappropriate services in the total sample in those groups was 82.60% and 86.49% respectively. Reducing those figures by 11% would have resulted in the percentages to be used for extrapolation purposes being reduced to 71.60% and 75.49% respectively. The consequence would have been that the extrapolated services would have totalled 1325 and 809 respectively, resulting in the amount of Medicare benefit in respect of the group of item 36 services with no other item being rendered on the same day (List 3) that is repayable being reduced by \$117.60 (7 times \$16.80). As the Determining Officer concluded that no amount should be recovered in respect of the diagnostic imaging services initiated, the variation of the percentage to be used for extrapolation purposes would have had no effect on the determination.

66. Contention (iii) advanced by counsel for the applicant required the Tribunal to satisfy itself that "each of the Committee's findings on the sampled services (other than those conceded by the applicant) was properly supported by probative evidence or was otherwise the preferable conclusion on the evidence". Counsel for the applicant presented no argument in support of this contention save to rely, without elaboration, on the written submissions which the applicant had made to the Committee in commenting upon the Committee's draft report. The written outline of counsel's submissions stated that the Tribunal should consider "whether the Committee's reasoning suggests that it may have, in a particular case, fallen into one or more of the errors" which were then set out (emphasis added). No assistance was given to the Tribunal, or indeed to the respondent, in identifying which of the Committee's findings were alleged to have been affected by any of the suggested errors.

67. The Tribunal has, none the less, reviewed each of the Committee's findings on the sampled services in respect of each of the six groups (Lists 1-6) other than those in each group conceded by the applicant. We agree with the Committee's findings in respect of each of those services within the five groups (Lists 2-6). In respect of the group of item 23 services on the 93 high volume days (List 1), we agree with the Committee's findings with the exception of the findings in respect of four services, two services in the exploratory sample and two services in the supplementary sample. These services are referred to in the Schedule to these reasons as are the considerations which have led the Tribunal to differ from the findings in respect of these services made by the Committee.

68. In the result we find, in respect of the group of item 23 services on high volume days, that the number of services found inappropriate in the exploratory sample of 30 should be reduced from 24 to 22 and that the number of services found inappropriate in the supplementary sample should be reduced from 36 to 34. By reason of the consequent reduction in the percentage of inappropriate services in the exploratory sample from 80% to 73% (rounded down), the application of formula (1) would have resulted in the Committee being required to examine a total (rounded up) of 78 services. The Committee satisfied this requirement - it examined a total of 81 services. As, in the Tribunal's opinion, the number of inappropriate services in the total sample should be reduced from 60 to 56, the percentage of inappropriate services in the total sample would be 69.16%. The total number of inappropriate services in the class size of 5022, ascertained by applying that percentage rounded down and reduced by 10%, is 2962.

69. The consideration which we have been required to give to the sampling methodology recommended by Professor Nicholls leads us to suggest that some variation may be necessary to guard against the process being aborted in the event that a Professional Services Review Tribunal finds that the percentage of inappropriate services in the sample examined is greater or less than the percentage found by the Professional Services Review Committee. This can be illustrated by reference to what would have occurred in consequence of the Tribunal differing from the Committee in relation to the percentage of inappropriate services in the sample of item 23 services on high volume days if the Committee had examined not 81 services

but only the number of services (64) that formula (1) required (see paragraph 26 above). The difficulty arises from the circumstance that the sample size varies as the percentage of inappropriate services varies. As Professor Nicholls points out, if  $d = 0.5$  (i.e. 50% inappropriate practice), the largest sample is required. As the percentage increases from 20% towards 50% the size of the sample increases. As the percentage increases above 50% the sample size decreases. If a Committee finds that that percentage is greater than 20% but less than 50% and a Tribunal upon review increases that percentage, the result may be that the Committee has not examined a sufficient number of services to enable the Tribunal to reach a conclusion based on the increased percentage. Similarly, if a Committee finds that the percentage is more than 50% and a Tribunal upon review decreases that percentage, the result may be that the Committee has not examined a sufficient number of services to enable the Tribunal to reach a conclusion based on the decreased percentage. The difficulty is exacerbated by the lack of power in a Tribunal to receive evidence in addition to the material that was before the Committee whose findings are under review. It may be that the methodology should be varied to require that the number of services to be examined by a Committee equal the number of services in the sample size indicated by the application of formula (1) when  $d = 0.5$ . We recommend that this aspect of the methodology receive further attention.

70. It remains to consider the appropriateness of the directions in the final determination dated 29 January 2001 (see paragraph 33 above). It is to this question that contentions (iv) and (v) in the summary produced by counsel for the applicant are directed (paragraph 46).

71. Counsel for the applicant submitted that the directions for disqualification under paragraphs (g) and (h) of subsection 106U(1) of the 1973 Act should be set aside or that the periods of disqualification should be substantially reduced. It is sufficient to refer to the summary of the matters relied upon as set out in counsel's written outline of submissions. The summary reads:

“12. In relation to disqualification, the significant factor is that the Tribunal can be satisfied that the peer review process before the Committee itself has caused the doctor to reform his practice and that the proceedings have firmly

brought home to the doctor the need to make a greater commitment to the recording and performing of the required stages of the consultations. His misapprehensions in relation to the use of ECG items and imaging referrals have been dispelled and this will be reinforced by reprimand and counselling. It is submitted that the balance of public interests favouring or disfavouring disqualification points to sanctions which would allow the preservation and improvement of his current practice.”

72. A factor mitigating against the reduction of the periods of disqualification is that the applicant was visited by a Medical Adviser from the Health Insurance Commission on four occasions, namely on 1 December 1987, 19 September 1991, 9 February 1992 and 5 September 1995. While there was some evidence that the applicant had, following those visits, made some changes to his pattern of practice, there was also evidence that some of those changes had not been maintained. Another significant factor is that it was not until after the Committee had made known to the applicant its proposed findings in the draft of its report that he conceded that his conduct in relation to a substantial number of the services being investigated by the Committee had been inappropriate.

73. 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. We are not convinced that the applicant has the necessary willingness and intention to make substantial changes to 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 under paragraphs 106U(1)(g) and 106U(1)(h).

74. By reason of the finding that the number of inappropriate services in the group of item 23 services on the 93 days when more than 60 services were rendered (List 1) should be reduced from 3214 to 2962 (see paragraph 68), the direction in paragraph 3(a) of the final determination must be varied so that the amount repayable to the Commonwealth is reduced from \$35,193.30 to \$32,433.90, a reduction of \$2759.40. To give effect to this variation, section 119 of the 1973 Act requires that the whole of the final determination be set aside and another determination made.

## Conclusion

75. For the reasons set out above, we set aside the final determination made by the respondent and dated 29 January 2001 and in lieu thereof make a determination directing that:

- (1) in accordance with paragraph 106U(1)(a) of the Act, the Director, Professional Services Review, or the Director's nominee, reprimand the applicant;
- (2) in accordance with paragraph 106U(1)(b) of the Act, the Director, 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 \$116,162.05 being:
  - (a) \$32,433.90, being an amount equivalent to part of the Medicare benefits paid in respect of 2,962 services rendered during the referral period under item 23 in the General Medical Services Table;
  - (b) \$5,023.20, being an amount equivalent to part of the Medicare benefits paid in respect of 299 services rendered during the referral period under item 36 in the General Medical Services Table where there was another service rendered to the same patient on the same day;
  - (c) \$22,377.60, being an amount equivalent to part of the Medicare benefits paid in respect of 1,332 services rendered during the referral period under item 36 in the General Medical Services Table where no other service was rendered to the same patient on the same day;
  - (d) \$12,776.50, being an amount equivalent to part of the Medicare benefits paid in respect of 110 services rendered during the referral period under item 11709 in the General Medical Services Table;

(e) \$43,550.85, being an amount equivalent to part of the Medicare benefits paid in respect of 413 services rendered during the referral period under item 11712 in the General Medical Services Table;

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

- (4) in accordance with subparagraph 106U(1)(g)(i) of the Act, the applicant be disqualified for a period of 12 months 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, the applicant be fully disqualified for a period of 6 months from the time when this determination takes effect.

#### THE SCHEDULE

##### SERVICES FOUND BY TRIBUNAL NOT TO BE INAPPROPRIATE

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##### GROUP OF ITEM 23 SERVICES ON HIGH VOLUME DAYS

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#### Exploratory Sample

No 1 Anastasiadis, A.

This patient presented on 8 April 1996 with red eyes. The only notation in the clinical records reads:

“Conjunctivitis: FML eye drops.”

The applicant stated in his evidence that, after examination of the patient, he made a diagnosis of viral conjunctivitis and prescribed FML eye drops.

In our opinion, the material before the Committee warranted the conclusion that the applicant had fulfilled the requirements of item 23 and that the clinical record, although cryptic, sufficiently implied that the applicant had examined the patient's eyes and, having reached a diagnosis of conjunctivitis, prescribed FML eye drops. We are unable to agree with the Committee that the applicant's conduct in prescribing that medication for a viral condition would have been unacceptable to the general body of general practitioners. We think the Committee's approach savours of a counsel of perfection.

We should add that we do not think it is correct to say, as the written submissions on behalf of the respondent do, that the management plan was insufficient on the basis that FML eye drops are not suitable for viral conjunctivitis.

No 28 Theodoridis, Deborah

This patient presented on 27 May 1996. The clinical record reads:

“Throat swab strep[tococcus] viridans. Looks better. Tongue raw.  
Cilamox 500mg i tds.”

The Committee noted that the patient had been on daily injections of Cilicaine since 21 May 1996 for a throat infection, that the throat swab grew an organism which was normally not a pathogen and that, despite the results of the throat swab, the applicant continued using antibiotics.

The Committee's concern was not discussed or, indeed, raised with the applicant during the course of the hearing. We accept that the pathology report before the Committee left open a judgment, based on clinical signs, that an oral antibiotic was appropriate. We, therefore, are unable to agree that the applicant's treatment of the patient on 27 May 1996 would have been considered unacceptable to the general body of general practitioners.

### Supplementary Sample

No 38 Puia, Billy Joe

The service examined was rendered on 24 November 1996. The patient was a 10 year old girl. The clinical record reads:

“C/O coughing ++ - dry. ENT - NAD. Lungs clear. 1, Syrup EES 5mls bd 2. Codeine APF 5mls tds.”

In his evidence before the Committee the applicant stated that the patient complained of coughing and a dry cough, that he examined the patient’s ear, nose and throat which were normal and her lungs were clear. He said he proceeded to treat the patient symptomatically and prescribed syrup EES and linctus codeine.

The Committee noted that there was no evidence of any bacterial infection and that the applicant had stated that the examination, although not recorded, was normal. The Committee concluded that the applicant had prescribed antibiotics in the absence of any evidence of bacterial infection and that this would be unacceptable to the general body of general practitioners. The Committee did not consider that antibiotics were “symptomatic” treatment in the absence of a bacterial infection.

In our opinion the management plan put in place by the applicant was appropriate in the circumstances. We do not agree with the limitation upon the prescribing of antibiotics which forms the basis of the Committee’s finding.

No 45 Trimboli, Maria

The relevant service was rendered on 17 October 1996. The clinical record reads:

“Hb 14.2. Chol 6.1. MBA-N. Zocor 1 daily. Migral.”

The patient was a 66 year old female. The applicant stated in his evidence that the patient had presented after having blood tests performed three days earlier.

The blood tests showed that the haemoglobin level was 14.2, the cholesterol level was 6.1 and the multiple bi-chemical within normal range. He said that, after discussing the dietary aspect of keeping the levels of fat down, he prescribed Zocor, one tablet to be taken daily. He said that at the same time she was given Migral for her ongoing migraine.

The Committee noted that the patient's cholesterol had been elevated in tests dated December 1995 and April 1996 and that the patient had been on lipid lowering drugs in the past. The Committee considered that, if any discussion of diet was to take place, it would have occurred prior to the trial of lipid lowering drugs. The Committee concluded that the consultation on 17 October 1996 consisted of telling the patient the results of her tests and prescribing routine medication. The Committee found that there was insufficient clinical input to warrant the charging of an item 23.

In our opinion, the clinical record, although scanty, supports the applicant's evidence that, in discussion with the patient, he addressed the haemoglobin and cholesterol levels and the other medical tests that had been performed. He also prescribed medication for the patient's migraine. In our opinion the requirements of an item 23 service were fulfilled.

Counsel for the applicant:	Mr M. Smith
Solicitors for the applicant:	Tress Cocks & Maddox
Counsel for the respondent:	Ms C. Needham SC and Dr J.G. Renwick
Solicitors for the respondent:	Minter Ellison
Dates of hearing:	21, 22 May 2001, 13 July 2001
Place of hearing:	Sydney
Date of decision:	28 August 2001

This and the preceding 44 pages comprise the decision and the reasons for decision of the Professional Services Review Tribunal constituted by The Hon A.R. Neaves, Dr N.J. Radford and Dr M. Williams given on the 28<sup>th</sup> day of August 2001.  
DATED this 28<sup>th</sup> day of August 2001.

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Acting Registrar