FEDERAL COURT OF AUSTRALIA

National Home Doctor Service Pty Ltd v Director of Professional Services Review [2020] FCA 386

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| File number: | NSD 1332 of 2019 |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 24 March 2020 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review relating to proposed investigation by Professional Services Review Committee into whether the National Home Doctor Service engaged in inappropriate practice within the meaning of s 82(2) of the *Health Insurance Act 1973* (Cth) – application to set aside decision by Director of Professional Services Review to establish a Committee and make a referral to it under s 93 *Health Insurance Act 1973* (Cth) – subject of referral related to conduct of specified practitioners with whom National Home Doctor Service held services agreements – whether Director’s decision was legally unreasonable or irrational – whether Director failed to afford procedural fairness – whether exercise of power under s 93 of the *Health Insurance Act 1973* (Cth) involved questions of jurisdictional fact – whether Court should determine whether an employment relationship arose between National Home Doctor Service and practitioners with whom it held services agreements – application allowed for procedural unfairness |
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| Legislation: | *Health Insurance Act 1973* (Cth), ss 3, 79A, 80, 81, 82, 82A, 83, 84, 86, 87, 88, 88A, 88B, 89, 89B, 89C, 90, 91, 92, 93, 94, 96, 98, 101, 102, 103, 105A, 106G, 106H, 106J, 106K, 106KD, 106KE, 106L, 106S, 106T, 106TA, 106U, 106UA, 106XA, 106XB, 106V, 106ZPR, 131  *Health Insurance Amendment (Professional Services Review and Other Matters) Act 2002* (Cth)  *Health Legislation Amendment (Improved Medicare Compliance and other Measures) Act 2018*  *Migration Act 1958* (Cth), s 500(6L)  *Health Insurance (Professional Services Review) Regulations 1999* (Cth)  Explanatory Memorandum, Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002 (Cth)  Explanatory Memorandum, Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Bill 2018 (Cth)  *The Report of the Review Committee of the Professional Services Review Scheme* (Commonwealth of Australia, March 1999) |
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| Cases cited: | *ACE Insurance v Trifunovski* [2013] FCAFC 3; 209 FCR 146  *Australian Heritage Commission v Mount Isa Mines Ltd* [1997] HCA 10; 187 CLR 297  *Byrne v Marles* [2008] VSCA 78; 27 VR 612  *Colonial Bank of Australasia v Willan* (1874) 5 LR PC 417  *Cornall v AB (A Solicitor)* [1995] 1 VR 372  *Edelsten v Health Insurance Commission* (1990) 27 FCR 56; 96 ALR 673  *Enfield City Corporation v Development Assessment Commission* [2000] HCA 5; 199 CLR 135  *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; 236 CLR 120  *Health Insurance Commission v Grey* [2002] FCAFC 130; 120 FCR 470  *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21  *Ikupu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 234  *Khalil v Minister for Home Affairs* [2019] FCAFC 151  *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437  *Minister for Immigration and Border Protection v Stretton* [2016]FCAFC 11; 237 FCR 1  *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421  *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541  *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332  *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611  *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; 59 CLR 369  *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173  *Pradhan v Holmes* [2001] FCA 1560; 125 FCR 280  *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; 144 CLR 13  *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte* *Lam* [2003] HCA 6; 214 CLR 1  *Somba v Minister for Home Affairs* [2019] FCAFC 150  *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; 46 NSWLR 55  *Tsvetnenko v United States of America* [2019] FCAFC 74; 367 ALR 465  *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707 |
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| Date of hearing: | 2-3 March 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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ORDERS

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|  | | NSD 1332 of 2019 |
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| BETWEEN: | NATIONAL HOME DOCTOR SERVICE PTY LTD (ACN 006 013 421)  Applicant | |
| AND: | DIRECTOR OF PROFESSIONAL SERVICES REVIEW  First Respondent  DR LEON SHAPERO  Second Respondent  DR MARCELLA COX (and another named in the Schedule)  Third Respondent | |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 24 March 2020 |

THE COURT ORDERS THAT:

1. The decision dated 23 July 2019 of the first respondent to set up and refer to Committee No 1228 the matters set out in Item 2 of the referral is set aside.
2. The referral dated 23 July 2019 purportedly made under s 93 of the *Health Insurance Act 1973* (Cth) is set aside.
3. The first respondent pay the applicant’s costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

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GRIFFITHS J:

## Introduction

1. This proceeding involves an application for judicial review relating to the proposed investigation by a committee into whether the applicant (**NHDS**)has engaged in inappropriate practice within the meaning of s 82(2) of the *Health Insurance Act 1973* (Cth) (***HI Act***). The first respondent is the Director of Professional Services Review (**Director**). She has set up a committee comprising the second to fourth respondents inclusively to carry out the proposed investigation (**Committee**). The Director formally referred the matter to the Committee on 23 July 2019 (**referral**). The judicial review application challenges both the Director’s decision that NHDS may have engaged in inappropriate practice by knowingly, recklessly or negligently having permitted or caused 56 specified practitioners (whom the Director believes **may** have been employed by NHDS) to engage in conduct that constituted inappropriate practice by reference to the provision of services rendered as Medicare Benefits Scheme (**MBS**) item 597 (which relates to after-hours consultations), and the conduct of that decision-making process. The potential inappropriate practice is said to be the failure to:
2. meet the Medicare Benefits Scheme descriptor and regulatory requirements for the items rendered, in particular the requirement for urgent treatment;
3. maintain an adequate contemporaneous record of the service; and
4. provide an appropriate clinical input.
5. NHDS seeks orders quashing or setting aside the Director’s decision to establish the Committee and make the referral. It also seeks declaratory and other relief as set out in the further amended originating application (**FAOA**). NHDS raises six grounds of judicial review. The first four relate in one way or another to the issue whether or not NHDS was the employer of the 56 practitioners identified in the referral. Grounds 5 and 6 raise claims of procedural unfairness (of which there are two limbs as discussed at [127] ff below) and legal unreasonableness/irrationality with respect to the referral decision.

## Summary of key background matters

1. During the relevant period (1 September 2016 to 31 August 2017, which is also the review period for the purposes of the referral), NHDS operated an approved medical deputising service under guidelines produced by the Federal Department of Health. The guidelines are the 2013 *Approved Medical Deputising Program Guidelines* (**Guidelines**). The purpose of this program was to expand the pool of available medical practitioners who provide after-hours only services on behalf of general practitioners. NHDS describes its business as Australia’s largest network of home visiting doctors, with operations extending to main cities and regional centres across Australia. NHDS claims that it delivers after-hours medical care to more than 80 per cent of the national population.
2. One of the key issues is whether the Director was required to determine, as a jurisdictional fact, if NHDS was party to an employment relationship with the 56 practitioners who are identified in the referral. As noted, the Director proceeded on the basis that, for the purposes of deciding whether or not to make a s 93 referral, it was sufficient if the Director believed that NHDS **may** have been the employer of the relevant practitioners.
3. NHDS acted as the billing agent of practitioners who provided home medical care after-hours on behalf of general practitioners. The patients assigned to the after-hours practitioners their right to receive a Medicare rebate from Medicare. Under Services Agreements between NHDS and the practitioners, the practitioners appointed NHDS as their agent to render the Medicare lodgment in order to receive the Medicare rebate and to collect the rebate from Medicare on behalf of the practitioners. NHDS then charged the practitioners a services fee for processing payments and other services. NHDS distributed the benefit it collected from Medicare to the practitioner concerned, minus that service fee (the amount of which varied between individual practitioners).

## Statutory scheme summarised

1. The statutory Professional Services Review Scheme (**PSR Scheme**) is set out at some length in Pt VAA of the *HI Act*. The PSR Scheme was first introduced in 1994. Its history and key features are described in *The Report of the Review Committee of the Professional Services Review Scheme,* March 1999.
2. The scheme is complex, but it is at the heart of these proceedings and therefore requires close attention. It should be noted that the parties were agreed that the relevant version of Pt VAA is that which was in force on 1 August 2017 (i.e. prior to extensive amendments introduced by the *Health Legislation Amendment (Improved Medicare Compliance and other Measures) Act 2018* (Cth), Schs 2 to 5 of which commenced on 1 July 2018). Many of the provisions in Pt VAA in force at the relevant time were introduced by the *Health Insurance Amendment (Professional Services Review and Other Matters) Act 2002* (Cth) (***2002 Amendment Act***). For convenience, I shall use the present tense in referring to the relevant statutory provisions.
3. Before descending into the statutory detail, it is appropriate to note that the Professional Services Review Agency (**PSR Agency**) is a separate statutory agency within the Federal Health Portfolio. The PSR protects patients and the community from the risks associated with inappropriate practice, and protects the Commonwealth from having to meet the cost of medical services provided as a result of inappropriate practice. Inappropriate practice is defined in s 82 of the *HI Act* as conduct by a practitioner in connection with rendering or initiating services that a practitioner’s peers could reasonably conclude was unacceptable to the general body of their profession.
4. The PSR Agency is responsible for reviewing and examining possible inappropriate practice by practitioners (which is defined to include medical practitioners as well as other health practitioners) when they provide Medicare services or prescribe Government-subsidised medicines under the Pharmaceutical Benefits Scheme. The PSR Agency examines suspected cases of inappropriate practice which the Director has been asked to review by the Chief Executive Medicare (or a delegate). The PSR Agency cannot initiate its own reviews of a practitioner.
5. It is desirable to now describe in more detail the relevant statutory provisions of the PSR Scheme, which has four tiers.
6. The object of Pt VAA is set out in s 79A:

**79A Object of this Part**

The object of this Part is to protect the integrity of the Commonwealth medicare benefits, dental benefits and pharmaceutical benefits programs and, in doing so:

(a) protect patients and the community in general from the risks associated with inappropriate practice; and

(b) protect the Commonwealth from having to meet the cost of services provided as a result of inappropriate practice.

1. The main features of the PSR Scheme are summarised in s 80 and are as follows:

* the scheme is “for reviewing and investigating the provision of services by a person to determine whether the person has engaged in an inappropriate practice” (s 80(2));
* the Chief Executive Medicare (or delegate) can request the Director to review the provision of services by a person and the Director must decide whether to undertake a review (s 80(3));
* following a review, the Director must:
  1. decide to take no further action in relation to the review; or
  2. enter into an agreement with the person under review; or
  3. make a referral to a Committee (s 80(4));
* if the Director enters into an agreement with the person under review, the agreement must be ratified by the Determining Authority before it takes effect. Having an agreement ratified avoids a Committee investigation (s 80(5));
* a referral to a Committee initiates “an investigation by the Committee into the provision of the services specified in the referral”. The Committee can investigate any aspect of the provision of the referred services and its investigation is not limited by any reasons given in a request for review or a Director’s report following a review (s 80(6));
* Committee members must belong to professions or specialities relevant to the investigation (s 80(7));
* Committees can hold hearings and require the person under review to attend and give evidence. Committees also have the power to require the production of documents, including clinical records (s 80(8));
* Committees can base findings on investigations of samples of services (s 80(9));
* if a Committee finds that the person under review has engaged in inappropriate practice, the finding will be reported to the Determining Authority. The Determining Authority decides what action to take (s 80(10));
* the scheme provides for the person under review to make submissions before key decisions are made or final reports are given (s 80(11)); and
* a Committee cannot make a finding of inappropriate practice unless it has given the person under review:
  1. notice of its intention to do so;
  2. the reasons for the findings; and
  3. an opportunity to respond (s 80(12)).

1. The first three tiers of the PSR Scheme broadly relate to the process of determining whether a practitioner (as defined in s 3(1)) may have or has engaged in “inappropriate practice”, as defined in s 82. The fourth and final tier relates to the imposition of a sanction where there has been a finding by a Committee of “inappropriate practice”.
2. As noted, “inappropriate practice” is defined in s 82, relevantly, as follows:

**82 Definitions of inappropriate practice**

*Unacceptable conduct*

(1) 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:

(a) if the practitioner rendered or initiated the services as a general practitioner—the conduct would be unacceptable to the general body of general practitioners; or

…

*Prescribed pattern of services*

(1A) Subject to subsections (1B) and (1C), a practitioner engages in ***inappropriate practice*** in rendering or initiating services during a particular period (the ***relevant period***) if the circumstances in which some or all of the services were rendered or initiated constitute a prescribed pattern of services.

(1B) A practitioner does not, under subsection (1A), engage in inappropriate practice in rendering or initiating services on a particular day during the relevant period if a Committee could reasonably conclude that, on that day, exceptional circumstances existed that affected the rendering or initiating of the services.

(1C) Subsection (1B) does not affect the operation of subsection (1A) in respect of the remaining day or days during the relevant period on which the practitioner rendered or initiated services even if the circumstances in which the services were rendered or initiated on that day or those days would not, if considered alone, have constituted a prescribed pattern of services.

(1D) The circumstances that constitute exceptional circumstances for the purposes of subsection (1B) include, but are not limited to, circumstances that are prescribed by the regulations to be exceptional circumstances.

*Causing or permitting inappropriate practice*

(2) A person (including a practitioner) engages in ***inappropriate practice*** if the person:

(a) knowingly, recklessly or negligently causes, or knowingly, recklessly or negligently permits, a practitioner employed by the person to engage in conduct that constitutes inappropriate practice by the practitioner under subsection (1) or (1A); or

(b) is an officer of a body corporate and knowingly, recklessly or negligently causes, or knowingly, recklessly or negligently permits, a practitioner employed by the body corporate to engage in conduct that constitutes inappropriate practice by the practitioner under subsection (1) or (1A).

*Matters to which Committee must have regard*

(3) A Committee must, in determining whether a practitioner’s conduct in connection with rendering or initiating services was inappropriate practice, have regard to (as well as to other relevant matters) whether or not the practitioner kept adequate and contemporaneous records of the rendering or initiation of the services.

1. It should be noted that conduct which may give rise to inappropriate practice is conduct “in connection with rendering or initiating services”. The term “initiate” is defined in s 3(1), *albeit* non-exhaustively:

***initiate***, in relation to a pathology service or a diagnostic imaging service, means make the decision by reason of which the service is rendered.

1. The meaning of “prescribed pattern of services” is set out in s 82A.
2. The reference in s 82(3) to the issue whether a practitioner has kept “adequate and contemporaneous records of the rendering or initiation of the services” attracts the following definition of “adequate and contemporaneous records” in s 81(1):

***adequate and contemporaneous records*** of the rendering or initiation of services means records that meet the standards prescribed by the regulations for the purposes of this definition.

1. Standards for the purpose of assessing whether there are “adequate and contemporaneous records” are set out in regs 5 and 6 of the *Health Insurance (Professional Services Review) Regulations 1999* (Cth) (***PSR Regulations***):

**5 An adequate record**

For the definition of adequate and contemporaneous records in section 81 of the Act, the standard to be met in order that a record of service rendered or initiated be adequate is that:

(a) the record clearly identify the name of the patient; and

(b) the record contain a separate entry for each attendance by the patient for a service and the date on which the service was rendered or initiated; and

(c) each entry provide clinical information adequate to explain the type of service rendered or initiated; and

(d) each entry be sufficiently comprehensible that another practitioner, relying on the record, can effectively undertake the patient’s ongoing care.

**6 A contemporaneous record**

For the definition of adequate and contemporaneous records in section 81 of the Act, the standard to be met in order that a record of a service rendered or initiated be contemporaneous, is that record must be completed:

(a) at the time the practitioner rendered or initiated the service; or

(b) as soon as practicable after the service was rendered or initiated by the practitioner.

1. It is desirable to now describe in some detail each of the four tiers of the PSR Scheme.

## The four tiers of the PSR Scheme

### (a) Tier 1: The Chief Executive Medicare

1. Under s 86, the Chief Executive Medicare (or a delegate who has been appointed under s 131 of the *HI Act*) is empowered to “request the Director to review the provision of services by a person during the period specified in the request”. The concept of “provide services” is defined in s 81(2) (emphasis in original noting the reference again to services being “rendered or initiated by” a person):

*Meaning of* ***provides services***

(2) For the purposes of this Part, a person ***provides services***if the services are rendered or initiated by:

(a) the person; or

(b) a practitioner employed by the person; or

(c) a practitioner employed by a body corporate of which the person is an officer.

The period specified in the request must fall within the two year period immediately preceding the request (s 86(2)) and the request must include reasons for the request (s 86(3)).

1. There is a situation where the Chief Executive Medicare is obliged to request the Director to review the provision of services. It is where the Chief Executive Medicare becomes aware that the circumstances in which services were rendered or initiated by a person constitute “a prescribed pattern of services” (as defined in s 82A), in which case the Chief Executive Medicare must make a request under s 86(1) in relation to the services (s 86(1A)).
2. It should be noted that there is no definition in the *HI Act* of the concept of “employed” (see s 82(2)(a) and (b) above at [14]). Having regard to the issues raised in the proceeding, it is also relevant to emphasise that at the relevant time (i.e. 1 August 2017), the definition of “provides services” in paragraphs (b) and (c) of s 81(2), as set out immediately above, did **not** extend to a practitioner who was “otherwise engaged by” the person or a body corporate of which the person is an officer. Those sub-paragraphs were amended by the *Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Act 2018* (Cth), which relevantly commenced on 1 July 2018. The Explanatory Memorandum which accompanied the Bill stated that inserting the words “or otherwise engaged” following the words “employed” was “intended to widen the scope of these provisions to extend beyond circumstances where there was a formal employment relationship in place between the person under review and the person who provided the service”. These amendments have no application to this proceeding. Accordingly, this highlights the central significance in the proceeding of the concept of an employment relationship.
3. Another relevant statutory definition is s 81(1). The term “service” is defined there, relevantly, as meaning:

(a) a service that has been rendered if, at the time it was rendered, medicare benefit or dental benefit was payable in respect of the service; or

(ab) a service that has been initiated (whether or not it has been or will be rendered) if, at the time it was initiated, medicare benefit would have been payable in respect of the service had it been rendered at that time; or

…

Note 1: See Part II, and in particular section 10, for when a medicare benefit is payable.

…

1. The content and form of the request must comply with any guidelines made under s 86(5) (s 86(4)). The Minister is empowered, by legislative instrument, to make guidelines about the content and form of request for review (s 86(5)). The only guidelines in force at the relevant time were the *Health Insurance (Professional Services Review – Content and Form of Adjudicative Referrals) Guidelines 1999* (Cth) (***Adjudicative Guidelines***), which were repealed by a sunsetting instrument on 1 October 2017. It is unclear why the *Adjudicative Guidelines* continued to operate after the commencement of the *2002 Amendment Act* which removed from the legislation the previous reference to an adjudicative referral. Neither party to the proceeding suggested that this had any relevant significance.
2. If the Chief Executive Medicare requests the Director to review the provision of services by a person, the Chief Executive Medicare must, within seven days after making the request, give the person to whom the review relates written notice of the request (s 87(1)) (noting, however, that the failure to comply with that requirement does not affect the validity of the request (s 87(2)).
3. In contrast with an earlier iteration of the legislation relating to the PSR Scheme, there was no requirement, as at 1 August 2017, that the Chief Executive Medicare consider that “the person under review may have engaged in inappropriate practice” as a precondition to requesting the Director to conduct a review (see s 86(4)(b) of the *HI Act* as in force prior to the commencement of the *2002 Amendment Act* and noting that, at that time, the body which could request the Director to undertake a review was theHealth Insurance Commission and not the Chief Executive Medicare). This previous precondition was discussed by Finn J in ***Pradhan*** *v Holmes* [2001] FCA 1560; 125 FCR 280 at [11]. Decisions such as *Pradhan* which relate to the PSR Scheme need to be read with particular caution because many relate to statutory regimes which were no longer in force as at 1 August 2017. Indeed, Finn J’s observations in *Pradhan* were the catalyst for some of the amendments which were made to Pt VAA by the *2002 Amendment Act*, as is confirmed in the Explanatory Memorandum to the related Bill. Some of his Honour’s observations were also criticised by the Full Court in *Health Insurance Commission v* ***Grey***[2002] FCAFC 130; 120 FCR 470 at [179] (per Beaumont, Sundberg and Allsop JJ), which I will refer to below on the jurisdictional fact issue.
4. It should also be noted that the Chief Executive Medicare has limited investigative powers to obtain information that may be relevant to his or her consideration of whether or not to make a request to the Director to review the provision of services by a person or a practitioner. It is evident that a decision whether to make such a request will generally be based upon the Chief Executive Medicare’s review of statistical data concerning a practitioner’s Medicare billing and any other information which the Chief Executive Medicare obtains by other means, including a voluntary interview with one or more practitioners, as occurred in this case.

### (b) Tier 2: The request to the Director for review and the Director’s review

1. The position of Director of Professional Services Review is established by s 83. The Director must be a medical practitioner appointed by the Minister, with the agreement of the Australian Medical Association (**AMA**).
2. A Professional Services Review Panel (**Panel**) is established by s 84(1), consisting of “practitioners” (as defined in s 81(1) so as to include, but not be limited to, medical practitioners) who are appointed by the Minister. In the case of a medical practitioner who is appointed to the Panel, the Minister must consult with the AMA. The Director may consult with a Panel member in making his or her decision on a review (s 90(1)(a)).
3. Division 3A of Pt VAA contains provisions relating to the conduct of a review by the Director. If the Director is requested by the Chief Executive Medicare to review the provision of services by a person, the Director has a power under s 88(1) to request the Chief Executive Medicare to provide further information in relation to the provision of those services. Any such request may relate to any or all of the services provided by the person during the review period (s 88(2)). NHDS submitted that it was open to the Director to request the Chief Executive Medicare to provide her with information relating to the Medicare benefit statistics regarding the 56 NHDS practitioners who were identified in Item 2 to the s 93 referral (see further below).
4. The Director must decide whether or not to undertake the requested review. Section 88A provides:

**88A Director must decide whether to review**

(1) If the Chief Executive Medicare requests the Director to review the provision of services by a person, the Director must, within 1 month after receiving the request, decide whether or not to undertake the review.

(2) The Director must decide to undertake the review if, after considering the request and any other relevant information the Director has obtained, it appears to the Director that there is a possibility that the person has engaged in inappropriate practice in providing services during the review period.

(3) If the Director does not make a decision under subsection (1) within the period of 1 month specified in that subsection, the Director is taken to have decided, at the end of that period, to undertake the review.

(4) The Director must give written notice of the decision to:

(a) the person; and

(b) the Chief Executive Medicare.

(5) The notice must be given within 7 days after the decision is made but failure to give the notice within that time does not affect the validity of the decision.

(6) If the Director decides to undertake the review, the notice given to the person under review under paragraph (4)(a) must set out the terms of section 89B.

(7) Failure to comply with subsection (6) does not affect the validity of the decision.

(8) If the Director decides not to undertake the review, the notice given to the Chief Executive Medicare under paragraph (4)(b) must include the grounds for the decision.

1. Section 88B is another central provision:

**88B Scope of Director’s review**

If the Director decides to undertake the review, he or she:

(a) may review any or all of the services provided by the person under review during the review period; and

(b) may undertake the review in such manner as he or she thinks appropriate; and

(c) in undertaking the review, is not limited by the reasons included in the request under subsection 86(3).

1. In certain circumstances (which are not relevant to this proceeding), the Director is obliged to conduct a review where requested to do so by the Chief Executive Medicare (see s 89).
2. In conducting a review, the Director has statutory powers in addition to that under s 88(1) to require the provision of information, or the production of documents, that are relevant to the review (s 89B). This power extends to requiring production of documents concerning services rendered or initiated during the review period by *inter alia* the person under review or a practitioner employed by the person under review (s 89B(1)(a) and (b)). The Director also has the power to require any other person whom the Director believes to have possession, custody or control of, or to be able to obtain, relevant documents by giving such person a written notice requiring production of relevant documents as are referred to in the notice (s 89B(2)(b)). These information gathering powers were inserted in the legislation by the *Health Insurance Amendment (Professional Services Review) Act 1999*. Previously, such powers were limited to a Committee only. This serves to underline the important and separate role of the Director under the PSR Scheme.
3. Section 89C is an important provision. It describes the Director’s obligations following a review of the provision of services by a person. It provides:

**89C Director’s action following review**

(1) Following a review of the provision of services by a person, the Director must either:

(a) make a decision under section 91 to take no further action in relation to the review; or

(b) give the person under review:

(i) a written report setting out the reasons why the Director has not made a decision under section 91; and

(ii) an invitation to make written submissions to the Director, within 1 month, about the action the Director should take in relation to the review.

(2) If the Director gives the person under review a report and invitation under paragraph (1)(b), the Director must, as soon as practicable after taking into account any submissions made as mentioned in subparagraph (1)(b)(ii):

(a) decide to take no further action in relation to the review in accordance with section 91; or

(b) enter into an agreement with the person under review under section 92; or

(c) make a referral to a Committee under section 93.

1. In brief, the significance of s 89C is that, unless the Director decides to take no further action, the Director is required to give the person under review a written report setting out the reasons why the Director has not made a decision under s 91 to terminate the review. The Director must also invite the person to make written submissions to the Director about the action the Director should take in relation to the review. Any such submissions must be taken into account by the Director in deciding what future course of action the Director will take.
2. Essentially, the following three courses of action are open to the Director where a review has been conducted (see s 89C(2)):
3. the Director may decide to take no further action in relation to the review if he or she is satisfied that:
   1. there are insufficient grounds on which a Committee could reasonably find that the person under review has engaged in inappropriate practice in providing services during the review period; or
   2. circumstances exist that would make a proper investigation by a Committee impossible (s 91(1)(a) and (b) respectively);
4. the Director may enter into a written agreement with the relevant practitioner, as specified in s 92; or
5. if neither of those courses is taken, the Director may, by writing, set up a Committee in accordance with Div 4 and make a referral to the Committee (s 93).
6. The Director’s statutory power under s 91 to decide to take no further action in relation to a review serves to underline the importance of the Director’s separate role, certainly when viewed through the eyes of a person whose conduct is under review. This is because the Director is empowered to terminate the review process, rather than take some alternative course of action which may prove to be detrimental to the person’s interests. Such detriment may include any sanction which is ultimately imposed, but also the time and resources involved in participating in the review.
7. It is desirable to set out s 91:

**91 Decision to take no further action**

(1) The Director may decide to take no further action in relation to a review if he or she is satisfied that:

(a) there are insufficient grounds on which a Committee could reasonably find that the person under review has engaged in inappropriate practice in providing services during the review period; or

(b) circumstances exist that would make a proper investigation by a Committee impossible.

(2) Within 7 days after making a decision to take no further action in relation to a review, the Director must give the Chief Executive Medicare and the person under review:

(a) written notice of the decision; and

(b) a written report setting out the grounds for the decision.

There is no single point in time in which the Director may make a decision under s 91 to, in effect, terminate a review. It may be exercised from time to time within the tier 2 stage. Such a decision might be made, for example, as contemplated in s 89C(1)(a), at the point in time when the Director has conducted a review of the provision of services by a person. The Director could also make a decision under s 91 to take no further action after taking into account any written submissions received from the person under review as contemplated by s 89C(1)(b). This is made clear in the terms of s 89C(2).

1. Again, because of its central significance in the proceeding, it is desirable to set out s 93 in full (which deals with referrals by the Director to a Committee):

**93 Referral to a Committee**

(1) The Director may, by writing, set up a Committee in accordance with Division 4, and make a referral to the Committee to investigate whether the person under review engaged in inappropriate practice in providing the services specified in the referral.

(2) If the referral arises from a request made by a Committee to the Director under subsection 106J(1), the Director may, instead of setting up a Committee under subsection (1), make the referral to the Committee that made the request.

(3) Subject to this section, the content and form of a referral must comply with any guidelines made under subsection (4).

(4) The Minister may, by legislative instrument, make guidelines about the content and form of referrals.

(6) If the Director makes a referral, the Director must:

(a) prepare a written report for the Committee, in respect of the services to which the referral relates, giving reasons why the Director thinks the person under review may have engaged in inappropriate practice in providing the services; and

(b) attach the report to the referral.

Note: The reasons given by the Director may relate solely to the services being rendered or initiated in circumstances that constitute a prescribed pattern of services.

(7) Within 7 days after making the referral, the Director must give a copy of the referral and report to the Chief Executive Medicare and the person under review.

(7A) The copy given to the person under review must be accompanied by a written notice setting out the terms of sections 102, 106H and 106K.

(7B) The services that may be specified in the referral are any or all of the services provided by the person under review during the review period.

(7C) Subsection (7B) is not limited by the terms of the Director’s report under subparagraph 89C(1)(b)(i).

(7D) Failure to comply with subsection (7) or (7A) does not affect the validity of the referral.

(8) If, in the course of the review that gave rise to the referral:

(a) the Director formed an opinion that any conduct by the person under review caused, was causing, or was likely to cause, a significant threat to the life or health of any person and sent a statement of his or her concerns to a person or body under section 106XA; or

(b) the Director formed an opinion that the person under review failed to comply with professional standards and sent a statement of his or her concerns to an appropriate body under section 106XB;

the referral must contain a statement that the Director formed that opinion and set out the terms of the statement sent to the person or body.

(9) The Director must disregard any opinion formed as mentioned in subsection (8) when making the referral.

1. NHDS did not contest the Director’s submission [of written outline] that the effect of s 93(7B) and (7C) was that the services specified in a s 93 referral need not be the same services which were the subject of the Director’s s 89C report and that additional services may be included. Page 3 of the Explanatory Memorandum to the related Bill to the *2002 Amendment Act* which introduced those provisions provides some support for that view, whilst also drawing attention to the different position which exists under tier 3 (where the Committee is empowered to refer back to the Director a request to review the provision of services other than those services which were the subject of the s 93 referral, as to which see further [53] below).
2. Page 3 of the Explanatory Memorandum describes the main amendments as including the following (emphasis added):

* replacing the current investigative referral process with a request from the Commission [now the Chief Executive Medicare] that the Director examine **certain services** rendered or initiated by a practitioner for which a Medicare benefit has been claimed (section 86). The purpose of the request is to initiate a process of further review and investigation into the conduct of the practitioner in connection with **those services** by the Director and, where the Director decides to make a referral to a PSR Committee, by that Committee. This process of investigation and inquiry **can only examine the referred services during a specified period** but is otherwise not limited in any way by the Commission’s request or, where a referral has been made to a PSR Committee, by the Director’s referral. In other words, both the Director and the PSR Committee may identify **additional species of conduct arising from the referred services that may constitute inappropriate practice**. In addition, a Committee may refer back to the Director a request to review the provision of services, **other than referred services** during the specified period.

### (c) Tier 3: The Director’s referral and the Committee’s investigation

1. It is appropriate to now briefly describe the third tier of the PSR Scheme, which concerns the role and powers of a Committee in investigating a referral made by the Director under s 93(1). This description is necessary notwithstanding that, in the present proceeding, the Committee has yet to conduct an investigation concerning NHDS even though the Director has made a referral to it.
2. The constitution, membership, and powers and procedures of a Committee are set out in Div 4, Subdiv A of Pt VAA. Meetings of the Committee must be held in private (s 98(2)). The Committee is also empowered, at any meeting, to hold a hearing at which evidence is given, and/or documents are produced, to the Committee (s 101(1)). The Committee is empowered to hold a hearing if it appears to the Committee that the person under review may have engaged in inappropriate practice in providing the referred services (s 101(2)). If the Committee proposes to hold a hearing, it must give to the person under review written notice, at least 15 days before the day of the proposed hearing, of the time and place proposed for the hearing (s 102(1) and (2)). The notice must also give particulars of the referred services to which the hearing relates (s 102(3)).
3. Section 103 sets out at some length the rights of a person who is under review. They include (subject to any reasonable limitations or restrictions that the Committee may impose) the right to attend the hearing, to be accompanied by a lawyer, to call witnesses to give evidence and to address the Committee.
4. Because of the potential significance of these rights to the issues which arise for determination in the proceeding, particularly the nature and scope of statutory procedural fairness obligations owed to the person under review, it is desirable to set out s 103 in full:

**103 Rights of persons under review at hearings**

(1) The person under review is entitled, subject to any reasonable limitations or restrictions that the Committee may impose:

(a) to attend the hearing; and

(b) to be accompanied by a lawyer or another adviser; and

(c) to call witnesses to give evidence (other than evidence as to his or her character); and

(d) to produce written statements as to his or her character; and

(e) to question a person giving evidence at the hearing; and

(f) to address the Committee on questions of law arising during the hearing; and

(g) after the conclusion of the taking of evidence, to make a final address to the Committee on questions of law, the conduct of the hearing and the merits of the matters to which the hearing relates.

(2) A lawyer accompanying the person under review is entitled, on behalf of the person under review, subject to any reasonable limitations or restrictions that the Committee may impose:

(a) to give advice to the person under review; and

(b) to address the Committee on questions of law arising during the hearing; and

(c) subject to subsection (4), after the conclusion of the taking of evidence, to make a final address to the Committee on questions of law, the conduct of the hearing and the merits of the matters to which the hearing relates.

(3) The Committee may allow an adviser (other than a lawyer) of the person under review, subject to any reasonable limitations or restrictions that the Committee may impose:

(a) to give advice to the person under review; and

(b) subject to subsection (4), after the conclusion of the taking of evidence, to make, on behalf of the person under review, a final address to the Committee on the merits of the matters to which the hearing relates.

(4) If the person under review is accompanied both by a lawyer and by an adviser who is not a lawyer, a final address to the Committee may be made either by the lawyer or by the other adviser, but not by both of them.

(5) Any fees or expenses in respect of the services of a lawyer or other adviser accompanying the person under review or in respect of witnesses called by that person are payable by that person.

1. The Committee is empowered to require the production of documents or the giving of information relevant to the referral, including clinical or practice records of services rendered or initiated during the review period, by *inter alia* the person under review or a practitioner employed by the person under review (s 105A).
2. The Committee is not bound by the rules of evidence and may inform itself on any matter in any way it thinks appropriate (s 106(2)). Evidence at a hearing may be taken on oath or affirmation (s 106A).
3. The Committee has a statutory duty to carry out its functions so that its final report is given relevantly to the Determining Authority or the person under review within six months after the day on which the referral is received by the Committee, subject to the Director exercising a discretion to allow a further period or periods of three months (s 106G).
4. Section s 106H is another provision of central importance in the proceeding. It defines the scope of the Committee’s investigation:

**106H Committee findings, scope of investigation etc.**

(1) The Committee is to make findings only in respect of the referred services.

(2) However, the Committee is not required to have regard to conduct in connection with rendering or initiating all of the referred services but may do so if the Committee considers it appropriate in the circumstances.

Note: Under section 106K, a Committee can make findings about a sample of the referred services and apply those findings across the relevant class of referred services.

(3) The Committee’s investigation of the referred services is not limited by:

(a) the reasons given in the Director’s report to the Committee under paragraph 93(6)(a) or anything else in that report; or

(b) the reasons given in any request under section 86 or 106J or anything else in such a request.

(4) Before the Committee makes a finding of inappropriate practice, it must:

(a) notify the person under review of its intention to do so; and

(b) provide the person under review with the reasons on which the Committee intends to base its finding; and

(c) give the person under review an opportunity to respond.

Note: Section 25D of the *Acts Interpretation Act 1901* provides for findings on material questions of fact to be included with the reasons under paragraph (b).

(5) The Committee complies with subsection (4) if it provides a draft report to the person under review in accordance with section 106KD.

1. The terms of s 106H serve to underline the distinction which is drawn in the PSR Scheme between “services” and conduct in connection with rendering or initiating services.
2. It is equally important to note the relevant terms of s 106J, which empower the Committee to request the Director to review the provision of services other than the services the subject of the referral to the Committee:

**106J Committee may request Director’s review**

(1) Despite subsection 106H(1), if it appears to the Committee that a person may have engaged in inappropriate practice in the provision of services other than the referred services during the review period, the Committee may request the Director to review the provision of those services.

(2) A request under subsection (1) is to be made in the manner in which requests are made to the Director by the Chief Executive Medicare, except that subsection 86(4) does not apply.

…

1. The combined effect of ss 106H and 106J is that the Committee is confined to making findings only in respect of services which have been referred to it by the Director (which is reinforced by the definition of “referred services” in s 81(1)), and if during the course of the Committee’s investigation it appears to the Committee that the person under review may have engaged in inappropriate practice in the provision of other services, the Committee cannot make findings in respect of those services in that particular review. But the Committee may request the Director to review the provision of the additional services and, if this occurred, the Director would necessarily have to consider whether or not to make a separate referral of those additional services to the Committee under s 93.
2. That is not to say, however, that the Committee cannot rely upon additional **grounds or reasons** to those of the Director in concluding that there was inappropriate conduct in respect of the services referred to the Committee under s 93. This is confirmed by the following extract from the Explanatory Memorandum to the 2002 Bill (page 3) which describes some of the effects of the relevant amendments (emphasis in original):

* Strengthening the provisions relating to a Committee’s investigation of a person under review by making it clear that the Committee is not to be confined by the Director’s (or Commission’s) grounds of why the conduct of the person under review may be inappropriate (section 106H). The PSR Committee may inquire into any practice issues arising from the referred services and should form its own view with reference to the profession’s established standards of appropriate practice. However before making a finding of an inappropriate practice, the Committee must notify the person under review of its intention to do so and give that person an opportunity to respond.

1. Under s 106K, in investigating the provision of services included in a particular class of the referred services, the Committee is empowered to have regard only to a sample of the services included in that class. There is no comparable statutory provision in respect of the Director.
2. The Committee is obliged to prepare a written draft report of its preliminary findings (s 106KD(1)), which draft report must set out the reasons for the preliminary findings (s 106KD(1A)). Subject to the qualification imposed by s 106KE (where the draft report contains no findings of inappropriate practice), the Committee must give to the person under review a copy of the draft report together with a notice inviting the person to make to the Committee, within one month, written submissions suggesting changes to the draft report (s 106KD(3)).
3. In preparing its final report under s 106L, the Committee is obliged to take into account any submissions made to it by the person under review within the specified period. The final report must set out:
4. if the Committee members are unanimous in their findings – those findings; or
5. if a majority agrees on the findings – those findings and the findings of the other member(s); or
6. if there is not a majority of the Committee members who are agreed on findings – the respective findings of the Committee members (s 106L(1)).
7. The final report must not include a finding of inappropriate practice unless the finding and the reasons for the finding were included in the draft report under s 106KD (s 106L(1B)).
8. Subject to some qualifications set out in s 106L(5), the Committee is obliged to give copies of its final report to the person under review and the Director, as well as to the Determining Authority (s 106L(3)).

### (d) Tier 4: The Determining Authority

1. The fourth and final tier in the PSR Scheme relates to the imposition by the Determining Authority of sanctions in the event of a Committee making a finding (unanimously or by a majority) that inappropriate practice was engaged in by the person under review in connection with rendering or initiating some or all the referred services.
2. The procedure to be followed by the Determining Authority in making a determination generally parallels that to be followed by the Committee in preparing its report. Before describing that procedure it should be noted that the determination itself must contain one or more of the “directions” set out in s 106U(1). These directions embody the various sanctions able to be imposed on the delinquent practitioner. They range from a reprimand by the Director to full disqualification for up to three years from providing services for which a Medicare benefit is payable. The disqualification period is up to five years if the person under review is a practitioner in relation to whom an agreement under s 92, or a final determination under s 106TA, has previously taken effect.
3. Section 106S specifies the circumstances in which the Director may give the Determining Authority any information that the Director considers is relevant to the Authority making its draft determination or final determination in accordance with s 106U.
4. The Determining Authority is obliged to give the person under review a written invitation to make written submissions to the Authority, having regard to the Committee’s final report and any information given by the Director under s 106S, about the directions the Authority should make in the draft determination of the Authority relating to the person.
5. In making its determination, the Determining Authority is required first, to prepare a draft determination containing the proposed s 106U direction or directions (s 106T(1)); secondly, to provide a copy of it to the person under review inviting submissions suggesting changes to the proposed s 106U directions (s 106T(2) and (3)); thirdly, to take account of such submissions, if made, in making a final determination (s 106TA); and fourthly, to give copies of the final determination to the person under review and the Director (s 106UA). Section 106V specifies when final determinations take effect.
6. Finally, it is relevant to note that the Determining Authority has a discretion, when a final determination has come into effect, to publish aspects of the determination, including the name and address of the person under review and the nature of the conduct in respect of which the Committee found that the person had engaged in inappropriate practice (s 106ZPR). This is the only statutory provision in Pt VAA which authorises the public disclosure of any information relating to an individual case under review.

## The statutory procedural fairness regime

1. As both parties to the present proceeding acknowledge (and as the above summary reveals), the statutory PSR Scheme is rich with procedural fairness requirements (but neither party claimed the statutory scheme was a code or an exhaustive statement of procedural fairness requirements). Many of the express procedural fairness requirements were inserted in Pt VAA by the *2002 Amendment Act*. The Explanatory Memorandum to the related Bill describes the main amendments as including “[e]nhanced procedural fairness opportunities at various stages of the Scheme”. At the risk of some repetition, it is appropriate to highlight those express statutory requirements by reference to the various tiers described above, omitting tier 1 which does not have any explicit procedural fairness requirements.

### (a) Tier Two

1. Where the Chief Executive Medicare requests the Director to review the provision of services by a person, the Director must, within 1 month after receiving the request, decide whether or not to undertake the review (s 88A(1)). As noted, where the Director has been requested by the Chief Executive Medicare to review the provision of services by a person, the Chief Executive Medicare must, within seven days after making the request, give the person written notice of the request (s 87(1)). Although failure to comply with that requirement does not affect the validity of the Chief Executive Medicare’s request (s 87(2)), it is evident that the scheme envisages that the person who is the subject of the request for review is aware that the request has been made. Although there is no explicit statutory provision which requires the Director to invite the person the subject of the requested review to make submissions or give information as to whether or not the Director should undertake the review, I see no reason why the Director could not, in his or her discretion, extend an invitation to that effect (bearing in mind the 1 month time period within which the Director is required to make a decision whether or not to conduct the review) or, indeed, why (with or without an invitation) the person the subject of the request could not provide submissions or information to the Director before that time expired on the question whether or not the Director should undertake the requested review. I emphasise that I am **not** suggesting that these are procedural fairness requirements. Rather, they are discretionary.
2. It is notable that the Director is under a statutory obligation to undertake the review if, after considering the Chief Executive Medicare’s request **and any other relevant information the Director has obtained**, if it appears to the Director that there is a possibility that the person has engaged in inappropriate practice in providing services during the review period (s 88A(2)). I see no reason why the phrase “any other relevant information the Director has obtained” should not include information or submissions provided by the relevant person, whether invited by the Director or not. In particular, I see no reason why the reference to “any other relevant information the Director has obtained” as referred to in s 88A(2) should be confined to further information which the Director has obtained from the Chief Executive Medicare pursuant to s 88.
3. The Director is obliged to give written notice of his or her decision whether or not to undertake a review to the person and to the Chief Executive Medicare (s 88A(4)). The notice must be given within seven days after the decision is made but failure to give notice within that time does not affect the validity of the decision (s 88A(5)). If the Director decides not to undertake the review, the notice given to the Chief Executive Medicare must include the grounds for the decision (s 88A(8)).
4. As noted, there are explicit procedural fairness requirements imposed upon the Director by s 89C. Following the Director’s review of the provision of services by a person, the Director has two options. First, he or she may make a decision under s 91 to take no further action in relation to the review. Secondly, if that first option is not taken, the Director must give the person under review a written report setting out the reasons why that Director has not made a decision under s 91 and the Director must also invite the person to make written submissions, within one month, about the action the Director should take in relation to the review. The Director is required to take any such submissions into account in reaching a decision as to what future course of action the Director will take (s 89C(2)). These provisions are meant to give the person under review a chance to respond and be heard with respect to, for example, whether or not the Director should take the next step of referral to a Committee.

### (b) Tier Three

1. If the Director makes a referral to a Committee under s 93, within seven days after making the referral, the Director must give a copy of the referral and the attached report giving reasons why the Director thinks the person under review may have engaged in inappropriate practice in providing the services to the person under review (s 93(7)). The copy given to the person under review must be accompanied by a written notice setting out the terms of ss 102, 106H and 106K (s 93(7A)).
2. The person under review may challenge the appointment of Committee members on bias-related grounds (s 96).
3. If it appears to the Committee that the person under review may have engaged in inappropriate practice in providing the referred services, it must hold a hearing (s 101(2)). It must give notice thereof to the person under review and the notice must give particulars of the referred services to which the hearing relates (s 102).
4. The person under review has the rights at the hearing that are set out earlier in these reasons (see at [46] above).
5. The Committee can only make findings in respect of the referred services (s 106H(1)).
6. The Committee must provide the person under review with a copy of its draft report of preliminary findings (which must set out the reasons for the preliminary findings); invite that person’s written submissions suggesting changes to the draft report; and take such submissions made (if any) into account when preparing its final report (ss 106KD and 106L(1)).
7. Subject to some qualifications set out in s 106L(5), the Committee must provide the person under review, the Director and the Determining Authority with copies of its final report (s 106L(3) and (4)).

### (c) Tier Four

1. If the final report contains a finding of inappropriate practice, the Determining Authority must provide the person under review with a copy of its draft determination; invite submissions from that person suggesting any changes to the s 106U directions it contains; and take account of such submissions made (if any) in preparing its final report (ss 106T and 106TA).
2. A copy of the final determination must, as soon as practicable after it is made, be provided to the person under review and the Director (s 106UA), but the final determination does not take effect for a period specified in s 106V so as to allow time for the institution of legal proceedings in respect of the decision (s 106V).

## Factual context of this proceeding

1. It is desirable to summarise at greater length the circumstances which give rise to this proceeding. This involves describing in summary form matters relating to the delegate’s s 86 request for a review by the Director, the Director’s decision and conduct in conducting that review and the Director’s referral to the Committee under s 93.

### (a) Chief Executive Medicare delegate’s s 86 request

1. As noted, on 28 June 2018, the Director received a written request from a delegate of the Chief Executive Medicare under s 86 of the *HI Act* (Request to Review No. 1228). NHDS did not see a copy of the request until after the proceeding was commenced. The copy of the request which was adduced in evidence contained numerous redactions which had the evident purpose and effect of anonymising the identities of various NHDS practitioners who had been interviewed by the delegate and whose Medicare billing statistics were relied upon by the delegate in deciding to make the s 86 request.
2. The delegate requested the Director to “review the provision of services by the National Home Doctor Service for the purpose of considering whether that entity may have caused or permitted inappropriate practice, within the meaning of section 82 of the Act”. Thus the person the direct subject of the delegate’s s 86 request for review by the Director was NHDS and not any individual practitioner associated with NHDS.
3. Under the heading “Concerns”, the delegate identified his concerns as “Rendered services – urgent after-hours items 597, 598, 599 and 600”. The delegate then added that, during the relevant period (1 September 2016 to 31 August 2017), “NHDS provided the following services1:

* 9,492 services under MBS item 597
* 10,548 services under MBS item 598
* 5,128 services under MBS item 599
* 2,554 services under MBS item 600”.

Footnote 1 in the written request stated: “Where services under items 597, 598, 599 and 600 were rendered or initiated by [practitioners’ names redacted] under a provider number for a NHDS location”. Although it is not entirely clear because of the redactions in footnote 1 of the particular practitioners’ names, it appears that the practitioners were the seven NHDS practitioners whose Medicare billing statistics were relied upon by the delegate in deciding to make the request. The statistics were also attached to the request itself.

1. Thus, the delegate identified 27,722 services in respect of four MBS items with reference to several (it would appear that there were seven) NHDS medical practitioners.
2. The delegate explained that the basis for his concern partly included information which he had apparently obtained from the seven unidentified NHDS practitioners, as well as the Medicare billing statistics for those NHDS practitioners in relation to MBS items 597, 598, 599 and 600. All those items related to urgent after-hours consultations. Based on the terms of the s 89C report, it appears that the delegate found that, in the 12 months preceding 30 June 2017, NHDS practitioners were ranked the first, second and third highest providers of MBS item 598 and the first and second highest providers of MBS item 599.
3. The delegate’s decision to request a review by the Director was also based on information contained in a NHDS document entitled *13 SICK National Home Doctor Services Quality Framework: A Summary*, which the delegate described as illustrating “intersections between urgent after-hours practitioners’ billing patterns and the oversight, education and training roles of NHDS”. A copy of that document was attached to the request. As noted, copies of daily servicing reports in respect of the seven anonymised NHDS practitioners were also attached to the request. The daily servicing reports contained detailed statistics relating to multiple services rendered by those particular NHDS practitioners (including, but not limited to, the four identified MBS items of particular concern to the delegate).
4. In accordance with the obligation in s 87(1), the delegate notified NHDS of his s 86 request in a letter dated 28 June 2018. It relevantly stated:

Following my review of the Medicare servicing of certain practitioners employed by National Home Doctor Service Pty Ltd (NHDS), I have concerns that NHDS may have engaged in inappropriate practice in the period 1 September 2016 to 31 August 2017. My concern is based on NHDS’s provision of urgent after-hours services, namely, Medicare Benefits Schedule items 597, 598, 599 and 600.

Therefore I have requested the Director of Professional Services Review to review the provision of services by NHDS, as an employer of practioners (sic) who provide services, for the period 1 September 2016 to 31 August 2017. I have made this request under section 86 of the *Health Insurance Act 1973*.

My decision to request a review of services provided by NHDS is based on analysis of Medicare servicing by NHDS. Requesting a review does not mean that I have concluded that NHDS has engaged in inappropriate practice.

This request was submitted to the Director of Professional Services Review on 28 June 2018 with the request number of 1228. The Director of Professional Services Review will write to NHDS about her review of this matter in due course.

1. Based on the terms of both the s 86 request itself and the notification of that request which was given to NHDS in the letter dated 28 June 2018, the services the provision of which was the subject of the request were services provided by NHDS (as an employer of practitioners who provided services) in respect of MBS items 597, 598, 599 and 600. Significantly, although it is clear that the delegate’s decision to make a s 86 request to the Director was based in part on information provided by the seven NHDS practitioners, the specification of the services in that request was not directed to those particular practitioners. Rather, the specification was immediately directed to NHDS’s provision of services during the relevant period in respect of the four specified MBS items, *albeit* through the conduct of medical practitioners “employed by” NHDS that had rendered or initiated urgent after-hours services.

### (b) The Director’s review of NHDS

1. It is convenient to divide the Director’s review into two parts, namely that relating to the s 89C report and then that relating to the s 93 report.

#### (i) The Director’s s 89C report

1. At the beginning of her s 89C report, the Director summarised the s 86 request she had received from the delegate. The Director explained at [6] of the s 89C report that she had decided to undertake a review of NHDS’s conduct because it appeared to her that there was a possibility that NHDS engaged in inappropriate practice during the review period. NHDS was informed of the Director’s decision to undertake a review on 24 July 2018, as required by s 88A.
2. The Director explained at [9] that her review of NHDS had focussed on urgent after-hours items, specifically MBS items 597, 598, 599 and 600. She recorded at [10] that she had served a formal notice to produce documents on NHDS under s 89B on 24 July 2018. The notice required NHDS to produce documents relating to its relationship with practitioners working with it during the relevant period. In response, NHDS produced various documents to the Director, including details of 1,117 practitioners who worked for it during the review period, as well as template Service Agreements.
3. The Director stated at [11] that she had also met with, and interviewed, 15 individual practitioners working with NHDS who had been “separately referred to PSR in respect of the same review period”, in order to assess whether or not there were grounds on which a Committee could reasonably find that those practitioners had engaged in “inappropriate practice” as defined by the Act in relation to any of the urgent after-hours services. It is not entirely clear whether the 15 practitioners were among the NHDS practitioners whom the delegate had interviewed and whose billing statistics were used by the delegate in making the s 86 request. The Director added at [11] that, as part of her review process, she had examined more than 300 patient files maintained by NHDS in respect of the review period. It is evident from the Table set out at [51] of the 89C report that these services were all provided by the 15 medical practitioners whom the Director had interviewed and were the subject of separate reviews. The Director stated at [12] of her s 89C report that she had also taken advice from various consultant general practitioners engaged under s 90 of the *HI Act*.
4. The Director’s s 89C report describes meetings which were held with NHDS representatives on 7 November 2018 and 6 December 2018 and the additional information which NHDS provided to the Director.
5. In the part of the s 89C report under the heading “Concerns”, the Director stated at [50] that, having considered all the material before her, she was “satisfied that there are sufficient grounds upon which a Committee could reasonably find that NHDS had engaged in inappropriate practice during the review period on the basis that it knowingly, recklessly or negligently caused or permitted an employed practitioner to engage in conduct that constituted inappropriate practice”. The Director stated at [53] that, based on her review of the more than 300 services, she had found that “a large proportion of the services rendered as these items involved conditions which either did not require treatment or could have reasonably waited until the next in-hours period for treatment and therefore did not meet the MBS requirements for an urgent after-hours consultation”.
6. At [56] and [57] the Director identified the concerns she had about the adequacy of NHDS practitioner’s recordkeeping for many services, as well as her concerns about clinical input.
7. In the part of the s 89C report under the heading “Employee relationship”, the Director stated at [60] that, when looking at the totality of the relationship between NHDS and the practitioners engaged under its Service Agreement, the Director was “concerned the reality of the relationship was more akin to an employment relationship than a contract for services”. In reaching this view, the Director made plain that she was relying upon information she had obtained from some of the 15 practitioners, as well as information provided by NHDS, including the terms and conditions of the Service Agreement and NHDS’s After Hours Clinical Handbook which it had provided to the Director in its response to the notice to produce.
8. It is desirable to set out [88] of the s 89C report, which summarises the Director’s findings as to why she concluded that there was sufficient evidence by which a Committee could reasonably find that NHDS had engaged in inappropriate practice in providing serves during the review period (emphasis added, but otherwise without altering the original):

Following my meeting with NHDS, my review of materials and responses provided by NHDS and with regard to my review of over 300 services provided by NHDS practitioners during the review period, I have concerns that there is sufficient evidence by which a Committee could reasonably find:

a. **NHDS practitioners rendering MBS item numbers 597, 598, 599 or 600 under a provider number for a NHDS location engaged in inappropriate practice in accordance with section 82(1) or (1A) of the Act by:**

**i. Failing to meet the MBS descriptor and regulatory requirements for items rendered, in particular the requirement for urgent treatment;**

**ii. Failing to maintain an adequate contemporaneous record of the service; and**

**iii. Failing to provide appropriate clinical input**

b. **The relationship between NHDS and its practitioners was one of employer-employee, for the purpose of section 82(2)(a) of the Act**;

c. NHDS had sufficient control and supervision of these practitioners such that it knowingly, recklessly or negligently caused or permitted NHDS practitioners to engage in such conduct, and

d. By knowingly, recklessly or negligently causing or permitting NHDS practitioners to engage in such conduct, NHDS itself engaged in inappropriate practice in accordance with section 82(2)(a) of the Act.

1. The Director then stated at [89] to [91] of her s 89C report that, at that stage of her review, she was not satisfied that there were insufficient grounds on which a Committee could reasonably find that NHDS had engaged in inappropriate practice in providing services during the review period or that circumstances existed that would make a proper investigation by a Committee impossible. Accordingly, she said that she had not made a decision under s 91 to take no further action in relation to the review. The Director added that she did not have power under s 92 of the *HI Act* to enter into an agreement with a corporate entity. For that reason, that particular course of action was not available to her in respect of NHDS.
2. The Director’s conclusions in her s 89C report were based in large part, but not entirely, on findings she had made in respect of the 15 specified practitioners who were associated with NHDS. This provides part of the foundation for NHDS’s complaint of procedural unfairness. One of the primary issues which arises for determination is whether the Director’s review was directed to general concerns regarding NHDS’s business and not confined to concerns relating to the 15 practitioners referred to repeatedly throughout the s 89C report. The Director submitted that, on a fair reading of her s 89C report, it should have been evident to NHDS that her concerns related not only to those 15 practitioners, but to NHDS’s business generally.
3. As required by s 89C(1)(b), the Director gave NHDS a copy of her written report setting out the reasons why she had not made a decision to terminate the review under s 91 and she invited NHDS to make written submissions to her, within one month, about the action she should take in relation to the review.
4. NHDS took up that invitation and provided detailed written submissions dated 30 May 2019, which I will now summarise.

#### (ii) NHDS’s written submissions dated 30 May 2019 summarised

1. NHDS’s written submissions contained the following complaint of procedural unfairness at [12]:

The PSR Director has not identified the services reviewed. Nor has NHDS been provided with sufficient information to identify these services to enable it to conduct an analysis of the services and to make any substantive submissions in relation to each medical practitioner’s conduct. While NHDS has access to the records of the practitioners, without further information about the particular services that formed the basis of the PSR Director’s review, it would be unsafe for NHDS to conduct its own analysis of these records for the purpose of addressing whether the practitioners engaged in inappropriate practice.

1. NHDS’s submissions explicitly stated that NHDS was responding to the Director’s findings in her s 89C report in respect of the 15 practitioners who were interviewed by the Director and whose billing statistics for urgent after-hours services were reviewed and relied upon by the Director in making her findings. The submissions referred to these practitioners as the “Practitioners Under Review”, being the 15 specific practitioners who were the subject of NHDS’s detailed submissions and **not** any other NHDS practitioners. Specifically, at [3] NHDS stated that “these submissions address NHDS’s operations in so far as they concern the Practitioners Under Review”.
2. Among the attachments to the submissions were two legal opinions dated 29 May 2019 (Max Kimber SC) and 15 May 2019 (Bret Walker SC and Andrew Gotting) respectively. Those opinions provided detailed reasons as to why the authors considered, based upon the material before them, that the Director should have concluded that the relationship between NHDS and the 15 medical practitioners was not one of employment. Mr Walker SC and Mr Gotting also advised that they considered that the Director had failed to afford procedural fairness to NHDS by relying upon matters she discussed at meetings with the 15 medical practitioners, without providing NHDS with an opportunity to respond to those matters.

#### (iii) The Director’s s 93 report

1. It is appropriate now to say something more about the Director’s referral decision and s 93 report, both of which are dated 23 July 2019. Copies of both those documents were provided to NHDS at around that time.
2. As noted, the Director produced a report dated 23 July 2019, as required by s 93. The Director stated at [9] of her s 93 report that she had taken into account, among other things, the written submissions which NHDS’s solicitors provided in response to the s 89C report.
3. Item 2 of the Director’s formal referral under s 93 is as follows (emphasis in original):

Item 2

The Committee is established to investigate whether National Home Doctor Service Pty Ltd of Level 1, 120 Christie St, St Leonards in NSW during the review period of 1 September 2016 to 31 August 2017 (the **Review Period**) engaged in inappropriate practice for the purposes of s 82(2)(a) or s 82(2)(b) (as it applied at the relevant time) by knowingly, recklessly or negligently having permitted or caused a practitioner employed by National Home Doctor Service Pty Ltd to engage in conduct that constituted inappropriate practice for the purpose of s 82(1), that conduct being the provision of services rendered as **MBS item 597** by the following practitioners:

[the names and details of 56 NHDS practitioners were set out].

Again, it is important to note that the person the subject of the s 93 referral is NHDS itself, and not any of its practitioners. The specified service the subject of the s 93 referral is more limited than those in either the s 86 request or the s 89C report (both of which related to the provision of services rendered in respect of four MBS items, whereas the s 93 referral is limited to the provision of services rendered as MBS item 597). Moreover, the conduct in relation to the provision of those services specified in the s 93 referral differs from that in the s 89C report. The former report related in part to the conduct of 15 particular NHDS practitioners during the relevant period in relation to the four MBS items, whereas a part of the conduct in the s 93 referral and related report is the conduct of 56 different NHDS practitioners who rendered services as MBS item 597 during the same relevant period. This provides part of the basis for NHDS’s complaint of procedural unfairness.

1. As mentioned, the s 93 referral was accompanied by a 31 page report by the Director. The following relevant features of this report should be noted, with particular reference to differences between findings made by the Director in this report when compared with those in her earlier s 89C report.
2. At [9] of the s 93 report, the Director identified the material she had considered in determining to make a referral. That material included the s 86 request, the documents produced by NHDS in response to the notice to produce and other material produced voluntarily by NHDS, the 30 May 2019 written submissions, the 300 plus patient files concerning the 15 NHDS practitioners who were the subject of separate referrals in respect of the same period and, significantly, “Data provided by Medicare detailing totalling services billed as MBS items 597, 598, 599 and 600 by practitioners identified by NHDS as having a provider number for a NHDS location during the review period”. It was common ground in the proceeding that this data related to services provided by 56 NHDS practitioners, who are separate from the 15 NHDS practitioners referred to immediately above. At no point prior to 23 July 2019 (when the Director determined to make a referral under s 93 and publish her s 93 report) did the Director inform NHDS that her referral decision was based, at least in part, on the conduct of the 56 NHDS practitioners. NHDS only became aware of that fact when it received and read the formal s 93 referral and the accompanying report, both of which referred to these 56 practitioners.
3. The Director stated at [10] of the s 93 report that the relationship between NHDS and each of the 56 practitioners (none of whom were the 15 practitioners interviewed by the Director as referred to above) “**may** be one of employer-employee” for the purpose of s 82(2)(a) (emphasis added). The Director further explained at [13] that she had proceeded on the understanding that “a practitioner would be employed by NHDS for the purposes of the Act if there is an employer-employee relationship of the kind recognised by the common law”. That is not to say, however, that the Director made a finding that there was such an employment relationship. On the contrary, in responding to NHDS’s submission that, as a matter of law, there was no such relationship, the Director emphasised at [111] that she had not drawn any conclusions to that effect; rather, she thought that there **may be** an employment relationship.
4. At [53] ff of her s 93 report, the Director explained why she considered that a committee could reasonably find that inappropriate practice had occurred during the relevant period. She repeated the table from the earlier s 89C report in respect of the services provided by the 15 NHDS practitioners and referred again to the more than 300 services rendered by them during the relevant period. She repeated why she considered that these 15 NHDS practitioners may not have kept adequate and contemporaneous records and also why she had concerns about the clinical input they had provided at each service (see at [58] and [59] respectively).
5. The Director then stated at [61] that, based on her review of more than 300 services provided by NHDS practitioners during the relevant period (including 100 services rendered as MBS item 597), as well as for the reasons expressed above in her s 93 report, that she was concerned that a Committee could reasonably find that each NHDS practitioner specified in Item 2 of the referral (i.e. the 56 different NHDS practitioners) may have engaged in inappropriate practice, by inappropriately providing services rendered as MBS item 597 by:
6. failing to meet the MBS descriptor and regulatory requirements for the items rendered, in particular the requirement for urgent treatment;
7. failing to maintain an adequate contemporaneous record of a service; and
8. failing to provide appropriate clinical input.
9. It is desirable to set out the relevant parts of the summary of the Director’s conclusions, contained at [121]-[123] (emphasis in original):

After considering NHDS’s written submissions, I am not satisfied that there is insufficient evidence on which a Committee could reasonably make a finding of inappropriate practice by NHDS.

Although following my review, I had concerns about NHDS practitioners (sic) conduct in connection with rendering services as MBS items 597, 598, 599 and 600, I appreciate there were over 1,100 NHDS practitioners billing these items under a NHDS provider number during the review period and total services billed as these items exceeded $158 million. I have therefore decided not to refer all items to the Committee in the interests of the efficient and expedient management of its investigation and to avoid the potentially punitive effect such a referral may have.

Accordingly, I have decided to make a referral to a PSR Committee in accordance with section 93 of the Act to consider whether NHDS engaged in inappropriate practice for the purposes of section 82(2)(a) of the Act during the review period by knowingly, recklessly or negligently having caused or permitted practitioners employed by it to engage in inappropriate practice during the review period within section 82(1) of the Act having regard to services rendered as **MBS item 597** by the following practitioners:

[The provider name, provider number, location number and address of the 56 practitioners were then set out].

1. These passages support the Director’s submission in the proceeding that she had a general concern about the conduct of NHDS practitioners as a whole. The referral was more limited, however, for the reasons given by the Director in the second paragraph of the extracts above.
2. The second limb of NHDS’s procedural fairness complaint (see [157] ff below) relates to what the Director said in [91] of her s 93 report. There, she said (without alteration):

In their written submissions in response, and regarding the issue of the conduct of NHDS practitioners (and whether it may be inappropriate), NHDS point out that as the particular practitioners I spoke to and the 300 services reviewed were not identified, it had insufficient information to enable it to conduct an analysis of the services and make any substantive submissions in relation to each medical practitioner's conduct. I accept this submission and draw no conclusions from the lack of a substantive response in respect of comments by individual practitioners or individual services. However, I do note that each of the practitioners’ reviewed did have this information and were given an opportunity to respond to the specific concerns raised, and did so. Notwithstanding those responses, my concerns remained in each instance, the overall outcome of which I have outlined above. Nothing in NHDS's submissions have allayed my concerns in this regard.

## Consideration and determination

1. It is convenient to address the six grounds of judicial review in the same order as the parties did during the hearing.

## Ground 6: Legal unreasonableness and irrationality

1. NHDS contended that the Director’s decisions that NHDS may have engaged in inappropriate practice and that this was not a case where the Director should take no further action in reviewing NHDS’s provision of services were “manifestly unreasonable and/or irrational” and were arrived at in circumstances “where there was no evidence or other material to justify the making of the decision”.
2. The parties were in general agreement as to the relevant principles guiding the application of these grounds for judicial review. Leading relevant cases include *Minister for Immigration and Citizenship v* ***Li***[2013] HCA 18; 249 CLR 332; *Minister for Immigration and Citizenship v SZMDS*[2010] HCA 16; 240 CLR 611; *Minister for Immigration and Border Protection v* ***SZVFW*** [2018] HCA 30; 264 CLR 541; ***Plaintiff M64/2015*** *v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173; *Minister for Immigration and Border Protection v* ***Stretton*** [2016]FCAFC 11; 237 FCR 1 and *Minister for Immigration and Border Protection v* ***Singh***[2014] FCAFC 1; 231 FCR 437.
3. Some of the relevant principles which emerge from those cases may be summarised as follows:
4. Both grounds of judicial review are stringent and confined and require the judicial review court “to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision” (*SZVFW* at [79] per Nettle and Gordon JJ) and on the basis of the factual information before the decision-maker (*Stretton* at [7]-[13]).
5. Where reasons are provided, as is the case here with respect to both the ss 89C and 93 reports, they are the focal point for the assessment of legal unreasonableness (*SZVFW* at [84] per Nettle and Gordon JJ and *Singh* at [47] per Allsop CJ, Robertson and Mortimer JJ).
6. Although the standard of legal unreasonableness applies across a range of statutory powers, the indicia of legal unreasonableness must be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case and the reasoning process in review for legal unreasonableness is inevitably fact dependent (*Singh* at [48]).
7. Legal unreasonableness can either be “outcome focussed” (without necessarily identifying another underlying jurisdictional error) or it can focus on an examination of the reasoning process by which the decision-maker arrived at the exercise of power (*Singh* at [44]-[47]).
8. In a case where a decision-maker’s statutory function calls for a “broad and subjective” evaluation, the task of demonstrating the requisite lack of an “evident and intelligible justification” becomes a “virtually insuperable hurdle” (*Plaintiff M64/2015* at [55]-[57]).
9. Legal unreasonableness requires the Court to acknowledge that there is “an area of decisional freedom” vested in the decision-maker in exercising a statutory discretionary power (*Li* at [28] per French CJ and *Singh* at [44]).
10. NHDS submitted that it was legally unreasonable or irrational for the Director to make a referral under s 93 of what it estimated to be approximately 136,000 services by 56 NHDS practitioners without the Director conducting any review or investigation of any of those services or any of those practitioners. It submitted that there must be a rational connection between the services the subject of the Director’s preliminary review and the s 93 referral. NHDS drew attention to the Director’s finding in the s 93 report that each of the 56 NHDS practitioners “may have engaged in conduct that constituted inappropriate practice” by rendering MBS item 597 inappropriately by “failing to meet the MBS descriptor and regulatory requirements for the items rendered, in particular the requirement for urgent treatment”, “failing to maintain an adequate contemporaneous record of the service” and “failing to provide appropriate clinical input”. NHDS emphasised that this finding was arrived at in circumstances where the Director had no evidence of any of the services rendered by any of the 56 practitioners, apart from the bare fact that the 56 practitioners had rendered those services. None of the 56 practitioners was interviewed, nor did the Director obtain any patient records or clinical notes for any of the services rendered by these 56 practitioners. Moreover, NHDS emphasised that the Director did not have any statistical billing information in relation to the 56 practitioners, in contrast with the information concerning the other 15 NHDS practitioners who were the subject of the s 89C report. In essence, NHDS submitted that it was legally unreasonable or irrational for the Director to draw conclusions about possible inappropriate practice by the 56 practitioners based upon her review of the other 15 NHDS practitioners. For example, there was no evidence about the record-keeping practices of those 56 practitioners and whether their records were “adequate and contemporaneous” within the meaning of s 81(1) of the *HI Act* and regs 5 and 6 of the *PSR Regulations*.
11. For the following reasons, I reject ground 6. Most importantly, as the Director pointed out, the basis upon which NHDS is under review is because of a general concern that NHDS practitioners have engaged in inappropriate practice with the use of various urgent after-hours MBS items. I accept the Director’s submission that details of specific practitioners, as set out in the ss 89C and 93 reports, simply exemplify or illustrate the concern which underlies the review. This is demonstrated by the following matters:
12. As noted, the s 86 request explicitly identifies the “concern” as “Rendered services – urgent after-hours items 597, 598, 599 and 600” and the delegate described the details concerning specific practitioners in his 28 June 2019 letter to NHDS as “[t]he examples provided”.
13. The initial letter which the Director sent to NHDS described the review as being “into NHDS’s provision of services during the Review Period”.
14. None of the Director’s document requests to NHDS were limited to a specific sub-set of practitioners, but rather related to a general review of NHDS’s business practices.
15. The Director’s s 89C report identified that the review of NHDS had focussed on urgent after-hours items (at [9]) and also described how information had been obtained in relation to all NHDS practitioners (at [10]). It is true that there are also numerous references in that report to information obtained from the 15 anonymous NHDS practitioners, but this was by way of “non-technical” sampling (i.e. not under s 106K which relates in any event only to the Committee). Significantly, the Director concluded at [59] of her 89C report that she was “concerned that a Committee could reasonably find that in rendering services as [urgent MBS] items, NHDS practitioners had engaged in conduct that constituted inappropriate practice”, which concern was not stated to be limited to the 15 practitioners. They were used, in effect, as a sample. NHDS did not claim that the Director lacked power to adopt such an approach.
16. Similarly, in her s 93 report, the Director summarised at [1] to [5] her general concern about NHDS practitioners over-using urgent after-hours MBS items. It is made clear at [9] of the report that the s 93 decision was based on a consideration of material including details of 1,117 practitioners working for NHDS during the review period, communications from NHDS to its practitioners and more than 300 patient files relating to the 15 practitioners who are also referred to in the s 89C report. The Director also considered data provided to her by Medicare which detailed total services billed as MBS item 597, 598, 599 and 600 by practitioners identified by NHDS as having a provider number for a NHDS location during the review period.
17. The Director then explained at [122] that, although she had concerns about NHDS practitioners’ conduct in connection with rendering services as MBS items 597, 598, 599 and 600, because more than 1,100 NHDS practitioners had billed these items during the review period, which total services billed for these items exceeded $158m, “in the interests of efficient and expedient management” of the investigation and to avoid a “potentially punitive effect” on NHDS, she had limited the formal referral to services relating to MBS item 597 alone. She then identified 56 practitioners who had rendered services in respect of that item during the relevant period.
18. I accept the Director’s submission that both the ss 89C and 93 reports were directed to a general concern about NHDS practitioners.
19. It was not legally unreasonable or irrational for the Director to switch the focus of her s 89C report (which relied partly on information relating to the 15 NHDS practitioners) to focus on 56 different NHDS practitioners in the s 93 referral (noting also that Medicare billing information in relation to these 56 practitioners was also taken into account by the Director). Although the evidence is scant, it appears that the reason for this switch of focus was because, when the s 93 referral decision was made, the Director had arrived at agreements under s 92 with 14 of those 15 practitioners, and the other was the subject of a separate referral to a Committee. The Director’s subsequent focus on 56 other NHDS practitioners is appropriately understood as the selection by her of a sample of NHDS practitioners for review by the Committee in circumstances where the Director was satisfied, on the basis of all the information before her (including, but not limited to that specifically in relation to the other 15 NHDS practitioners) that NHDS practitioners generally may have engaged in inappropriate practice. But rather than refer all that conduct to the Committee, the Director chose a sample of 56 NHDS practitioners so as to limit the scope and burden of the referral. That is entirely reasonable and rational.
20. As will shortly emerge, however, different considerations arise when the Director’s actions are measured against the requirements of procedural fairness.
21. NHDS’s complaints of legal unreasonableness and irrationality are not advanced by its contention that there was no probative evidence to support the s 93 referral. It is unnecessary to describe any differences between the “no evidence” ground under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***) and at common law, an issue which was faintly referred to by NHDS. That is because, whether the issue is viewed through either of those prisms, there was some evidence before the Director to justify her general concern that NHDS practitioners may have over-used MBS item 597 and thereby engaged in inappropriate practice. That material is described at [121] above.
22. For all these reasons ground 6 is rejected.

## Ground 5: Procedural fairness

1. NHDS’s procedural fairness complaint was pressed on two limbs, being that:
2. it was not given adequate notice of significant matters in the s 93 referral and report; and
3. procedural unfairness arises from [91] of the s 93 report.
4. For the reasons which follow, I consider that both limbs of NHDS’s procedural fairness claims should be upheld.

### (a) No adequate notice of significant matters in s 93 referral and report

1. NHDS’s complaint under the first limb is that it was not provided with the following information prior to the Director’s decision to make the s 93 referral:
2. how any of the 15 practitioners mentioned in the s 89C report or any of the 56 practitioners mentioned in the s 93 report may have engaged in conduct that constituted inappropriate practice during the review period;
3. how any of those practitioners may have been employed by NHDS; and
4. how NHDS may have knowingly, recklessly or negligently caused or permitted any inappropriate conduct of each of those practitioners.
5. NHDS complains that it was only provided with generalised information without it having any way of knowing how that information related to any of the particular practitioners mentioned in either of those reports or the services rendered. It submitted that it was procedurally unfair for the Director to lead NHDS to believe that the 15 unidentified practitioners in the s 89C report would be the subject of the potential referral, but then identify 56 different practitioners in both the s 93 referral and related report. It complains that it was denied an opportunity to make submissions to the Director as to whether or not it was appropriate for the Director to make a referral with specific reference to those 56 practitioners and the services they had rendered as MBS item 597.
6. Unsurprisingly, there was no serious contest as to the relevant legal principles concerning procedural fairness. The Director accepted that the statutory scheme imposed various procedural fairness obligations on her and that the content of those obligations had to be determined in the context of the statutory scheme. The Director submitted, however, that, in determining the content of procedural fairness obligations, it was relevant to take into account that a s 93 referral occurs at a relatively early stage of the review process and prior to an investigation of whether inappropriate practice has in fact occurred, not to mention well before the imposition of any sanction. It was submitted that a s 93 referral “lacks any quality of finality” and “is not a substantive determination”.
7. While it is relevant to take into account the different tiers of decision-making under the PSR Scheme, I consider that the Director has overstated the relevance of that matter in determining the content of procedural fairness requirements in tier 2. Different considerations may arise with a multi-staged decision making process which, unlike the legislative regime here, does not contain its own rich supply of procedural fairness requirements. It is also relevant to take into account the essentially investigative nature of tier 2 and that the person under review will have a right to be heard before the Committee if a referral is made under s 93. Of particular relevance and significance, however, is the Director’s obligation under s 89C to make a decision under s 91(1) to take no further action in relation to the review, rather than enter into a s 92 agreement (which was not an option in the case of NHDS) or make a referral under s 93.
8. The point is well illustrated by a decision of the Victorian Court of Appeal in ***Byrne*** *v Marles* [2008] VSCA 78; 27 VR 612, which the Court drew to the parties’ attention. There, Nettle JA (with whom Dodds-Streeton JA and Coghlan AJA agreed) highlighted the difference between the circumstances in *Cornall v AB (A Solicitor)* [1995] 1 VR 372 and the circumstances in 2004 after amendments were made to the State legislation regulating the legal profession in Victoria. His Honour made the following observations at [85] to [87], which are apposite to the position under the PSR Scheme (footnotes omitted and emphasis added):

85. Now, however, because the Commissioner is compelled by s 4.2.8 of the 2004 Act to give notice of the complaint to the solicitor as soon as practicable after receipt, and to make a preliminary decision whether to dismiss the complaint summarily before going further with the investigation, it appears to me that the statute evinces an intention that the Commissioner should give notice of a complaint to the solicitor more or less immediately after receipt, and then take into account anything about the complaint which the solicitor may wish to submit, before determining whether to dismiss the complaint summarily or to go on to investigate it further or to refer it to the Institute for investigation. Otherwise, why provide, as s 4.2.8 so clearly does provide, that the Commissioner must notify the solicitor of the complaint as soon as practicable after receipt?

86. As has been seen, the essence of the reasoning of the court in *Cornall v AB* was that, because the function of the Secretary under the 1958 legislation did not involve any more than satisfaction as to facts sufficient to form a prima facie case, there was little practical merit in providing the solicitor with an opportunity to make submissions or adduce facts. The solicitor’s right to natural justice was said to be adequately protected by his right to be heard before the tribunal which would decide the charge. Now, however, the position under the 2004 Act appears to be such that the Commissioner has an independent obligation under s 4.2.10 to determine whether a complaint is to be dismissed summarily or not proceeded with further. If so, there is practical merit in providing the solicitor with an opportunity to make a submission or adduce facts to the Commissioner before the Commissioner determines that the complaint is a disciplinary complaint which needs be investigated. **The right to be heard at that stage affords the solicitor an opportunity to head off the complaint *in limine*, by persuading the Commissioner not to treat it as a disciplinary complaint or to dismiss it or not proceed with it under s 4.2.10. And such a right to be heard is essentially different to any which the solicitor may later be accorded by the Institute or the Board**.

87. In the result, it appears to me as a matter of statutory construction that the structure and operation of Part 4.2 imply an expectation that the Commissioner will give the solicitor a right to be heard at the outset before making the preliminary decision for which s 4.2.10 provides. The position is analogous to *Ainsworth* and *Johns*.

1. These observations are directly pertinent to the proceeding here having regard to the terms and effect of s 89C(1) and with its particular reference to s 91. A right to be heard by the person under review affords that person an opportunity to persuade the Director to terminate the complaint at a relatively early stage. That right is different from the rights which the person under the review who is the subject of a subsequent referral has before the Committee.
2. I shall now explain why I consider that NHDS was denied procedural fairness in respect of the s 93 referral and the related report.
3. As has been emphasised above, a not insignificant part of the s 89C report refers to findings made by the Director in respect of 15 NHDS practitioners. Their conduct provided an important basis (even if it was not the only basis) for the Director’s decision that she would not make a decision under s 91 to take no further action in relation to the review and that, instead, she would proceed to determine which of the available courses of action specified in s 89C(2) she might take in respect of NHDS, having regard to any written submissions made by NHDS within the prescribed timetable about those matters.
4. It is plain that NHDS understood that the Director’s continuing review related, at least in part, to the conduct of those 15 practitioners. This is reflected in the contents of NHDS’s written submissions dated 30 May 2019 (see [102] ff above).
5. Given the wording of the s 89C report, I accept NHDS’s submission that it did not, and could not, reasonably have contemplated the possibility that the Director would make a referral in respect of the 56 NHDS practitioners identified in Item 2 to the referral, who were entirely separate to those 15 practitioners, and whose conduct as reflected in the Medicare data was also taken into account by the Director. The Director did not dispute NHDS’s contention in the proceeding that the data provided by Medicare relating to total services billed as MBS items 597, 598, 599 and 600 by NHDS practitioners included the 56 practitioners identified in Item 2 of the referral. The Director gave NHDS no prior notice that she intended to rely upon the conduct of those 56 practitioners in determining that their conduct should be the focus of the s 93 referral.
6. Thus NHDS was denied a prior opportunity to seek to persuade the Director that she could not reasonably be satisfied that the conduct of these 56 practitioners involved inappropriate practice in respect of MBS item 597 and that the review should be terminated.
7. I also accept NHDS’s contention that the submissions it made, and was entitled to make, in accordance with s 89C(1)(b)(ii) would not necessarily have been the same if it had been given proper notice of the Director’s intention to rely upon the conduct of the 56 NHDS practitioners specified in Item 2 of the s 93 referral.
8. It is important to bear in mind that there were three elements of “inappropriate practice” which the Director relied upon in making the s 93 referral, namely:
9. knowingly, recklessly, negligently causing or permitting certain conduct;
10. which included the conduct of one or more practitioners employed by NHDS; and
11. the conduct constituted “inappropriate practice” as defined in s 82.
12. Procedural fairness obliged the Director to provide NHDS with a reasonable opportunity to address those three elements, which required the Director to provide NHDS with appropriate particulars and/or information in respect of those three matters with reference to the 56 identified NHDS practitioners. There is an obvious connection between the provision of a s 89C report and the obligation of the Director to invite submissions as to the future course of action, as required by s 89C(1)(b)(ii). Having regard to the contents of the s 89C report, NHDS reasonably believed that the conduct of the other 15 NHDS practitioners formed an important part of the Director’s decision not to terminate the review at that point and that their conduct would also be relevant in determining what future course of action the Director might take. That this was NHDS’s belief is abundantly clear by the terms of its 30 May 2019 submissions (see [102] ff above).
13. There is also a plain connection between the making of those submissions and the effect they may have on the Director’s decision under s 93, as is emphasised by the explicit obligation on the Director under s 89C(2) to take into account those submissions in deciding whether or not to make a referral to a Committee.
14. The Director effectively shifted the goal posts after receiving NHDS’s submissions so as to bring to the forefront of the Director’s further deliberations the conduct of 56 other NHDS practitioners. The Director took their conduct into account (as well as other matters, including the conduct of the other 15 NHDS practitioners), in referring the matter to the Committee. NHDS was given no notice of this significant change in the focal point of the review. The statutory requirements of procedural fairness under the PSR Scheme would be seriously compromised if the Director proceeded as she has done without giving NHDS proper notice and relevant information about the significant change in direction she had taken.
15. As NHDS pointed out at [28] of its written submissions in the proceeding, disclosing that it is alleged, for example, that “the person knowingly permitted their employee Dr A to engage in such-and-such inappropriate practice says nothing as to whether Dr B engaged in that or some other inappropriate practice, whether this was knowingly permitted by the person, or whether Dr B was employed by them”. This proposition is patently correct.
16. As noted, the Director did not submit that the PSR Scheme in the *HI Act* constituted an exhaustive procedural code which precluded the implication of any additional requirements of procedural fairness. Nor would I have accepted any such submission. The richness of the statutory procedural requirements in the multi-stage process under the PSR Scheme are not exhaustive. In particular, the procedural fairness rights and obligations under tier three do not deny the need for procedural fairness at the tier two level. The Director has a statutory power under s 91 at that stage to terminate a review and not make a referral under s 93.
17. The regime in force in 1989 (i.e. well before the PSR Scheme was first inserted in 1994), and which was the subject of the Full Court’s decision in *Edelsten v Health Insurance Commission* (1990) 27 FCR 56; 96 ALR 673, was notably different from that which was introduced in 1994 and later by the *2002 Amendment Act*. It is that regime which was in force at the relevant time for the purpose of the current proceeding. One of the significant changes was the introduction of the four tiers and the enhancement of the Director’s powers under tier 2, including the power to terminate a review in accordance with s 91. In particular, there was no provision such as s 91 under that previous regime. The significance of such a provision in a multi-stage decision-making process is highlighted by what was said analogously in *Byrne*, as referred to at [133] above.
18. I also accept NHDS’s submission that the Director may have reached a different decision on the matter had NHDS been afforded the opportunity to respond to particulars or information concerning the 56 practitioners, including as to whether a Committee might reasonably find that those 56 practitioners had engaged in conduct that constituted inappropriate practice (with particular reference to the three matters identified in [10(a)] of the s 93 report).
19. I reject the Director’s submission that the procedural unfairness was not material, relying upon cases such as *Minister for Immigration and Border Protection v* ***SZMTA***[2019] HCA 3; 264 CLR 421at [4], [41] and [93] and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte* *Lam*[2003] HCA 6; 214 CLR 1 at [37] per Gleeson CJ regarding the concern of the law of procedural fairness being “to avoid practical injustice”.
20. In *SZMTA*, the plurality (Bell, Gageler and Keane JJ) said the following in respect of the requirement of materiality in the case of an undisclosed notification (at [45] and [46]):

45. Materiality, whether of a breach of procedural fairness in the case of an undisclosed notification or of a breach of an inviolable limitation governing the conduct of the review in the case of an incorrect and invalid notification, is thus in each case essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision.

46. Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application.

1. The plurality’s further observations at [49] of *SZMTA* are also apposite (footnotes omitted):

49. Where non-disclosure of a notification has resulted in a denial of procedural fairness, the similar question that remains for the court on judicial review of a decision of the Tribunal is whether there is a realistic possibility that the Tribunal's decision could have been different if the notification had been disclosed so as to allow the applicant a full opportunity to make submissions. Whilst “[i]t is no easy task for a court ... to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome”, the task is not impossible and can be done in these appeals.

1. I accept that NHDS carried the burden of establishing that the procedural unfairness was material, but I do not accept the Director’s contention that this burden was not discharged. First, it is no answer to say, as the Director did, that any submission that NHDS says it was prevented from making to the Director prior to her s 93 referral decision will be able to be made to the Committee. This ignores the importance of the opportunity afforded to NHDS under the PSR Scheme to seek to persuade the Director as to what future course she should take in circumstances where, having reviewed the s 86 request, she determined on 3 April 2019 that, at that stage of her review, the review process should proceed and not be terminated at that point.
2. Secondly, nor is it an answer to contend, as the Director did, that some significance should attach to the fact that NHDS was in no different position *viz a viz* its lack of information concerning the services rendered by the 56 practitioners than was the case in relation to the 15 practitioners. This ignores the explicit complaints raised by NHDS in its 30 May 2019 submissions regarding the lack of more detailed information concerning the conduct of those 15 practitioners and that its submissions were thus necessarily confined to those practitioners alone. Moreover, as will shortly emerge, the second limb of NHDS’s procedural fairness complaint, which is directed to the lack of detailed information provided to it concerning those 15 practitioners, will be upheld.
3. Thirdly, contrary to the Director’s contention, I do not consider that it was incumbent on NHDS to adduce evidence in the proceeding that it was misled or did not contemplate a referral extending beyond the 15 practitioners, or that it would have made different submissions if it had been provided with information regarding the 56 practitioners. There is nothing in *SZMTA* which casts doubt on the correctness of what Gageler and Gordon JJ said on this subject in *Minister for Immigration and Border Protection v WZARH*[2015] HCA 40; 256 CLR 326 at [60]. Their Honours said there that if the procedure adopted by the relevant decision-maker can be shown itself to have failed to afford a fair opportunity to be heard, “a denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome”. As their Honours explained, the practical injustice in such a case “lies in the denial of an opportunity which in fairness ought to have been given”.
4. Finally, I should add that I reject the Director’s contention, made in oral address, that if she had appreciated that a focus of the first limb of NHDS’s procedural fairness case related to the non-provision to NHDS of details of the 300 plus particular services which the Director had sampled, she would have wished to put on some evidence which explained the reasons why that information had not been provided. That this matter figured in NHDS’s procedural fairness case was made sufficiently clear in [18] and [19] of its FAOA. Indeed, the Director was aware as early as 30 May 2019 that this was NHDS’s position, having regard to the explicit complaint it made in its written submissions of that date.
5. The procedural unfairness has the effect of vitiating the s 93 referral.

### (b) Procedural unfairness arising from [91] of the s 93 report

1. The second limb of NHDS’s procedural fairness case relates to [91] of the s 93 report, which is set out at [115] above. In substance, the Director conceded there that NHDS had insufficient information regarding the 15 practitioners and the 300 plus services rendered by them which had been reviewed by the Director for the purposes of the s 89C report. Thus it was unable to conduct an analysis of those services and make any substantive submissions in relation to each of those 15 practitioners’ conduct. The Director then reasoned that she would draw no adverse inference from the lack of any substantive response by NHDS on those matters but added that the 15 practitioners themselves had each responded to the relevant concerns. She said that, despite those responses, her concerns remained and that nothing in NHDS’s submissions had allayed those concerns.
2. This reasoning is a patently inadequate response to NHDS’s complaint of procedural unfairness. It is to be recalled that it was NHDS whom the Director was proposing to be the person under review. Moreover, the other 15 NHDS practitioners had been the subject of an earlier separate review which had produced the outcomes described at [123] above. Merely because the Director was dissatisfied with the responses of those 15 practitioners did not excuse her from providing NHDS, as the person under review, with relevant and significant information concerning the 15 NHDS practitioners and the services rendered by them which the Director reviewed, as well as an opportunity to respond to that material. The Director was, of course, entitled to take into account and assess the adequacy of the individual responses she received from the 15 medical practitioners, but that did not obviate the need for her to provide appropriate procedural fairness to NHDS given that it was the person referred for review. It is possible that NHDS may have been able to provide the Director with information by way of response which allayed some or all of the concerns she had. This required the Director to provide sufficient information to NHDS to enable it, if it so wished, to conduct an analysis of the services and of the 15  practitioners’ conduct. The failure to provide that opportunity and information amounted to procedural unfairness, which also vitiates the s 93 referral.
3. It is no answer to say, as the Director did in her submissions in the proceeding, that NHDS could have done its own sampling. That submission is inconsistent with the Director’s own acknowledgement in [91] of her s 93 report of NHDS’s disadvantage with particular reference to the lack of information it had on the 300 plus services provided by the 15 practitioners which the Director had reviewed and relied upon in her s 89C report. Moreover, it is plain from the terms of the s 93 report that, even though the central focus may have switched from those 15 practitioners to 56 other NHDS practitioners, the Director continued to rely upon information relating to those 15 practitioners in determining to make the s 93 referral. There are numerous references in the s 93 report to the Director’s analysis of and findings in respect of those 15 practitioners.
4. For similar reasons to those given above in respect of the first limb of NHDS’s procedural fairness case, I also find that the procedural unfairness under the second limb was material and amounted to a jurisdictional error.

## Ground 1: Provides services precondition

1. Having regard to NHDS’s success in relation to ground 5 it is strictly unnecessary to determine the remaining grounds of review. In the light of the emphasis given to the jurisdictional fact issue, however, it is appropriate to say something briefly about that issue, which was raised by grounds 1 to 3.
2. NHDS contended that it is a jurisdictional fact for the exercise of the Director’s power to make a referral under s 93 that the person under review had provided the services specified in the referral.
3. Once again, the relevant legal principles were not in dispute. They are reflected in authorities such as *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; 236 CLR 120; *Enfield City Corporation v Development Assessment Commission* [2000] HCA 5; 199 CLR 135; *Australian Heritage Commission v Mount Isa Mines Ltd* [1997] HCA 10; 187 CLR 297; *Tsvetnenko**v United States of America* [2019] FCAFC 74; 367 ALR 465; ***Timbarra*** *Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; 46 NSWLR 55 and *Woolworths Ltd v Pallas**Newco Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707. They may briefly be summarised as follows:
4. Whether a fact is a jurisdictional fact (which may be a complex of elements) is a question of statutory construction.
5. If a fact is a jurisdictional fact, the fact must objectively exist, which falls to be determined by the Court on review having regard to all the evidence before it which may be more extensive than that which was before the primary administrative decision-maker.
6. Where a factual reference appears in a statutory formulation which includes terms involving the mental state of the administrative decision-maker (such as “opinion” or “satisfaction”), this may (although not necessarily) point against the factual reference being a jurisdictional fact, other than in the sense that the decision-maker’s mental state itself is a particular kind of jurisdictional fact. In such as case, therefore, the question is whether that mental state itself objectively existed and whether it was formed reasonably on the basis of the material before the primary decision-maker.
7. An important consideration is whether the relevant factual reference occurs in the statutory formulation of a power to be exercised by the administrative decision-maker as opposed to necessarily arising in the course of the consideration by that decision-maker of the exercise of the power. The distinction has been expressed as whether the fact referred to is “a fact to be adjudicated upon in the course of the inquiry” as opposed to an “essential preliminary to the decision making process” (see *Colonial Bank of Australasia v Willan* (1874) 5 LR PC 417 at 442-443).
8. Another consideration in determining whether or not a factual reference is a jurisdictional fact is whether the matter requires the exercise of a broad judgment in relation to which reasonable minds may differ, which points to the matter not being a jurisdictional fact.
9. Finally, and importantly, the practical inconvenience that may arise from classifying a factual reference as a jurisdictional fact is a relevant and important matter. As Spigelman CJ said in *Timbarra* at [91]:

Statutes are construed on the basis that parliament did not intend to cause inconvenience, although it can do so, and often has. Was it the intention of parliament to invalidate a development application which was not accompanied by a species impact statement when, on an objective test, it should have been?

It is apposite to note the following observations of the Full Court in *Grey* at [179] which are to similar effect *albeit* that they were not directed to a jurisdictional fact argument, but were directed more generally to the PSR Scheme as it was at the relevant time:

When, as here, the Court is considering the effect of legislative provisions, having as its object the protection of the public, a holding of nullification of the whole process from its beginning for purely formal reasons would occasion public inconvenience, a consequence which the parliament would be unlikely to intend…

The nature and extent of public inconvenience produced if a fact is a jurisdictional fact, which leaves the validity of the relevant administrative action an outstanding question until a review court determines whether or not the fact objectively exists, requires a restrained approach by the Court in determining whether or not a fact is jurisdictional and requires the Parliament to clearly express an intention to make a fact a jurisdictional fact (see, for example, *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; 59 CLR 369 at 391 per Dixon J).

1. NHDS contended that, having regard to the terms of s 93(1), it was a precondition to the Director’s exercise of the power under that provision that the person under review is the person who provided the services specified in the referral. It emphasised that s 93(1) empowered the Director to set up a committee and make a referral “to investigate whether the person under review engaged in appropriate practice **in providing the services** specified in the referral” (emphasis added). It submitted that whether or not the person under review provided the services is not something which the Committee investigates; rather, its role is to investigate whether the provision of services was inappropriate practice. NHDS submitted that the “provides services precondition” was a jurisdictional fact which the Director had to determine and which the Court could determine for itself in a judicial review.
2. NHDS submitted that it did not render or initiate the referred services; rather they were rendered by the 56 practitioners identified in the referral and the related s 93 report. NHDS emphasised that only practitioners may render services which attract Medicare benefits (see the definition of “service” in s 81(1), as well as the definition of “provides services” in s 81(2)).
3. If it had been necessary to do so, I would have rejected NHDS’s submissions on this matter for the following reasons.
4. First, they are not supported by the text of s 93(1) (which is set out at [40] above). The power conferred upon the Director by that provision is a power to “make a referral… to **investigate** whether the person under review engaged in inappropriate practice in providing the services…” (emphasis added). I accept the Director’s submission that the issue of whether the person under review provided the services specified in the referral is an aspect of the question that is referred for investigation to the Committee. It is not a jurisdictional fact in respect of the Director’s power under that provision.
5. Secondly, this view is supported by the surrounding context, with particular reference to the features of the PSR Scheme. The Director’s s 93 referral power arises for determination **prior to** an investigation by the Committee, which investigation includes the provision of services by the person under review.
6. Thirdly, I take into account the considerable inconvenience and disruption which would follow if the matter involved a jurisdictional fact. In particular, the person under review could delay and disrupt a statutory investigation at a relatively early stage of the review process, noting also that the issue would involve complex questions of both fact and law. These are the sorts of considerations which the Full Court had in mind when it made the observations that it did in *Grey* at [79].
7. Fourthly, NHDS’s position on this matter sits uncomfortably with the language of s 93(6)(a), which requires the Director to prepare a written report for the Committee, in respect of the services to which the referral relates, giving reasons why the Director “thinks” the person under review may have engaged in inappropriate practice in providing the services. The reference to “thinks” is scarcely consistent with the notion of the matter being a jurisdictional fact.
8. For completeness, I should also say something briefly about NHDS’s separate submission that it is a jurisdictional fact for the exercise of the Committee’s powers that the person under review had provided the services specified in the referral. I accept the Director’s submission that this matter is premature and should not be determined at this stage of the proceeding. The Committee is yet to exercise any power under Div 4. It is entirely unclear what attitude the Committee might adopt to this issue, if and when a valid referral is made to it.

## Ground 2: Employment precondition

1. As to NHDS’s contention that it was a jurisdictional fact for the exercise of the Director’s power to make a referral under s 93 that NHDS was the employer of the medical practitioners, I would have rejected that contention for similar reasons as those given above in respect of the “provides services precondition”.
2. Insofar as NHDS contends that the issue of employment was also a jurisdictional fact for the exercise of the Committee’s powers, I repeat and adopt what I said above in respect of the prematurity of that matter in circumstances where the Committee has yet to exercise any power.

## Ground 3: Employment question

1. Under this ground, NHDS invites the Court to determine the issue whether or not it was the employer of the 56 practitioners specified in the s 93 referral and report, even if the Court considered that the question of an employment relationship was not a jurisdictional fact for the exercise of power under s 93(1).
2. If necessary, I would have declined to do so for the following reasons. First, although prior to 12 February 2020, the Director proceeded on the basis that there was no constraint on her full participation as a respondent to the proceeding, her position then changed. She indicated that she would take no active stance on the issues of fact relating to the employment question and would submit to any findings of fact as the Court might make on the matter. She explained that she took this position because of the potential effect on any future consideration of these matters by the Committee, by causing it “to deviate from the decision-making course it would otherwise have adopted”. She cited the well-known decision of the High Court in *R v Australian Broadcasting Tribunal; Ex parte* ***Hardiman***[1980] HCA 13; 144 CLR 13 in support of that position.
3. Although I consider that the Director’s reference to *Hardiman* and the position of the Committee is misplaced, I accept that *Hardiman* has some application here because of the prospect of future decision-making by the Director herself in the event, for example, that her s 93 referral decision is set aside. The fact that the Director adopted the neutral position which she did on ground 3 means that the Court did not have a contradictor to advance an opposing position to that of NHDS on the issue of employment.
4. Secondly, I accept the Director’s additional submission that it is inappropriate to determine ground 3 because it would result in factual determinations being made at a relatively early stage of a multi-stage statutory decision-making process and in circumstances where the PSR Scheme does not contemplate that final determinations will be made on such issues at this stage.

## Ground 4: Improper exercise of power/error or law

1. This ground is premised on the proposition that the issue of employment is not a jurisdictional fact, but rather arises for determination by the Director in the exercise of her power under s 93.
2. If it had been necessary to do so, I would have rejected this ground. I do not accept NHDS’s submission that the Director took into account irrelevant considerations in concluding that there may have been an employment relationship by having regard to:
3. the subjective views of medical practitioners; and
4. the alleged lack of ability for medical practitioners to negotiate terms of the relevant contracts.
5. Having regard to the proper construction of the relevant provisions of the *HI Act*, I would have accepted the Director’s submission that the subjective views of practitioners is not an impermissible consideration. Moreover, whether or not there is an employment relationship would depend upon the entirety of the relationship between the parties, and not merely on relevant contractual terms (see *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21 at [24] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Moreover, there is authority which supports the Director’s submission that the subjective views of a party to a putative employment relationship is a relevant consideration, even if it is not conclusive (see *ACE Insurance v Trifunovski* [2013] FCAFC 3; 209 FCR 146 at [37] per Lander J).
6. It is also important not to lose sight of the fact that the Director did not express a conclusion that there was a relationship of employment, but rather indicated that it might be open to the Committee to form a view that this was the case on the basis of all the evidence that was put before it for the matter to be determined.
7. As to the second claimed irrelevant consideration, I note that this matter was not addressed by NHDS in either its written or oral submissions. Assuming that the matter is pressed, NHDS advances no reasons why this matter should be viewed as an irrelevant consideration. In my view, there is nothing which is either explicit or implicit in the *HI Act* which would prohibit the Director from taking this matter into account.
8. As to NHDS’s claim that it was not open to the Director to conclude that there may be an employment relationship, I would have rejected that claim for the following reasons. First, having regard to the evidence which was before the Director (not including additional material which has been placed before the Court and which is not relevant for the purposes of this ground of review), there is no evidentiary basis for the claim. It was open to the Director to come to the tentative view which she did.
9. Secondly, I accept the Director’s submission that the relevant question for her to determine under s 93 was not whether it was open on the material before her to find that the practitioners were employees. Rather, the relevant question for her was whether it was open for her to conclude on that material that they might be employees, or whether it might be open on material that might later be placed before the Committee for the Committee to form a final view on that issue.

## Conclusion

1. For these reasons, the Director’s decision dated 23 July 2019 to set up, and refer to, Committee No 1228 the matters set out in Item 2 of the referral will be set aside, as also will the s 93 referral itself. Consequently, there will no longer be on foot any Committee or referral concerning NHDS as described in Item 2 of that referral. I see no need to enjoin the Committee as there is no reason to doubt that it will abide by the Court’s order setting aside the referral. Nor do I see any basis for granting the declaratory relief sought in the FAOA.
2. NHDS did not seek any relief in respect of the s 86 request, nor either the s 89C report or the s 93 report.
3. The parties were agreed that costs should follow the event.
4. The Director asked to be heard on the terms of any final orders in the event that any of the grounds of review were upheld. This concern appeared to relate to the possible effect of s 94 of the *HI Act* if the s 93 referral decision was set aside. There was a brief discussion at the end of the hearing regarding the relevance of Jagot J’s decision in *Ikupu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 234 in respect of the effect of a similarly worded provision in s 500(6L) of the *Migration Act 1958* (Cth). Her Honour referred *inter alia* to the Full Court’s decisions in *Somba v Minister for Home Affairs* [2019] FCAFC 150 and *Khalil v Minister for Home Affairs* [2019] FCAFC 151 in relation to that provision.
5. Consistently with those authorities I consider that, even though the Court will quash the Director’s decision dated 23 July 2019 to set up, and refer to, Committee No 1228 the matters set out in Item 2 of the referral, it is nevertheless a decision for the purposes of s 94 of the *HI Act* with the consequence that this section has no application.
6. As I made clear at the hearing, I am not satisfied that the proceeding should be relisted for further argument on this question. The Director had an opportunity during the hearing to say whatever she wished to say about the effect of s 94 or any other difficulty relating to relief. It is in the interests of finality in litigation that there be no unnecessary delay.

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| I certify that the preceding one hundred and ninety (190) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 24 March 2020

SCHEDULE OF PARTIES

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| --- | --- |
|  | NSD 1332 of 2019 |
| Respondents |  |
| Fourth Respondent: | DR DAVID RIVETT |