Federal Court of Australia

Karmakar v Minister for Health (No 2) [2021] FCA 916

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| File number: | QUD 443 of 2018 |
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| Judgment of: | **LOGAN J** |
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| Date of judgment: | 6 August 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW** – *Health Insurance Act 1973* (Cth) – application for judicial review of exercise of power by the Director of the Professional Services Review Agency to refer the applicant to a committee – whether the Director was obliged to disclose the identity of a practitioner consulted pursuant to s 90 of the Act – where s 89C(1)(b)(i) of the Act requires the Director to provide a report to the applicant – held: the Director discharged the procedural fairness duty by the provision of that report – whether the exercise of power by the Director ought to have been made in reference to an “objective standard” – where the standard specified in s 82(1)(a) is a professional evaluative standard – held: the Director correctly exercised her power in reference to “inappropriate practice” **ADMINISTRATIVE LAW** – *Health Insurance Act 1973* – application for judicial review of exercise of power by the Committee to find the applicant had engaged in inappropriate practice – whether the exercise of the power by the Committee ought to have made in reference to an “objective standard” – held: the Act only requires that the Committee’s evaluation be reasonable – whether the Committee took into account the incompleteness of records – held: the Committee’s report makes clear issue taken into account – where the applicant makes various claims that the Committee’s decision affected by bias and procedural unfairness – where none of allegations made out – application dismissed **PRACTICE AND PROCEDURE** – application for judicial review of exercise of power by Chief Executive to request the Director to review the applicant and by Director to decide to undertake that review – whether application brought pursuant to the *Judiciary Act 1903* (Cth) in the alternative – where statement of claim and submission exclusively refer to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – where Court proceeds on basis that jurisdiction solely conferred by ADJR Act – held: particular exercises of power by the Chief Executive and Director “wholly procedural” and not amenable to review because they were not decisions to which ADJR Act applies**CONSTITUTIONAL LAW** – where applicant submits that s 106ZR of the *Health Insurance Act* 1973 is invalid – whether s 106ZR unreasonably burdens political communication and goes beyond legislative purpose – where enactment of Pt VAA of the *Health Insurance Act 1973* supported by s 51(xxiiiA) or s 51(xxxix) of the *Constitution* – where Act provides for disclosure in various forms – where Act does not prevent the applicant from calling witnesses or adducing statements before the Committee – where Act does not prevent disclosure by applicant that she is subject to a determination or public discussion that the applicant considers the process unfair – held: s 106ZR is not incompatible with the requirements of responsible government – application dismissed  |
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| Legislation: | *Constitution* ss 7, 24, 64, 51, 128*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Health Insurance Act 1973* (Cth) (HIA) ss 20A, 79A, 80, 82, 84, 86, 88A, 89C, 91, 92, 93, 95, 102, 103, 105A, 106, 106GA, 106KD, 106KE, 106L, 106N, 106U, 106XA, 106XB, 106ZQ, 106ZR, 106ZPR, 124B, 130, Pt II, Pt VAA*Health Insurance (General Medical Services Table) Regulation 2015* (Cth)*Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Act 2018* (Cth)*Judiciary Act 1903* (Cth) s 39B*Public Governance, Performance and Accountability Act 2013* (Cth) s 46*Health Insurance (Professional Services Review) Regulations 1999* (Cth) reg 5 |
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| Cases cited: | *APLA Ltd v Legal Services Commissioner* *(NSW)* (2005) 224 CLR 322*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321*British Medical Association v The Commonwealth* (1949) 79 CLR 201*Brown v Tasmania* (2017) 261 CLR 328*Buck v Bavone* (1976) 135 CLR 110*Byrne v Marles* (2008) 19 VR 612*Clubb v Edwards* (2019) 267 CLR 171*Comcare v Banerji* (2019) 267 CLR 373*Edelsten v Health Insurance Commission* (1990) 27 FCR 56*Commissioner of Taxation (Cth) v Spotless Services Ltd* (1996) 186 CLR 404*Griffith University v Tang* (2005) 221 CLR 99*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520*LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490*McCloy v New South Wale*s (2015) 257 CLR 178*Medical Board (Qld) v Byrne* (1958) 100 CLR 582*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24*Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151*Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594*Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611*Municipality of Bankstown v Fripp* (1919) 26 CLR 385*MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441*National Home Doctor Service Pty Ltd v Director of Professional Services Review* (2020) 276 FCR 338*Phan v Kelly* (2007) 158 FCR 75*Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155*Re Minister for Immigration and Multicultural Affairs and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1*Sevdalis v Director of Professional Services Review* [2017] FCAFC 9*Unions NSW v New South Wales* (2019) 264 CLR 595*Wong v The Commonwealth* (2009) 236 CLR 573*Yoong v The Chief Executive of Medicare* [2021] FCA 701 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 105 |
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| Date of last submission filed on behalf of the Applicant: | 7 April 2021 |
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| Date of hearing: | 22 – 24 March 2021  |
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| Counsel for the Applicant: | Mr J Burnside QC with Ms R De Luchi and Mr B Coyne |
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| Solicitor for the Applicant: | Gardner Legal & Regulatory |
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| Counsel for the First and Second Respondents: | Mr G del Villar QC with Ms K McGree |
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| Solicitor for the First and Second Respondents: | Australian Government Solicitor |
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| Counsel for the Third and Fourth Respondents: | The Third and Fourth Respondents filed a submitting notice, save as to costs |

ORDERS

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|  | QUD 443 of 2018 |
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| BETWEEN: | ANCHITA KARMAKARApplicant |
| AND: | MINISTER FOR HEALTH First RespondentDIRECTOR, PROFESSIONAL SERVICES REVIEW AGENCYSecond RespondentDETERMINING AUTHORITY (AS ESTABLISHED UNDER S106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)) (and others named in the Schedule)Third Respondent |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 6 AUGUST 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed.

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

REASONS FOR JUDGMENT

LOGAN J:

1. Ever since the commencement of the *Health Insurance Act 1973* (Cth) (HIA) on 8 August 1974, the price which members of the Australian medical profession (and allied professions or health related occupations) have paid for access to public monies appropriated by Parliament for the purposes of that Act has been subjection to external scrutiny in respect of the rendering of professional services which attract the payment of those public monies.
2. As the HIA was enacted, the provision for external scrutiny was found in the then Pt V of the HIA. It centred on inquiries and then reports to the Minister for Health (Minister) concerning the rendering of professional services, following a reference by the Minister, by what were termed Medical Services Committees of Inquiry. The present system for external scrutiny, found in Pt VAA of the HIA and detailed below, though it has some similar features to the original, is much more elaborate. This case must be decided by reference to the statutory scheme as applicable to the applicant, Dr Anchita Karmakar (Dr Karmakar), during the review period, not by uncritical reference to the “muffled echoes of old arguments”: *Commissioner of Taxation (Cth) v Spotless Services Ltd* (1996) 186 CLR 404, at 414 (*Spotless Services*). The review period was in respect of the provision of services by Dr Karmakar from November 2015 to May 2016.
3. The financial incentive for members of the medical profession to participate in the scheme for the payment of public monies for which the HIA has from time to time provided since its commencement has been a strong and enduring one. That is because of the attraction to patients of receiving a benefit from public monies, which they can assign (presently, s 20A of the HIA refers) to the medical practitioner, in respect of the rendering to them of a professional service. Absent the provision of that benefit, a patient might have to pay in full from their own funds for the professional service, or decide not to seek that service, or perhaps the medical professional might have to decide whether to provide the service *pro bono* or a lesser than usual fee.
4. The apparent source of legislative competence for the enactment of the HIA is s 51(xxiiiA) of the *Constitution*, which does not authorise any form of civil conscription. Some, uninformed by authority, might perhaps see in the strength of the financial incentive presented by the HIA a form of civil conscription. After all, constructive recruitment might rationally and pragmatically be regarded as a reciprocal of constructive dismissal, the latter a well-known concept in industrial law. However rational and pragmatic it may be, this is not the view which has been taken of the effect of the conscription qualification on the HIA. In *Wong v The Commonwealth* (2009) 236 CLR 573, the High Court adopted the view expressed as follows by Dixon J in a dissenting judgment in *British Medical Association v The Commonwealth* (1949) 79 CLR 201, at 278, in respect of a predecessor legislative scheme which also looked to s 51(xxiiiA) for its source of legislative competence, “[t]here is no compulsion to serve as a medical [practitioner], to attend patients, to render medical services to patients, or to act in any other medical capacity, whether regularly or occasionally, over a period of time, however short, or intermittently”. The High Court found that the scheme in the HIA did not constitute a form of civil conscription.
5. Dr Karmakar has experienced both the benefit and burden of participation in the scheme for which the HIA provides. She has not sought to resurrect a civil conscription-based challenge to the validity of the HIA scheme as a whole. She has, however, included in her grounds of review a separate constitutional validity challenge to an aspect of the professional services review scheme for which Pt VAA of the HIA presently provides. Based on the implied freedom of political communication, she alleges that the confidentiality prescription found in s 106ZR of the HIA is invalid.
6. Some explanation needs to be given for the delay in the hearing of Dr Karmakar’s application. It is not because of any tardiness on her part, or on the part of the respondent Minister for Health or the various other respondents performing functions under the HIA. In part, the delay is referable to an evolution in the decisions challenged, after the originating application was initially filed on 29 June 2018. The scope of the application was enlarged after the Determining Authority (the third respondent, of whom more below) made a decision in 2019. That resulted in an amended originating application being filed on 7 October 2019. Overwhelmingly however, the delay is because of the impact on the administration of justice of the COVID-19 pandemic and related State public health measures. In relation to a court which exercises federal jurisdiction nationally, and which hitherto and otherwise routinely heard by appearance in a courtroom from counsel and witnesses resident interstate, that impact, in relation to trials particularly, notwithstanding prompt and innovative use of modern communications technology by the Court, has been much more marked than in courts the routine exercise of the jurisdiction of which is confined to the borders of a given State or Territory. Appearances by such technology are qualitatively inferior to in person appearances and, in some cases, of which the present is one, just not suitable in particular circumstances for the exercise of judicial power. That necessitated postponing the hearing until in person appearances by counsel and witnesses could be undertaken.
7. The relief which, by her amended originating application, Dr Karmakar seeks, and the related grounds for claimed entitlement to that relief, may be summarised as follows:
	1. A declaration that the decision of Dr David Field, as a delegate of the Chief Executive, Medicare (the fifth respondent) to ask the Director of the Professional Services Review Agency (the second respondent – Director – CEO) to review her practice was invalid, as the decision was based upon a subjective comparison of Dr Karmakar with other (unnamed or unidentified) medical practitioners, rather than being based upon an objective standard;
	2. A declaration that the decision of the Director to undertake that review was invalid, as the decision was based upon a subjective comparison of the Applicant with other (unnamed or unidentified) medical practitioners, rather than being based upon an objective standard;
	3. A declaration that the decision of the Director to refer her to the Professional Services Review Committee No. 1092 (the fourth respondent – Committee) was invalid, as that decision:
		1. was based upon a subjective comparison of Dr Karmakar with other (unnamed or unidentified) medical practitioners, rather than being based upon an objective standard; and
		2. did not take into account the fact that the medical records under consideration were incomplete, and that Dr Karmakar did not have any opportunity or ability to obtain the complete records;
	4. A declaration that the decision of the Committee that she had engaged in unsatisfactory practice was invalid, as that decision:
		1. was based upon a subjective comparison of Dr Karmakar with other (unnamed or unidentified) medical practitioners, rather than being based upon an objective standard;
		2. did not take into account the fact that the medical records under consideration were incomplete, and that Dr Karmakar did not have any opportunity or ability to obtain the complete records; and
		3. was made in circumstances which involved a denial of natural justice.
	5. A declaration that the decision of the Determining Authority that Dr Karmakar had engaged in unsatisfactory practice was invalid as it was based wholly or substantially on the unlawful decision of the Committee referred to at paragraph 1.d above;
	6. A declaration that s 106ZR of the HIA is invalid, as it unreasonably burdens political communications.

Dr Karmakar seeks the consequential quashing of the decisions challenged and injunctive relief restraining the respondents from acting upon them.

1. The term “unsatisfactory practice” does not appear in the HIA but the case was conducted, and I have decided it, on the basis that the use of this term was intended to be a reference to the term which is used in the HIA, “inappropriate practice” (defined in s 82). Acting upon the report of the fourth respondent, the Committee, a committee constituted for the purposes of Pt VAA of the HIA, the third respondent, the Determining Authority, made a finding that Dr Karmakar had engaged in “inappropriate practice”.
2. The Committee and the Determining Authority have, appropriately, each made a submitting appearance. The active party respondents are thus the first, second and fifth respondents, respectively, the Minister, the Director and the CEO.
3. In summary and chronologically, what has occurred in relation to Dr Karmakar under Pt VAA is as follows:
	1. In 2015 and 2016, a Dr Peter Baker, as a delegate of the Department of Human Services Medicare, made some preliminary inquiries, which included dealings with Dr Karmakar and her then lawyers, in relation to payment claims in respect of certain services rendered by her.
	2. On 17 March 2017, and as a sequel to Dr Baker’s preliminary inquiries, a Dr David Field, as a delegate of the CEO, requested the Director, pursuant to s 86 of the HIA, to review the Dr Karmakar’s provision of certain services.
	3. The Director decided to undertake a review. The culmination of that review was that, on 13 November 2017, the Director decided to establish the Committee to investigate the provision of certain services by Dr Karmakar and to decide whether it should make findings whether in so doing she had engaged in “inappropriate practice”, as defined.
	4. The committee process occurred throughout 2018. It included six days of hearings in February and March 2018. The final report of the Committee was issued on 30 January 2019. The Committee made findings of inappropriate practice in respect of the rendering of certain services (detailed below by reference to item numbers) by Dr Karmakar.
	5. On 27 August 2019, in respect of the findings of the Committee, the Determining Authority determined that:
		1. a reprimand was warranted and that the Director or the Director’s nominee reprimand Dr Karmakar – s 106U(1)(a) of the HIA;
		2. counselling was necessary and that the Director or the Director’s nominee counsel Dr Karmakar – s 106U(1)(b) of the HIA;
		3. due to the level of inappropriate practice as found by the Committee, repayment in the amount of $352,553.70 was warranted – s 106U(1)(cb) of the HIA (representing full repayment of the Medicare benefits that were paid for the MBS item 54, 597, 721, 723 and 732 services in connection with which Dr Karmakar was found by the Committee to have engaged in inappropriate practice); and
		4. having regard to the reasons for the Committee’s findings of inappropriate practice in relation to MBS items 54, 597, 721, 723, 732, that Dr Karmakar be disqualified from rendering MBS services as follows:
		5. MBS item 54, 585, 588, 591 and 594 services – for a period of 6 months starting when the determination takes effect – s 106U(1)(g)(i) of the HIA; and
		6. MBS item 721, 723 and 732 services – for a period of 12 months starting when the determination takes effect – s 106U(1)(g)(i) of the HIA.

To the extent necessary, I elaborate on these occurrences below.

1. Given the bases of challenge, it is desirable to commence with an outline of the scheme found in Pt VAA of the HIA. Since the review period, the scheme in Pt VAA has been extensively amended 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. As it happens, a comprehensive outline of the scheme in Pt VAA as it stood during the review period, including the reproduction of key statutory provisions, was offered by Griffiths J in *National Home Doctor Service Pty Ltd v Director of Professional Services Review* (2020) 276 FCR 338, at [9] to [65] (*First NHDS Case*). I gratefully adopt and incorporate that outline, including its statutory extracts, by reference, without separately reproducing it.
2. Suffice it to say, the scheme in Pt VAA of the HIA has the potential, as disclosed by s 80 of the HIA, for four, successive stages or “tiers” – CEO request stage, Director review stage (if so disposed in response to the request), committee stage, entailing investigation and, if thought warranted, findings in respect of inappropriate practice in relation to the provision of services referred for investigation by the Director (if the Director’s review has resulted in the establishment of a committee) and the Determining Authority stage, in which the Determining Authority considers what action should be taken in response to the findings of a committee. The decision of a Determining Authority can provide for one or more of the counselling or reprimand of a practitioner found by a Committee to have engaged in “inappropriate practice” in the provision of services, the repayment to the Commonwealth of benefits paid in respect of such services and the disqualification of the practitioner for a specified period in respect of the provision of particular services or to a particular class of persons. As the chronology above attests, each of these stages is exemplified in Dr Karmakar’s case.
3. The object of the professional services review scheme found in Pt VAA of the HIA is as stated in s 79A of the HIA:

**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 active party respondents accept that the decisions made by the Committee and the Determining Authority are amenable to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). However, referring to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (*ABT v Bond*), especially the discussion of principle by Mason CJ in that case, at 335 – 339, an application of that discussion by the Full Court in *Edelsten v Health Insurance Commission* (1990) 27 FCR 56 (*Edelsten*) in respect of the predecessor scheme in the HIA and to the later judgment of the High Court in *Griffith University v Tang* (2005) 221 CLR 99 endorsing the discussion of principle in *ABT v Bond*, they submit that the antecedent decisions made in relation to Dr Karmakar do not have the necessary quality of finality to be amenable to review under the ADJR Act. They also advance the submission, correct in itself, that, being nonetheless decisions, they cannot simultaneously constitute conduct amenable to review under the ADJR Act. In *Edelsten*, decisions anterior to an inquiry and a Ministerial decision were not regarded as amenable to review under the ADJR Act.
2. For her part, Dr Karmakar submitted that the statutory regime considered in *Edelsten* was very different to that found in the present Pt VAA of the HIA. She particularly pointed to provisions found in Div 3A of Pt VAA, notably:
	1. the Director’s discretionary power to make a referral to a Committee – s 93;
	2. the ability of the Director of her own motion to decide to take no further action – s 91; and
	3. if the Director decides not to take no further action, the ability of the practitioner under review to make a further submission to seek to convince the Director to decide under s 91 to take no further action – s 89C(2).
3. The objection taken by the active party respondents depends for its foundation upon Dr Karmakar’s having invoked the Court’s jurisdiction under the ADJR Act. That is not expressed to be so by the amended originating application, which adopts a form apt for use when the Court’s separately conferred judicial review jurisdiction under s 39B(1A) of the *Judiciary Act 1903* (Cth) (Judiciary Act) is invoked. Were the Judiciary Act either further or alternatively the invoked source of jurisdiction, it would be nothing to the point jurisdictionally whether any of the challenged decisions were “final”, although an absence of that quality might well be relevant in relation to whether, as a matter of discretion, to grant relief. However, in its final, amended form, Dr Karmakar’s statement of claim refers only to the ADJR Act. Ordinarily, one might, and I do, regard the later filed and served statement of claim as amending by necessary implication the apparent jurisdictional invocation found in the originating application. Dr Karmakar’s submissions were cast on the basis that the ADJR Act was the invoked source of jurisdiction. I therefore proceed on the basis that the jurisdiction invoked is solely that conferred on the Court by the ADJR Act.
4. The recollection in the opening paragraphs of this judgment of *Spotless Services* and the reference in that case to “muffled echoes” of old arguments was prompted by the reliance on *Edelsten* by the active party respondents to support their objection. The regime found in Pt VAA of the HIA is indeed different to that considered in *Edelsten*. The differences to which Dr Karmakar pointed in her submissions were the same as those recognised and highlighted by Griffiths J in the *First NHDS Case*, at [147]. The authorised report of his Honour’s judgment in that case does not, however, disclose (see, at [1]) the source of the “judicial review” jurisdiction being exercised by his Honour. Further, though *Edelsten* was considered by his Honour, that consideration was to the different end of whether it compelled particular conclusions as to the absence at particular stages of a procedural fairness obligation to the applicant. That means one cannot treat the *First NHDS Case* as an authority directly against the objection taken by the active party respondents.
5. The decisions which s 89C(2) summarises as open to the Director to make are not merely procedural. Decisions to take no further action or to enter into an agreement bring the Pt VAA process to an end. Once made, they become the source of substantive rights. If not made, those substantive rights are denied to the practitioner. These features, in my view, give each the necessary quality of finality to make each of the decision options mentioned in s 89C(2) decisions to the ADJR Act applies.
6. It does not follow from this conclusion that the anterior decisions of the CEO under s 86 to request the Director to undertake the review of services and a decision of the Director under s 88A as to whether or not to undertake that review have that same quality. Neither such decision entails what Mason CJ in *ABT v Bond*, at 337, described as a “substantive determination”. Each is wholly procedural. The administrative states of mind which inform the making of these decisions have no consequential binding effect whatsoever in respect of any later stage in the Pt VAA review processes. In my view, neither of these anterior decisions is a reviewable decision for the purposes of the ADJR Act. As that Act is the asserted jurisdictional foundation, it necessarily follows that, insofar as Dr Karmakar’s originating application claims the declaratory relief specified in paragraphs 1 and 2, the application must, for that reason alone, be dismissed. Another consequence of that conclusion is that evidence concerning these anterior decisions and of the conduct of Dr Peter Baker, the delegate of the CEO, is not relevant, save to the extent that it explains the occasion for the Director conducting her review. As to that evidence, I do nothing more than record that I am quite unpersuaded, having regard to the contemporary correspondence, that there was anything misleading of Dr Karmakar in statements made by Dr Baker as to the nature of the Pt VAA review processes or her billing practices.
7. For completeness, I should record that, after judgment was reserved, my attention was drawn by the parties to *Yoong v The Chief Executive of Medicare* [2021] FCA 701 (*Yoong*). It is evident from *Yoong*, at [3], that the applicant in that case invoked both the ADJR Act and the Judiciary Act as sources of jurisdiction. Unsurprisingly in those circumstances, the question as to whether a decision under s 86 was a decision amenable to review under the ADJR Act did not arise as an issue, because the Court would any event have retained jurisdiction, albeit to review for jurisdictional error rather than on a ground specified in s 5 of the ADJR Act.

### Director’s decision to proceed

1. By s 89C(1)(b) of the HIA, if the Director decides under s 91 not to take no further action, she is then obliged to give the practitioner:

(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.

In the face of this explicit provision for the affording to the practitioner of an opportunity to be heard, and when that opportunity is to be given, it would, in my respectful view and as a matter of initial impression, be an odd construction of s 91 of the HIA to conclude that, before making any decision not to proceed, the Director was under some general, procedural fairness obligation to extend to the practitioner a prior opportunity to be heard.

1. The Director is obliged (s 89C(2)) to take into account any submission made in response to the invitation given pursuant to s 89C(1)(b)(ii). After having so done, the Director may decide to take no further action under s 91 (s 89C(2)(a)). There are thus two opportunities for the Director to decide under s 91 to take no further action – initially upon a review (s 89C(1)(a)) or following the consideration of submissions made by the practitioner in response to the invitation (s 89C(2)(a)). Thus, I respectfully agree with this observation made by Griffiths J in the *First NHDS Case*, at [39]:

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. As Griffiths J highlighted in in the *First NHDS Case*, at [132] – [134], based on an analogy with *Byrne v Marles* (2008) 19 VR 612 (*Byrne v Marles*), the procedural fairness obligation in s 89C(1)(b) of the HIA is an important one, offering the practitioner an opportunity to persuade the Director to bring the Pt VAA process to an end at a relatively early stage. It does not follow from this that, at the earlier stage of deciding under s 88A whether to undertake a review at all, the presence of a requirement to notify the practitioner of a decision to undertake the review means that, at that point, the practitioner has a right to be heard. Nor does it follow that the Director is by implication under any procedural fairness obligation before making the initial decision under s 89C(1) not to take no further action under s 91 but rather to give the practitioner the report and invitation under s 89C(1)(b) of the HIA. In the face of the express obligation in s 89C(1)(b), it is an unlikely construction of the provisions governing this stage of the Pt VAA process that additional procedural fairness obligations are present by implication.
2. *Byrne v Marles* can be reconciled with the High Court’s earlier judgment in *Medical Board (Qld) v Byrne* (1958) 100 CLR 582 (*Medical Board (Qld) v Byrne*) not just on the basis of a different statutory scheme but also on the basis that, the earlier decisions which fall to the Director to make are procedural with a substantive right or interest affected only at the stage when the Director decides it is necessary to furnish the practitioner with a report and extend an invitation to make submissions. In *Medical Board (Qld) v Byrne*, the formation of an anterior administrative opinion by the Medical Board that a practitioner should be subjected to disciplinary punishment, which was a condition precedent to a hearing on the merits by a medical assessment tribunal, was not regarded as carrying with it an obligation to afford the medical practitioner concerned an opportunity to be heard before the Board decided whether to form its opinion. In Pt VAA of the HIA scheme, the earlier decisions which fall to the Director to make are likewise conditions precedent but, given the express incorporation, via s 89C(1)(b)(ii), of a procedural fairness opportunity to the practitioner to persuade the Director to decide under s 91 to take no further action, there is no reason to construe s 88A, s 89C or s 91 as entailing any earlier such obligation. A corollary of this procedural quality of these earlier decisions of the Director is that they are not amenable to review under the ADJR Act.
3. I respectfully consider that an analysis offered by Tamberlin J in *Phan v Kelly* (2007) 158 FCR 75 (*Phan v Kelly*) of the then Pt VAA of the HIA remains pertinent to that Part as it stood during the review period. It is not necessary to rehearse the authorities there discussed by his Honour, only to apply them in the context of the scheme revealed by Pt VAA of the HIA. Considering that scheme, it contains such provision as Parliament intended in respect of procedural fairness: *Phan v Kelly*, at [46]. It is true, as Dr Karmakar submitted, that Pt VAA was amended after *Phan v Kelly* was decided but not, in my view, in a way which affects the reasoning of Tamberlin J. If anything, the later amendments underscore that express prescriptions in respect of procedural fairness obligations leave no room for their supplementation by implication.
4. I note that, in *Yoong*, Rangiah J accepted, without analysing it in relation to s 89C, the correctness of the conclusion reached by Griffiths J in the *First NHDS Case*. However, the issue in *Yoong* was whether that conclusion could be translated so as to imply a procedural fairness obligation into s 86 of the HIA. It was sufficient in that case to assume the correctness of that conclusion about s 89C. In the result, at [106] – [107], his Honour was unpersuaded that the reasoning in the *First NHDS Case* that led Griffiths J to his conclusion about s 89C translated in a conclusion that s 86 of the HIA entailed any procedural fairness obligation by implication.
5. For these reasons, I reject Dr Karmakar’s submission that, before making any decision not to proceed, the Director was under some general, procedural fairness obligation to extend to the practitioner concerned a prior opportunity to be heard. The only obligation was that specified in s 89C(1)(b) of the HIA.

### Director’s decision to refer to the Committee

1. It does not necessarily follow from this conclusion that ground 3 must be dismissed. The ADJR Act does, for reasons already given, apply to the Director’s decision to refer Dr Karmakar to the Committee. The alleged basis of invalidity is not, as pleaded as a ground of review, described as a denial of procedural fairness, be that sourced in some general obligation or that for which s 89C(1)(b) of the HIA makes explicit provision, but grounded in an alleged taking into account of the consideration mentioned in ground 3(a) and an alleged failure to take into account the consideration mentioned in ground 3(b).
2. For the purposes of s 5(1)(e) and s 5(2)(a) of the ADJR Act, a consideration will only be irrelevant if the statute pursuant to which the administrative decision is made either expressly or by necessary implication forbids that consideration to be taken into account: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (*Peko-Wallsend*), at 40, per Mason J. The converse applies for the purposes of s 5(1)(e) and s 5(2)(b) of the ADJR Act in relation to what constitutes a relevant consideration: *Peko-Wallsend*, at 39 – 40.
3. Adopting this conception of what is relevant and irrelevant, the HIA does make a subjective comparison as pleaded in ground 3(a) an irrelevant consideration but, as will be seen, no such comparison was undertaken either by the Director or by the Committee. There were, necessarily, subjective elements in the Director’s decision but not to the end pleaded. Also adopting this conception, the completeness or otherwise of Dr Karmakar’s medical records, as pleaded in ground 3(b), is not a relevant consideration. As it happens, and as detailed by emphasis below with respect to the Director’s ultimate decision, the Director expressly took into account the subject of the completeness of records. It was certainly not irrelevant for her to do this.
4. Understanding what exactly was the grievance with the Director’s decision was not assisted by a disjunct between the grounds of review pleaded in the originating application, the last version of the statement of claim and the submissions made on behalf of Dr Karmakar. I have already referred to the pleaded ground of review. In submissions on her behalf it was, with reference to the second further amended statement of claim, that the errors relevant to the Director were:

b. The Applicant not being provided with any details in relation to a review by a general practitioner upon which the Director relied, where, as a matter of procedural fairness, the Applicant ought to have been provided with:

(a) The name and qualifications of that general practitioner;

(b) The findings of the general practitioner, and the criteria by which the general practitioner made those findings; and

(c) The manner and extent of the Director’s reliance on those findings, although the reliance appeared to be significant (as per the comments of the Director at the meeting with the Applicant on 1 August 2017);

c. The decision by the Director not to use any set standard in her review of the practitioner meant that the practitioner did not and could not know the standard against which she was to be judged, despite the Director’s obligation to conduct the review in a manner that was fair to the Applicant

[sic]

1. Yet, as the active party respondents pointed out in their submissions, the absence of “set standard” issue raised in [36] of the second further amended statement of claim was deleted from the third further amended statement of claim.
2. Notwithstanding the disjunct mentioned, the active party respondents engaged with the denial of procedural fairness allegation and it is in the interests of justice to address so much of it as appears to remain after the amendment of the statement of claim.
3. In terms of explicit provision, s 90(1) of the HIA expressly authorised the Director (as the Director submitted), in order to obtain assistance in making her decision on a review, to consult one or both of the following, a “Panel member” or any consultant or learned professional body that the Director considered appropriate.
4. “Panel members” are medical practitioners appointed by the Minister to the Professional Services Review Panel, established by s 84 of the HIA, after consultation with the Australian Medical Association and such other consultation as ordained by or under that section. Panel members are charged with the performance of a number of functions under Pt VAA of the HIA. In relation to a review conducted by the Director, the apparent purpose of permitting the Director to consult with a Panel member is to afford the Director, if the Director chooses to take up the option, of having a professional sounding board who can, if occasion requires, challenge any idiosyncratic thinking by the Director. Section 90 also authorises the Director to consult more widely but for like purposes.
5. In this case, the Director took up an option offered by s 90 of the HIA so as to have the benefit of a review by a consultant, a general practitioner, of such of Dr Karmakar’s medical records as were then available to the Director. There is neither evidence nor allegation in a ground of review of any resultant abrogation by the Director in favour of that general practitioner of her decision-making function. The decision was hers.
6. It is true that the Director declined to reveal to Dr Karmakar’s then lawyers the identity of the practitioner she had consulted, who had reviewed and at her request advised upon Dr Karmakar’s records - see the Director’s letter of 21 August 2017. Yet neither in s 90 nor elsewhere in the HIA is there any provision obliging the Director to reveal the name of any such consultant. In that same correspondence, the Director reiterated a statement already made in her s 89C(1)(b) report that the “consultant is an experienced and currently practising general practitioner”.
7. What the Director was obliged to do, by s 89C(1)(b) of the HIA, was to give Dr Karmakar a report setting out the reasons why she had at that point decided, pursuant to s 91, not to take no further action and extending to her an invitation to make written submissions, within 1 month, about the action the Director should take in relation to the review. By a letter dated 9 August 2017, which enclosed a report of that same date, the Director at least purported to comply with that obligation.
8. In *Re Minister for Immigration and Multicultural Affairs and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, at 13 – 14, [37] – [38], Gleeson CJ observed that procedural fairness was concerned with whether there was any practical injustice. That observation was recently taken up by Kiefel CJ and Gageler, Keane and Gleeson JJ in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, at [46], who stated in their joint judgment:

46 … To say that a demonstration that the appellant had been deprived of the opportunity of a successful outcome is an aspect of proof of procedural unfairness is necessarily to accept that procedural unfairness is a matter of practical injustice, so that a demonstration of a bare or merely technical denial of procedural fairness alone is not sufficient to establish an entitlement to a new trial.

1. Thus, the real question is whether, in the prevailing circumstances, Dr Karmakar has demonstrated that compliance by the Director with the obligation in s 89C(1)(b) of the HIA required that she be furnished by the Director with the particulars pleaded and, even if the obligation did entail that, whether that was productive of any practical injustice to her?
2. In her report, the Director recited that, as a sequel to a request made of her by the CEO pursuant to s 86 of the HIA received on 17 March 2017, it appeared to her that “there was a possibility that you engaged in inappropriate practice in providing services during the review period”. The Director then recited, and the fact is, that she had decided to undertake a review of Dr Karmakar’s provision of services in accordance with Div 3A of Pt VAA of the HIA and advised Dr Karmakar of this decision on 21 March 2017 in accordance with s 88A of the HIA. The Director then stated:

4. The review has focussed on a sample of services that you provided as Medicare Benefits Schedule (MBS) items.

**Review**

5. Pursuant to section 88 of the [HIA], I asked Medicare to provide me with lists of patients to whom MBS item 597 (urgent attention after hours) 721 (GP management plans), 723 (team care arrangements) and 732 reviews of GP management plans or team care arrangements) 54 (long consultations), and 735 (multidisciplinary case conferences) services were provided by you during the review period.

[emphasis in original]

1. Having so done, the Director then recited in her report further particular steps which she had undertaken in her review, which included requiring the production of clinical records by the operators of medical practices where Dr Karmakar had practised. She then stated that these had been “examined in assessing whether or not there were grounds on which a Professional Services Review Committee (**Committee**) could reasonably find that you had engaged in 'inappropriate practice' as defined by the [HIA] in relation to any of those services”. The Director recorded that, in “reviewing these records, I have had the benefit of advice from an experienced and currently practising consultant general practitioner who was engaged under [s 90 of the HIA]”. The Director did not, in terms, quote from the contents of that advice. Rather, the Director afforded Dr Karmakar with her summary of a meeting which she had held with Dr Karmakar and her then lawyer in Brisbane on 1 August 2017, reciting the Director’s concerns as then raised and responses made by Dr Karmakar.
2. The Director then detailed in her report, at length, particular areas of concern adopting these headings:
* Clinical records (areas of concern as to adequacy were detailed);
* Urgent Attendance – After Hours (MBS item 597) (adequacy of records as to whether attendance was after hours and appropriateness of prescribed medication detailed);
* Chronic Disease Management (CDM) Services – GP Management Plan (GPMP) (MBS item 721), team care arrangement (TCA) (MBS item 723) and review of a GPMP or TCA (MBS item 732) (apparent use of “template” rather than individualised care plans and adequacy of records as to consistent practice of identification of the chronic disease, consultation with at least two collaborating health service providers and rational for ordering pathology tests;
* Professional attendance at consulting rooms of more than 25 minutes (MBS item 54) (absence of record supporting length of attendance detailed);
* Multidisciplinary Case Conferences (MBS item 735) (absence on occasion of record of such a conference detailed).
1. The Director summarised at the conclusion of her report her various concerns in this way:

42. Following the review of your records and my meeting with you, I have concerns in relation to your rendering of MBS items 597, 721, 723, 732, 54 and 735 services during the review period.

43. My concerns include that:

* the MBS requirements were not met for all items that you rendered;
* you have billed items that were not clinically necessary;
* your prescription of first line antibiotics may be inappropriate;
* you have ordered pathology without clinical indication; and
* your notes were an inadequate clinical record;
1. The Director opined in her report, at [44], that “Inadequate documentation alone can be grounds for a Committee of your peers to find that you engaged in inappropriate practice.” She then stated:

45. At this stage of my review, I am not satisfied that there are:

* insufficient grounds on which a Committee could reasonably find that you had engaged in inappropriate practice in providing services during the review period; or
* circumstances that would make a proper investigation by a Committee impossible.

46. Accordingly, I have not made a decision under section 91 of the [HIA] to take no further action in relation to the review.

1. The acronym, “MBS”, as the report indicated, and as used in these reasons for judgment, is a reference to what is generally termed the “Medicare Benefits Schedule”, being the table of general medical services scheduled to regulations made from time to time under s 4 of the HIA, which set out the following:
	1. items of medical services (hence the reference to particular item numbers);
	2. the amount of fees applicable in respect of each item; and
	3. rules for interpretation of the table.
2. After the later exchange, mentioned above, concerning Dr Karmakar’s request for further information, Dr Karmakar sent to the Director a detailed response (including related, supporting annexures), dated 18 October 2017 but received by the Director on 6 November 2017, to the issues raised in the Director’s report.
3. By a letter dated 13 November 2017, the Director advised Dr Karmakar that she was not prepared to take no further action under s 91 of the HIA but rather that she had decided, pursuant to s 93 of the HIA, to refer the matter to the Committee. The Director stated:

Notwithstanding your submissions, I remain of the view that your conduct in rendering the referred services may be considered inappropriate by a Committee of your peers and I am not prepared to take no further action in this review in accordance with section 91 of the *Health Insurance Act 1973* (Act).

*I acknowledge your submission that there is documentation missing from the records obtained from Harbourtown Medical Centre but do not accept that this makes a proper investigation by a Committee impossible.*

I have therefore decided to refer this matter to a Professional Services Review Committee (PSR) Committee under section 93 of the Act.

[Emphasis added]

1. One submission made by Dr Karmakar was that the Director’s refusal to specify the name and qualifications of the practitioner she consulted under s 90 of the HIA was procedurally unfair, because it denied her the opportunity to make a submission as to the weight which ought to be afforded to the views expressed by that practitioner. As I understood it, the unfairness lay in an inability to ascertain whether that practitioner was, for example, known in the profession as an iconoclast, possessed of idiosyncratic views. As an abstract proposition, that submission may, in certain circumstances, have merit. But not, in my view, in the context of the scheme in Pt VAA of the HIA.
2. Whether any consultation as envisaged by s 90 occurs at all is entirely a matter for the Director. If it does, the Director’s obligation is not to disclose the assistance, if any, received or the author of any advice but rather, as s 89C(1)(b)(i) of the HIA dictates, to furnish the practitioner concerned with “a written report setting out the reasons why the Director has not made a decision under section 91”. The reasons in that report must be those of the Director, not of such person or body, if any she may have chosen to consult for assistance. There is nothing to indicate that the reasons in the report were other than those of the Director. It is to that report containing those reasons that the practitioner is expressly afforded an opportunity by invitation to respond. If those reasons reflect idiosyncratic views within the profession, that will be apparent on the face of the report itself. It would, in my view, have been permissible for the Director, if she chose, to have quoted from any advice which she received under s 90 of the HIA, naming the author, and indicating that she agreed with that advice. But she was under no obligation either expressly by statute or by implication so to do. Indeed, it would be permissible for the Director to consult under s 90 but depart from any resultant advice to her if she had a different opinion. The s 90 process is intramural. The extramural aspect of this stage of the processes for which Pt VAA provides is the report containing the Director’s reasons. The reasons which the Director furnished in her report were comprehensive. They conspicuously fulfilled her obligation to afford Dr Karmakar with an opportunity to engage with the critical issues that had not led the Director initially just to decide to take no further action under s 91 and which might persuade her to make a referral to a committee. They also enabled Dr Karmakar to address those same issues to the end of persuading the Director under s 91 that, taking her submission into account no further action ought to be undertaken.
3. This is a case where no injustice, practical or otherwise, was visited upon Dr Karmakar by the Director. The Director discharged the procedural fairness duty imposed on her by s 89C(1)(b)(i) of the HIA.
4. As to the “objective standard” issue, both as alleged in relation the Director and, for that matter, the Committee, it is, with respect, a confected issue, an archetypical “straw man”. The standard with which Pt VAA is concerned is, for better or for worse, “inappropriate practice”, as defined by s 82 of the HIA, nothing more and nothing less. That is the standard adopted by Parliament. More particularly, because Dr Karmakar rendered the services concerned as a general practitioner, the standard is that specified in s 82(1)(a) of the HIA – “the conduct would be unacceptable to the general body of general practitioners”. It is a professional evaluative, not an objective, standard. Those practitioners who choose to have the benefit of participating in the scheme for the payment of public monies out of Consolidated Revenue under the HIA also choose to subject themselves to the prospect that their conduct may come to be measured by reference to that standard in the processes for which Pt VAA of the HIA provides.
5. Initially, it fell to the Director to decide whether it appeared to her that there was a possibility that Dr Karmakar had engaged in “inappropriate practice”, as defined, in providing services during the review period: s 88A(2) of the HIA. That possibility having appeared to the Director, and flowing from s 89C(2) and s 91 of the HIA, the Director was obliged, by s 91(i) after taking into account Dr Karmakar’s response to her report, to consider whether she was satisfied that:

(a) there are insufficient grounds on which a Committee could reasonably find that the person under review (Dr Karmakar) 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.

1. In the circumstances of this case, the making of an agreement with Dr Karmakar under s 92 of the HIA was not an option. That being so and the Director not being satisfied, after considering Dr Karmakar’s response, as to insufficiency of grounds or impossibility of investigation but rather, as her letter of 13 November 2017 evidences, of the reverse, the Director was obliged, by s 89C(2)(c) of the HIA, to make a referral to a committee under s 93 of the HIA. That is exactly what the Director then did, as the formal referral enclosed with her letter of 13 November 2017 evidences. She set up the Committee for the purpose of investigating whether Dr Karmakar engaged in inappropriate practice over the review period in providing the following services during the review period:

(a) MBS item 54;

(b) MBS item 597;

(c) MBS item 721;

(d) MBS item 723;

(f) MBS item 732; and

(g) MBS item 735.

1. The Director’s decision was conditioned upon what “appears” to her and upon her being “satisfied” as to a possibility. Provisions so cast leave no room for any litigation on the factual merits of the evaluation to which the s 82(1)(a) definition of “inappropriate practice” is directed: *Municipality of Bankstown v Fripp* (1919) 26 CLR 385, at 403, per Isaacs and Rich JJ. “Appears” and “satisfied” necessarily entail a particular state of mind being held. In this sense, subjectivity, as pleaded by Dr Karmakar, is present. However, the evidence, particularly her report, discloses that the end to which the Director turned her mind as to what “appears” to her or about which she was satisfied was the possibility that a committee established under Pt VAA could make a finding of “inappropriate practice”, as defined. That is quite different to the “subjective comparison of [Dr Karmakar] with other (unnamed or unidentified) medical practitioners” as alleged by Dr Karmakar. The Director made no such comparison. The evidence of the decisions she made discloses that she turned her mind, as and when required, to the ordained subject of “inappropriate practice”, as defined.
2. Either as specified as a ground of review or as put in the final version of her statement of claim, or in submissions, there is, for the reasons given, no merit in any of the challenges made by Dr Karmakar to the Director’s decisions.

### Committee’s Decision

1. Two bases of challenge to the Committee’s decision as pleaded in the originating application were the same as two made to the Director’s decision:
	1. “subjective comparison” rather than “objective standard”; and
	2. failure to take into account incompleteness of medical records and Dr Karmakar’s inability to obtain the complete records.
2. As to the first, the Committee’s role was to investigate and then make findings in respect of the referred services. Those findings had to be whether or not Dr Karmakar had engaged in inappropriate practice, as defined, in respect of the referred services. As so defined, the Committee was required to make an evaluation by reference to its understanding (or at least that of a majority of the Committee) as to whether Dr Karmakar’s conduct in connection with the rendering of those services would be unacceptable to the *general* body of general practitioners. To take up an expression favoured in Dr Karmakar’s statement of claim, s 82 contains the “legislatively endorsed” standard. To take up another such expression, s 95 specifies what constitutes “peer review”. The specified standard and review body is not unacceptability to the general body of general practitioners of Dr Karmakar’s length of registration as determined by a committee comprised of such practitioners. Further, the required finding, one way or the other, is wholly evaluative by the Committee. There is no “objective standard”. All that is necessary is that the Committee’s evaluation be reasonable.
3. Whether or not this statutory standard and by whom the evaluation is made is, as Dr Karmakar submitted was required, “formally taught” is nothing to the point. The HIA forms part of the law of Australia. Perhaps, given the pervasiveness of impact on the Australian medical profession of the HIA, a general understanding of the professional standards review system found in Pt VAA of that Act should form part of the curriculum of each and every medical school in Australia. Perhaps, too, for these same reasons, it ought to form the subject of compulsory, continuing professional development education for the medical profession. But any absence of such inclusions does not render the decisions successively made in this case by the Director, the Committee and the Determining Authority unlawful.
4. It is not for the Court on judicial review to remake the evaluative finding consigned to the Committee. Indeed, the professional evaluative judgement which the Committee was required to make, and did make in respect of its findings of “inappropriate practice”, as defined is a paradigm example of a “matter of opinion or policy or taste”: *Buck v Bavone* (1976) 135 CLR 110, at 119 in respect of which it is always difficult to demonstrate a ground of judicial review is present. This may perhaps be a case where reasonable minds might reasonably differ as to whether Dr Karmakar’s professional constituted “inappropriate practice”, as defined. Dr Turnbull evidently considered that it did not. But that does not make the Committee’s findings unreasonable: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, at [137], per Gummow J.
5. By s 106L(1B) of the HIA, a committee can only make a finding of inappropriate practice if the proposed finding and the reasons for the finding were included in the draft report prepared and furnished to Dr Karmakar under s 106KD of the HIA. The Committee observed this requirement. The Committee’s final report makes explicit it took into account the resultant submissions in reply made by Dr Karmakar. In particular, the Committee took into account views expressed by Dr Turnbull in a report relied upon by Dr Karmakar. The Committee was not obliged to accept Dr Turnbull’s opinions. The Committee’s final report discloses a reasoned, rational basis for the findings which it made.
6. As to the second, the Committee’s report of 30 January 2019 makes plain that it took into account the completeness of medical records, the reasons for that and the extent to which there was inability to obtain complete records. The Committee’s report reveals that it explored the subject of the adequacy of Dr Karmakar’s record keeping in meticulous detail. The Committee’s report discloses that it was well seised with, and took into account, all of the explanations offered by Dr Karmakar in relation to the adequacy of her recordkeeping and the completeness of the records available to the Committee. Some of these explanations were accepted by the Committee, others were not. It is not for the Court on judicial review itself to engage in the investigation consigned to the Committee.
7. For these reasons, there is no substance in the grounds of review as pleaded in the originating application in relation to the Committee. As with the Director, the bases of challenge ranged more widely in the statement of claim and then in submissions.
8. It was put that Dr Karmakar’s provision of the referred services had not been investigated by a committee of her peers. As I understood it, foundation for this submission was that she was a junior, general practitioner and ought therefore to have been investigated by a committee so comprised. That submission must be rejected. The constitution of the Committee was dictated by s 95 of the HIA. The Chairperson of the Committee had to be a Deputy Director. Given that Dr Karmakar was, during the review period, a general practitioner, the other members of the Committee had to be (and were) general practitioners: s 95(5) of the HIA. Neither explicitly nor implicitly did the HIA additionally require that those general practitioners be of the same number of years post-registration as Dr Karmakar.
9. As to the meaning of “urgent” for the purpose of item 597, this was ordained by the meaning given in [2.15.1] of Sch 1 to the *Health Insurance (General Medical Services Table) Regulation 2015* (Cth) made under the HIA. It was not, as Dr Karmakar seemed to suggest, dictated by the meaning adopted by Dr Turnbull for the purposes of a report prepared by him, which formed part of the submission made on behalf of Dr Karmakar to the Committee. Both in its interim as well as its final report, it is explicit that the Committee adopted the ordained definition.
10. Dr Karmakar alleged that the Committee’s proceedings constituted a “bias[ed] and a prejudged interrogation process”. As mentioned, the statutory remit of the Committee was to investigate and to make findings. It was entitled to, and did, ask questions of Dr Karmakar as part of its investigation. But nothing either in the transcript of the hearings conducted by the Committee or in its dealings by correspondence with Dr Karmakar’s then lawyers would, on any objective basis, give rise to a reasonable apprehension that the members of the Committee might not have brought impartial minds to bear on their evaluation of whether in respect of the referred services Dr Karmakar had engaged in “inappropriate practice”. The transcript is replete with assurances that the Committee had not prejudged any issue. Even more so, there is no evidence of any actual bias on the part of any member of the Committee. The onus of proving bias, be it apprehended or actual, lies on Dr Karmakar. She has not discharged that onus.
11. Dr Karmakar also alleged that the processes of the Committee entailed a denial of natural justice, because she was not legally represented at the hearing which she attended. There is no substance in this allegation. As the active party respondents submitted, the absence of legal representation was a matter of choice by her. The HIA does not mandate that a committee can only conduct a hearing if the practitioner concerned is legally represented. Rather, the HIA authorises a practitioner to be legally represented and delineates the role which that legal representative may undertake at a hearing: s 103 of the HIA.
12. An alternative way in which Dr Karmakar put her allegation that she was denied natural justice was that she had neither received prior notice nor disclosure of material relating to the processes of the Committee. In respect of this allegation, too, there is no substance. The evidence establishes that the prior notice of hearing requirements specified in s 102 of the HIA were observed. Dr Karmakar attended the hearings concerned. It also establishes that prior to the Committee’s hearings, Dr Karmakar’s then lawyers and, on behalf of the Committee, the Department of Health’s Professional Services Review Agency corresponded about the hearing arrangements, the MBS items to be examined, the clinical records to be referred to, the ability of witnesses to give evidence and the rights afforded to Dr Karmakar in respect of a hearing. It also discloses that inquiries Dr Karmakar made personally, whether in the course of a hearing or otherwise, were substantively answered by or on behalf of the Committee. Yet further, it discloses that the Committee observed the requirements of s 106KE of the HIA in relation to the furnishing to Dr Karmakar of a draft of its report for such submissions, if any, as she may care to make.
13. Dr Karmakar alleged (but did not prove) that the Committee was provided with incomplete medical records to consider the purpose of the PSR Committee hearing. But she was furnished (via her then lawyers) with copies of such records as the Committee did obtain pursuant to notices issued by it under s 105A of the HIA before the Committee’s first hearing. There is nothing in Pt VAA of the HIA which prevents a committee from undertaking its investigation if records are incomplete. Indeed, s 106KB contemplates that findings of inappropriate practice may be made even in cases where clinical records are either incomplete or missing altogether:

**106KB Generic findings of inappropriate practice**

(1) This section applies in relation to services (the ***relevant services***) in respect of which:

(a) there are no clinical or practice records or some or all of the clinical or practice records are missing, inadequate, illegible or otherwise incomprehensible; and

(b) the Committee is unable, because of the matters mentioned in paragraph (a), to make findings under section 106K or for the purposes of subsection 82(1A) or (1B).

(2) For the purpose of making a finding in respect of the relevant services, the Committee may use any information that it is able to obtain, including information supplied by the Chief Executive Medicare, contained in the report by the Director or given in evidence at hearings held by the Committee.

(3) If:

(a) the Committee is of the opinion, based on an evaluation by the Committee of the information obtained as mentioned in subsection (2), that the person under review has engaged in inappropriate practice in the provision of some or all of the relevant services; but

(b) the Committee is not able to identify or determine the number of particular services in the provision of which the person engaged in inappropriate practice;

the Committee may nevertheless make a finding that the person engaged in inappropriate practice in the provision of some or all of the relevant services.

[emphasis in original]

A committee is also empowered, by s 106GA of the HIA to notify the Director that “[it] is satisfied that circumstances exist that would make a proper investigation by the Committee impossible”, detailing those circumstances. Conceivably, where there was no issue before a committee as to whether the practitioner concerned had kept adequate records, an absence or incompleteness of records might provide occasion for such satisfaction. But that is a matter for the value judgement of the committee concerned. This Committee evidently did not consider that such an impossibility existed.

1. As it was, during the hearings conducted by the Committee, Dr Karmakar accepted that she had written the records which had been produced to the Committee. Contrary to a submission on her behalf that she was at the Committee’s hearings, “examined and criticised for incomplete records”, all that the transcripts disclose is that the Committee took her through records which had been produced to it and afforded her an opportunity to offer an explanation about the records. The Committee’s final report, at [78], expressly stated that it agreed that the quality of the records to which Dr Karmakar was exposed in the Harbourtown practice was relatively poor and that she was of limited experience and “has borne [those facts] in mind” in making its findings. Dr Karmakar’s account of her record keepings practices was taken into consideration by the Committee. Indeed the Committee did this on a record by record basis. The Committee accepted that certain records may not have been scanned but stated, at [59] – [60], that none of its findings turned on an absence of documentation that could have been scanned. All of this is apparent from the meticulous, individual consideration of, and related reasons given by the Committee in respect of, each of the permissibly randomly selected sample services provided by Dr Karmakar, as found in the tables which are annexed to and form part of the Committee’s report.
2. A variant of Dr Karmakar’s allegation that she was provided with incomplete records by the Committee was an allegation that the Committee was subject to a “duty to inquire” and had failed to discharge that duty upon being informed by Dr Karmakar that the records were incomplete.
3. It is not controversial that a committee constituted for the purposes of Pt VAA of the HIA is an inquisitorial body. A committee is charged with a duty of investigation into the provision of services specified in the Director’s referral: see s 80(6) and s 93(1) of the HIA. At this general level of abstraction, there is a “duty to inquire”.
4. Detailed provision is made by Div 4 of Pt VAA of the HIA as to how such an investigation is to be undertaken and the powers exercisable by the Committee for that purpose. Those powers include a power to require the production of documents and the giving of information relevant to the referral: s 105A of the HIA. That production requirement power was exercised by the Committee prior to the first hearing day. Both in its draft and final reports the Committee addressed what to make of Dr Karmakar’s claims about incompleteness of records.
5. Dr Karmakar did not, and could not, on the evidence she adduced in the proceeding point to any obvious inquiry which the Committee might have made to remedy the incompleteness of records she claimed. The Committee had already made the obvious inquiry by exercising its power under s 105A of the HIA. It also had the benefit (as had Dr Karmakar) of the results of the inquiries earlier made by the Director.
6. Some care must be taken in relation to the use of the expression “duty to inquire” in relation either to a ground of review found in s 5 of the ADJR Act or as a foundation for jurisdictional error. In *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 (*SZIAI*), at [20], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated:

The failure of an administrative decision-maker to make inquiry into factual matters which can readily be determined and are of critical significance to a decision made under statutory authority, has sometimes been said to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it.

1. Later their Honours allowed, at [25], with respect to an administrative decision-making tribunal, the core function of which was to conduct a review of a primary administrative decision:

It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.

[Footnote references omitted]

1. Thus, as Gummow J noted in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, at [78], the High Court left open in *SZIAI* whether a failure to make an obvious inquiry as to a critical fact might give rise to jurisdictional error. That question remains unresolved at ultimate appellate level.
2. That, in singular circumstances, a failure to make such an inquiry might expose a failure to discharge statutory function or demonstrate that final conclusions reached in an inquiry were unreasonable finds support in observations made by Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, at 167 – 170, which is something of a root authority for that proposition. Other authorities collected by Kenny J in *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151, at [65] – [67], might also be said to support such a proposition. The difficulty for Dr Karmakar is that the Committee did make the obvious inquiry about the critical facts relevant to its investigation in respect of the referred services. Having so done, it made its findings taking into account, to the extent that it accepted her account, her claims about incompleteness of her records.
3. It was also put that Dr Karmakar had not been interrogated by the Committee about “probative evidence”. In relation to such an expression also, some care needs to be taken. That is because a committee is not bound by the rules of evidence: s 106(2) of the HIA. Necessarily therefore, where the word “evidence” is used in Div 4 of Pt VAA, it is not used in the sense of evidence which would be admissible in the exercise of judicial power by a court. To conceive of “evidence” in that sense is to commit the error of borrowing “from the universe of discourse which has civil litigation as its subject”: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, at 282. The hearing transcripts disclose that the Committee asked questions of Dr Karmakar by reference, *inter alia*, to records in respect of the referred services which were before the Committee. In an administrative investigation such as the Committee was duty bound to conduct, those records were “evidence”. What to make of them was a matter for the Committee, taking into account, *inter alia*, such responses as Dr Karmakar chose to make either at the hearing by evidence or submission or afterwards by submission. The Committee’s final report discloses that it did this. There is no merit in this particular submission.
4. A submission was made that the Committee had failed to take into account Dr Turnbull’s report. That is contradicted by the contents of the Committee’s final report.
5. It was also put that the Committee had failed to take into account, “Medicare systemic issues”, either at all or “properly or sufficiently”. The latter alternative is an impermissible exhortation to conduct merits review under the guise of judicial review. As to the former alternative, the precise metes and bounds of exactly what is embraced by “Medicare systemic issues” are elusive. The HIA does not, in terms, use that expression at all and neither can it be said by necessary implication, to be a relevant consideration for a committee constituted under Pt VAA.
6. That is not to say that some factors highlighted by Dr Karmakar in her submissions might not permissibly be taken into account by a committee in its evaluation of whether to make a finding of inappropriate practice as defined in respect of a referred service. Mentioned in her submissions to the Court were:
	1. Inconsistencies (not detailed by reference to the item numbers in the referred services) in the guidance offered by the Minister’s department either in a publication termed the “MBS Book” (MBS being Medical Benefits Schedule), other online resources and documentation produced by the Australian Medical Association;
	2. That none of these publications and resources were authoritative;
	3. That, materially, the definition of an “adequate record” in reg 5 of the *Health Insurance (Professional Services Review) Regulations 1999* (Cth) (PSR Regulations) was vague, ultimately leaving it to a matter of evaluative judgement as to whether each entry in a record was “sufficiently comprehensible that another practitioner, relying on the record, can effectively undertake the patient’s ongoing care”.
	4. Corporatisation of medicine with junior medical practitioners employed by large medical service companies having little, if any, control over billing practices.
7. However, to the extent that Dr Karmakar chose to develop these considerations in submissions, the Committee took them into account, as its final report reveals. For better or for worse, the definition of “adequate record” in the PSR Regulations bound the Committee: *Sevdalis v Director of Professional Services Review* [2017] FCAFC 9, at [7] – [8]. The Committee was obliged to make an evaluative judgement on this, as in respect of all of the referred services, by reference to the standard found in the definition of “inappropriate practice” as applicable to a general practitioner such as Dr Karmakar. Those appointed to the Committee were eligible to be members of the Committee and, as their final report discloses, made that evaluation.
8. Perhaps there may be policy considerations arising from the “corporatisation” of aspects of general practice, the pervasive application of the HIA and a related predicament for junior medical practitioners aspiring to gain experience for accreditation as general practitioners. If so, these are for resolution in the political arena, not in the courts.
9. Dr Karmakar’s submissions to the Court also referred to the impact of findings by a Committee based on permissible sampling upon an amount which ultimately comes to be payable by a practitioner if inappropriate practice findings are made. But it is no part of the Committee’s function to determine what amount, if any, should be refunded by a practitioner. Within Pt VAA of the HIA, that role is consigned to the Determining Authority. The consideration mentioned might perhaps be relevant to a decision by a Determining Authority, as might, for that matter, power imbalances and other absences of control by junior medical practitioners over billing. However, the challenge made by Dr Karmakar to the decision of the Determining Authority is wholly derivative, depending for its success on her successfully impeaching decisions at earlier in the Pt VAA scheme.

### Validity of Section 106ZR

1. Dr Karmakar also submitted that, if valid, s 106ZR of the HIA had operated so as to deny her a reasonable opportunity to present her case before the Committee. Put another way, she submitted that the inevitable consequence of the operation of that section was to deny a practitioner the opportunity of a fair hearing.
2. Section 106ZR of the HIA provides:

**106ZR Disclosure of Committee deliberations etc.**

(1) A person must not disclose to another person:

(a) any of the deliberations or findings of a Committee; or

(b) any information or evidence given to the Committee in the course of its deliberations;

unless the disclosure is required or permitted under this Act or the *Dental Benefits Act 2008* or is necessary in connection with the performance of the first-mentioned person’s functions or duties under this Act or the *Dental Benefits Act 2008*.

Penalty: Imprisonment for 12 months.

(3) This section does not prevent a person from making a disclosure:

(a) to a lawyer for the purpose of obtaining legal advice or representation relating to a matter involving the deliberations or findings of the Committee; or

(b) if the person is a lawyer—for the purpose of complying with a legal duty of disclosure arising from his or her professional relationship with a client.

(4) In this section:

***lawyer*** means a barrister or solicitor.

1. Section 106ZR must, as the active party respondents correctly submitted, be construed in the context of Pt VAA. Part of that context is s 103(1)(c), which, in respect of a hearing by a committee, permits the practitioner “to call witnesses to give evidence (other than evidence as to his or her character)” and s 103(1)(d), which permits the practitioner “to produce written statements as to his or her character”. Contrary to a submission made by Dr Karmakar, it would be disharmonious with the scheme in Pt VAA in respect of investigation by a committee to construe s 106ZR as inhibiting the practitioner from making such disclosures as were necessary to witnesses to give evidence as permitted by s 103(1)(c) or to give statements as permitted by s 103(1)(d) of the HIA. In my view, such disclosures are, in terms of s 106ZR(1) of the HIA, “required or permitted under this Act”. Self-evidently from the proceedings of the Committee, s 106ZR did not in fact prevent Dr Karmakar from gathering statements from patients and other health professionals which were tendered on her behalf or from obtaining as part of the response she made, a report from Dr Turnbull. Her doing so was, for the reasons just given, lawful. Section 106ZR did not operate to deny her procedural fairness in the course of the Committee’s investigation.
2. Is s 106ZR invalid?
3. Dr Karmakar submitted that it was beyond the legislative competence of the Parliament to enact s 106ZR because:

(a) it unreasonably burdens political communication as it prohibits and regulates an inherently political communication; and

(b) goes well beyond the purpose for which it was designed because, among other things, it unfairly prevents persons under review from defending themselves by discussing the process and the evidence.

1. The active party respondents submitted, correctly, that the freedom concerned is not a personal right but rather a restriction on legislative power. They also submitted that Dr Karmakar’s challenge to the validity of s 106ZR lacked any practical utility, because she had not sought to engage in any communication of political or governmental nature concerning Pt VAA of the HIA. In relation to a confidentiality provision, which, for the apparent purposes mentioned below, has a chilling effect in relation to communications, there is a certain self-fulfilling or “bootstraps” quality about that submission. As was pointed out in behalf of Dr Karmakar, an absence of desire to engage in such communications was never put to her in cross-examination. Further, the evidence disclosed that Dr Karmakar had made her own inquiries about possible problems in the Pt VAA regime, including approaching contributors to a 2011 Senate Inquiry. She had also sought, via a freedom of information application, information from the Professional Services Review agency established under Pt VAA information regarding internal processes. She obviously has a grievance about the operation of the Pt VAA regime and desires to air that grievance via public discussion. I do not doubt that either that grievance or that desire are held in good faith. I do not therefore accept that the relief she seeks about s 106ZR lacks practical utility.
2. Yet another submission made by the active party respondents, relying upon *Comcare v Banerji* (2019) 267 CLR 373 (*Comcare v Banerji*), was that s 106ZR did not impose a burden on freedom of political communication because only one group relevantly, medical practitioners, was affected by it. However, as was correctly put on behalf of Dr Karmakar, this submission mischaracterises the nature of the effect of s 106ZR. The section is not directed just to medical practitioners, but to any person who discloses information subject to the restriction.
3. Recently, in *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490 (*LibertyWorks*), Steward J, at [249], opined that, “it is arguable that the implied freedom does not exist”; compare Kiefel CJ, Keane and Gleeson JJ, who stated, at [44], “The constitutional basis for the implication in the *Constitution* of a freedom of communication on matters of politics and government is well settled.”
4. The active party respondents made no submission that the implied freedom did not exist. Rather, their submissions accepted that it did but put that s 106ZR did not transgress that implied freedom. Whether there should be reconsideration of whether any such implied freedom exists is a matter for the High Court. As the judgments in the cases cited below demonstrate, there are authorities aplenty after the root authority, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*), where reference is made to the existence of such an implied freedom. Especially given that its existence is accepted in this case, I consider that I am obliged to proceed on the basis that the implied freedom does exist.
5. Proceeding on this basis, there is no difference between the parties as to issues which fall for determination:
	1. The first (and perhaps only) issue flows from an identification of the purpose which the statute (s 106ZR in particular) seeks to achieve. The purpose will be legitimate only if it is compatible with the constitutionally prescribed system of representative government: *McCloy v New South Wale*s (2015) 257 CLR 178, at [31] (*McCloy*).
	2. Even if the statute is compatible, the next issue is whether it is proportionate to the achievement of that purpose. Only if the statute is proportionate will a burdensome effect on the freedom be justified. To be proportionate, the statute must be a rational, response to a perceived mischief: *Clubb v Edwards* (2019) 267 CLR 171 (*Clubb v Edwards*), at [66] – [70]; *McCloy*, at [68].
	3. The final issue as to the validity of a statute effecting a burden on the freedom is whether the burden is “undue” having regard to its purpose: *Lange* at 569, 575. It will be “undue” if it is not a proportionate response to its purpose. That is to be ascertained by a “structured method of proportionality analysis”: *LibertyWorks* at [48]; *McCloy*, at [2], [79]; see also *Brown v Tasmania* (2017) 261 CLR 328, at [123] – [127], [278]; *Unions NSW v New South Wales* (2019) 264 CLR 595, at [42], [110], [161] – [167]; *Clubb v Edwards*, at [96] – [102], [270] – [275], [491] – [501]; and *Comcare v Banerji*, at [38] – [42], [202] – [206].
6. The evident purpose of s 106ZR of the HIA is the preservation, subject to the exceptions specified in the section itself and as otherwise permitted by that Act, of the deliberations and findings of a committee and information or evidence given to a committee in the course of its deliberations. Even if the enactment of s 106ZR and, for that matter, Pt VAA of the HIA in its entirety are not directly authorised by s 51(xxiiiA) of the *Constitution* itself, they would be authorised by the incidental power conferred by s 51(xxxix) of the *Constitution*. The establishment of a regime for ensuring that the medical services for which benefits are paid from consolidated revenue are not rendered via “inappropriate practice” as defined is surely incidental to a law providing for the payment from that source of such benefits.
7. Within that regime, one end served by the confidentiality purpose of s 106ZR is, in my view, to preserve, at the committee stage, the professional reputation of the practitioner concerned. For reasons already given, when s 106ZR is read in the context of Pt VAA and s 103 in particular, it does not inhibit that practitioner’s ability to make a case before a committee that there should be no finding of “inappropriate practice”. Another end served by the confidentiality purpose of s 106ZR is the privacy of the patients to whom the services have been rendered by the practitioner under review. In this regard, s 106ZR complements the requirement in s 98(2) that a committee hearing be in private and a more general secrecy provision, s 130, applicable to persons performing functions or exercising powers under the HIA.
8. At various stages in the processes for which Pt VAA provides, there are limited circumstances in which disclosures can be made to nominated persons or agencies about the practitioner concerned. For example, were the Director to have thought that, in relation to services provided by her during the review period Dr Karmakar had committed a “relevant offence” or a “relevant civil contravention” (each as defined by s 124B), s 89A authorised her to send the material or a copy of the material concerned to the CEO, together with a statement of the matters that she thought may have constituted the offence or contravention. A similar disclosure authorisation is found at the committee stage: s 106N. Via such means, the name of the practitioner concerned might become known in the course of a consequential criminal or civil penalty proceeding. Other disclosures via a committee might permissibly occur if they from an opinion that conduct by a person under review has caused, is causing, or is likely to cause, a significant threat to the life or health of any other person (s 106XA) or has failed to comply with professional standards (s 106XB).
9. In general, however, it is only if a case proceeds to the Determining Authority stage and a determination is made that the identity of the practitioner and related findings and determination are revealed via a publication made by the Director, as authorised by s 106ZPR of the HIA:

**106ZPR Publication of particulars of reports and determinations**

(1) When a final determination of the Determining Authority has come into effect, the Director may cause to be published, in such way as he or she thinks most appropriate, particulars of:

(a) the name and address of the person under review; and

(b) the profession or specialty of the person under review; and

(c) the nature of the conduct of the person under review in respect of which the Committee found that the person had engaged in inappropriate practice; and

(d) the directions contained in the determination under subsection 106U(1).

(3) No action or other proceeding may be brought for defamation in respect of the publication of matters in accordance with subsection (1).

Thus, the Pt VAA regime itself contemplates that the general public, and thus the medical profession, will, *inter alia*, gain via this means an understanding of conduct which has been found to be “inappropriate practice”.

1. In *APLA Ltd v Legal Services Commissioner* *(NSW)* (2005) 224 CLR 322 (*APLA v Legal Services Commissioner*), at [27], Gleeson CJ and Heydon J pithily observed the meaning of the expression, “freedom of communication about government or political matters” is “imprecise”. They considered that the source of the requirement for such a freedom, ss 7, 24 and 64 and s 128 of the *Constitution*, threw light on its content.
2. The active party respondents submitted that an analogy was to be drawn between the inhibition found in s 106ZR of the HIA and the professional advertising inhibition which, in *APLA v Legal Services Commissioner*, was found not to transgress the implied freedom, because it was not a communication about government or political matters. Of course it might be said that, these days, the business of federal government is broad and the merits and performance of any regime providing for expenditure from consolidated revenue may constitute a government or political matter. Dr Karmakar put as much.
3. The present focus is just upon s 106ZR. That section does not prevent any communication about the regime in Pt VAA itself and its fairness or otherwise to practitioners of the processes for which it provides. The regime itself is a matter of public record.
4. Section 106ZQ of the HIA mandates that the Director must prepare and give to the Minister under s 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth) an annual report concerning the operation of Pt VAA. Via that means, the annual report must be tabled in Parliament by the Minister and becomes a public document. At a general level of abstraction, nothing in s 106ZR prevents communications about the merits or otherwise of the operation of Pt VAA as revealed by that annual report. The inhibition in s 106ZR is only at the committee stage in respect of a particular case. Dr Karmakar is now the subject of a determination by the Determining Authority. Section 106ZR is not aimed at preventing her from disclosing this or that she considers that the process ordained by Pt VAA is unfair. The section would not, for example, prevent her from promoting the reform of the present regime for examining and finding whether there has been “inappropriate practice” is unfair or from advocating that the definition of “inappropriate practice” should be reformed so as expressly to take account of the knowledge, training and experience of the practitioner concerned.
5. *APLA v Legal Services Commissioner* is useful for its highlighting the imprecision in the expression and a need to understand the purposes of the impugned provision and exactly what it does or does not inhibit or restrict. However, beyond that, error can lie in analogy. When the purposes of s 106ZR and what it does or doesn’t inhibit or restrict are understood, there is nothing about it which is incompatible with the requirements of responsible and representative government as found in the Constitution. In my view, the challenge to its validity fails.
6. For these reasons, the application must be dismissed.

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| I certify that the preceding one hundred and five (105) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 6 August 2021

SCHEDULE OF PARTIES

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|  | QUD 443 of 2018 |
| Respondents |  |
| Fourth Respondent: | PROFESSIONAL SERVICES REVIEW COMMITTEE NO. 1092 |
| Fifth Respondent: | CHIEF EXECUTIVE, MEDICARE |