FEDERAL COURT OF AUSTRALIA

Ho v Professional Services Review Committee No 295

[2007] FCA 388

ADMINISTRATIVE LAW – health insurance – investigation by Professional Services Review Committee as to whether a medical practitioner has engaged in inappropriate practice in relation to the number of services rendered or initiated by him – whether exceptional circumstances existed that excused the conduct – operation of s 106KA(2) of the *Health Insurance Act 1973* (Cth) – relation to reg 11(a) of the *Health Insurance (Professional Services Review) Regulations 1999* (Cth) – meaning of 'exceptional circumstances' – meaning of 'unusual occurrence' – circumstances under which committee must consider reg 11(a) – whether practice management considerations are relevant

WORDS AND PHRASES – 'exceptional circumstances' – 'unusual occurrence'

Health Insurance Act 1973 (Cth) s 106KA
Health Insurance (Professional Services Review) Regulations 1999 (Cth) reg 11

Cohn v Hatcher (2005) 146 FCR 275 applied
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 cited
Network Ten Pty Ltd v TCN Channel Nine Pty Ltd (2004) 218 CLR 273 cited
Oreb v Willcock (2005) 146 FCR 237 applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 cited
Sydney Airport Corporation Ltd v Australian Competition Tribunal (2006) 155 FCR 124 cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 231 ALR 592 followed
The Queen v Australian Broadcasting Tribunal; Ex Parte Hardiman (1980) 144 CLR 13 approved

HO v PROFESSIONAL SERVICES REVIEW COMMITTEE NO 295 AND ORS
NSD 1320 OF 2002

AND

DO v PROFESSIONAL SERVICES REVIEW COMMITTEE NO 293 AND ORS
NSD 1321 OF 2002

RARES J
26 MARCH 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **1320 OF 2002**

BETWEEN:	**HUGO HUU HIEP HO** **Applicant**
AND:	**WAL GRIGOR, HEATHER KNOX AND PHILLIP KNOWLES CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE NO 295** **First Respondent**
	THE DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH) **Second Respondent**
	HEALTH INSURANCE COMMISSION **Third Respondent**
	BERNARD RAYMOND KELLY IN HIS CAPACITY AS ACTING DIRECTOR OF PROFESSIONAL SERVICES REVIEW **Fourth Respondent**
	ALAN JOHN HOLMES IN HIS CAPACITY AS DIRECTOR OF PROFESSIONAL SERVICES REVIEW **Fifth Respondent**

JUDGE: **RARES J**

DATE OF ORDER: **26 MARCH 2007**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. Orders that an order in the nature of a writ of certiorari in the first instance issue to quash the findings made on 13 November 2002 by the first respondents in respect of the applicant under s 106L of the *Health Insurance Act 1973* (Cth).

2. Directs that the proceedings stand over to 9.30am on 28 March 2007 to consider whether any further orders should be made to give effect to these reasons.

3. Orders that the first respondents pay the applicant’s costs other than those the subject of the separate constitutional issue.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1321 OF 2002**

BETWEEN:	**HIEN THANH DO** **Applicant**
AND:	**SIMON WILLCOCK, GEORGE PEPONIS and ROD McMAHON CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE NO 293** **First Respondents**
	THE DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH) **Second Respondent**
	HEALTH INSURANCE COMMISSION **Third Respondent**
	BERNARD RAYMOND KELLY IN HIS CAPACITY AS ACTING DIRECTOR OF PROFESSIONAL SERVICES REVIEW **Fourth Respondent**
	ALAN JOHN HOLMES IN HIS CAPACITY AS DIRECTOR OF PROFESSIONAL SERVICES REVIEW **Fifth Respondent**

JUDGE:	**RARES J**
DATE OF ORDER:	**26 MARCH 2007**
WHERE MADE:	**SYDNEY**

THE COURT:

1. Orders that an order in the nature of a writ of certiorari in the first instance issue to quash the findings made on 8 November 2002 by the first respondents in respect of the applicant under s 106L of the *Health Insurance Act 1973* (Cth).

2. Directs that the proceedings stand over to 9.30am on 28 March 2007 to consider whether any further orders should be made to give effect to these reasons.

3. Orders that the first respondents pay the applicant’s costs other than those the subject of the separate constitutional issue.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1320 OF 2002**

BETWEEN: **HUGO HUU HIEP HO**
Applicant

AND: **WAL GRIGOR, HEATHER KNOX AND PHILLIP KNOWLES CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE NO 295**
First Respondent

THE DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)
Second Respondent

HEALTH INSURANCE COMMISSION
Third Respondent

BERNARD RAYMOND KELLY IN HIS CAPACITY AS ACTING DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fourth Respondent

ALAN JOHN HOLMES IN HIS CAPACITY AS DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fifth Respondent

NSD 1321 OF 2002

BETWEEN: **HIEN THANH DO**
Applicant

AND: **SIMON WILLCOCK, GEORGE PEPONIS AND ROD MCMAHON CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE NO 293**
First Respondents

THE DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)
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HEALTH INSURANCE COMMISSION
Third Respondent

BERNARD RAYMOND KELLY IN HIS CAPACITY AS ACTING DIRECTOR OF PROFESSIONAL SERVICES

REVIEW
Fourth Respondent

ALAN JOHN HOLMES IN HIS CAPACITY AS DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fifth Respondent

JUDGE: **RARES J**
DATE: **26 MARCH 2007**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 Dr Ho and Dr Do practice in partnership at Merrylands in New South Wales. On 13 December 2001 the Health Insurance Commission made separate investigative referrals expressing concern that each of the doctors, who were general practitioners, had engaged in inappropriate practice in connection with rendering certain referred services during 2000, within the meaning of s 106KA of the *Health Insurance Act 1973* (Cth). The referrals under s 86 of the Act expressed concern that Dr Ho had engaged in inappropriate practice on 24 occasions between 1 January 2000 and 6 November 2000 and that Dr Do had done so on 56 occasions in the period between 1 January 2000 and 23 June 2000.

2 Separate professional services review committees were established with different members to consider each referral. Each committee had a hearing, prepared a separate draft report, received further submissions and then prepared a separate final report in respect of each doctor. The conclusion of each final report was a finding under s 106L of the Act that the conduct of the doctor in relation to the rendering of professional attendances on the days identified constituted a prescribed pattern of services within the referral period and that he had thus engaged in inappropriate practice for the purposes of s 106KA.

3 In 1999 each of the doctors had been in partnership with a third doctor, Dr Bao-Quy Nguyen-Phuoc, who was Dr Ho's brother-in-law at the time. Earlier, when they had established that partnership, the three of them had been involved in another medical practice. Dr Nguyen-Phuoc claimed he had been entitled to take that practice's database which was then used in the new practice of the three. The previous practice's principal contested the ownership of the database. That dispute involved the practice of the three doctors in

litigation that was finally settled in June 1999 with a payment of a substantial sum to the previous practice's principal.

4 In late 1998 and early 1999 relations between Dr Nguyen-Phuoc on the one hand and Drs Ho and Do on the other began to deteriorate severely. The partnership finally dissolved at the end of December 1999 when Dr Nguyen-Phuoc left taking 909 patient files out of a total of 11,258. Drs Ho and Do then began a new partnership retaining the balance of the patient files. They initially practised from the partnership's old rooms, but in late March 2000 moved to new premises in Merrylands.

5 Dr Ho challenges the final report of Professional Services Review Committee No 295. They found that Dr Ho had engaged in inappropriate practice by rendering 80 or more professional attendances on 24 days during the referral period (1 January 2000 to 6 November 2000) which constituted a prescribed pattern of services under s 106KA(1) of the Act.

6 Dr Do challenges the final report of Professional Services Review Committee No 293. They found that Dr Do had engaged in inappropriate practice by rendering 80 or more professional attendances on 56 days during the referral period (1 January 2000 to 23 June 2000) which constituted a prescribed pattern of services under s 106KA(1).

7 The committees also found that they did not consider that exceptional circumstances existed that affected the rendering of services by Dr Ho or Dr Do on any of the 24 or 56 days in question for the purposes of s 106KA(2) of the Act.

8 In essence, each of Dr Ho and Dr Do asserts that the findings in each final report resulted from each committee committing jurisdictional errors, constructively failing to exercise its jurisdiction, denying procedural fairness, making errors of law or improperly exercising a power. This was alleged to arise from the following:

(a) the committee failing to consider or apply reg 11(a) of the *Health Insurance (Professional Services Review) Regulations 1999* (Cth) first, at all or, secondly, in respect of any or all of the 24 or 56 days in the referral period and, thirdly, if they did apply reg 11(a), the committee misconstrued it;

(b) the committee taking into account practice management considerations for the purposes of reg 11(a) or incorrectly using practice management as a test for rejecting the doctor's claim that exceptional circumstances existed for the purpose of s 106KA(2) on one or more of the relevant days;

(c) the committee failing to apply the statutory test, namely whether the doctor's circumstances were truly exceptional having regard to the unusual operation of his medical practice and bearing in mind the circumstances ordinarily faced by general practitioners;

(d) each final report was an improper exercise of the power conferred on the committee because they applied a policy of practice management firmly instead of having regard to the merits of the case;

(e) each final report involved a denial of natural justice because the committee was affected by apprehended bias in light of the overwhelming and impermissible emphasis and effect it gave to the policy of practice management.

9 On 13 July 2006, I made an order pursuant to O 29 r 2 that these questions be decided separately from an argument that the provisions of the Act are not valid laws because the Parliament had no power to enact them. This constitutional question has been raised in separate and related litigation.

10 Dr Ho and Dr Do, respectively, conducted their proceedings before each committee on the admitted basis that each had had more than 80 patient consultations on each of the 24 and 56 respective separate days referred. Regulation 10 of the *Health Insurance (Professional Services Review) Regulations 1999* (Cth) provided that professional attendances constituted a prescribed pattern of services in the circumstance that 80 or more such services were rendered on each of 20 or more days in a 12 month period. The question in these proceedings is essentially whether or not each committee had before it, and if so, properly considered the nature of each doctors' claim that exceptional circumstances existed on all or some of the referred days. No point was taken that the period in each of the referrals was of less than 12 months, for they were fairly based on respective periods which could have been used. The

regulations commenced only on 1 November 1999 (reg 2).

11 Critical for present purposes are the provisions of s 106KA and reg 11 at the time. Relevantly s 106KA was in the following terms:

> *'106KA Patterns of services*
>
> *(1) Subject to subsections (2) and (2A), if, during a particular period (the **relevant period**), the circumstances in which some or all of the referred services were rendered or initiated constituted a prescribed pattern of services, the conduct of the person under review in connection with rendering or initiating services during that period in those circumstances is taken, for the purposes of this Part, to have constituted engaging in inappropriate practice.*
>
> *(2) If the person under review satisfies the Committee that, on a particular day or particular days during the relevant period, exceptional circumstances existed that affected the rendering or initiating of services by the person, the person's conduct in connection with rendering or initiating services on that day or those days is not taken by subsection (1) to have constituted engaging in inappropriate practice.*
>
> *(2A) However, subsection (2) does not affect the operation of subsection (1) in respect of the remaining day or days during the relevant period on which the person rendered or initiated referred services even if the circumstances in which the referred services were rendered or initiated on that day or those days would not, if considered alone, have constituted a prescribed pattern of services.*
>
> *(3) The regulations may prescribe, in relation to:*
>
> *(a) a particular profession; or*
>
> *(b) an identified group or groups of practitioners in a particular profession;*
>
> *circumstances in which services of a particular kind or description that are rendered or initiated constitute, or do not constitute, a prescribed pattern of services for the purposes of subsection (1).*
>
> *(4) The circumstances that may be prescribed under subsection (3) as circumstances in which services that are rendered or initiated constitute a prescribed pattern of services include, but are not limited to, the rendering or initiation of more than a specified number of services, or more than a specified number of services of a particular kind, on each of more than a specified number of days during a period of a specified duration.*

(5) The circumstances that constitute exceptional circumstances for the purposes of subsection (2) include, but are not limited to, circumstances that are declared by the regulations to be exceptional circumstances.

(6) This section only applies to services rendered or initiated after the commencement of this section.

(7) This section does not preclude the Committee from making a finding under this Subdivision (other than section 106KB) in relation to conduct during a particular period in connection with rendering or initiating services without considering whether or not the circumstances in which the services were rendered or initiated constituted a prescribed pattern of services.'

12 Reg 11 was in these terms:

*'**11 Exceptional circumstances***

For subsection 106KA(5) of the Act, the following circumstances are declared as constituting exceptional circumstances:

(a) an unusual occurrence causing an unusual level of need for professional attendances;

(b) an absence of other medical services, for patients of the person under review during the relevant period, having regard to:

(i) the location of the practice of the person under review; and

(ii) characteristics of the patients of the person under review.'

EXCEPTIONAL CIRCUMSTANCES

13 In *Oreb v Willcock* (2005) 146 FCR 237 the Full Court held that there were two ways of establishing exceptional circumstances for the purposes of s 106KA(2). First, the doctor concerned could show that on the particular day or days during the relevant period 'exceptional circumstances', within the ordinary English meaning of the words, existed which affected the rendering or initiating of services by the doctor so as to take him or her outside the deeming pursuant to s 106KA(1) of engagement in inappropriate practice. Secondly, the doctor could rely upon 'exceptional circumstances' as prescribed in regulations

made pursuant to s 106KA(5), being those set out in reg 11 (*Oreb* 146 FCR at 240 [6] per Black CJ and Wilcox J; see also per Lander J at 265 [169], 268 [191]).

14 Although *Oreb* 146 FCR 237 concerned the construction of s 106KA and reg 11(b) the Court also made observations as to how reg 11(a) might be engaged. The Court held that once the practitioner had established that exceptional circumstances existed in either sense the practitioner had also to show a causal connection between those established circumstances and the provision of the relevant services if he or she were to get the benefit of s 106KA(2) (*Oreb* 146 FCR at 240-241 [7]-[10], 266 [178]-[181]).

15 And, in a decision handed down on the same day, *Cohn v Hatcher* (2005) 146 FCR 275 the same Full Court looked again at the operation of 'exceptional circumstances' within s 106KA and reg 11. Lander J said that reg 11(a) provided for certain circumstances which are like, but not the same as, circumstances which might be 'exceptional circumstances' in s 106KA(2) (*Cohn* 146 FCR at 288 [67]). He held that, first, the medical practitioner had to establish that an unusual occurrence had occurred which caused an unusual level of need for professional attendances. Next, the practitioner must establish that that occurrence affected the rendering or initiating of services by him or her (*Cohn* 146 FCR at 288 [70]). In this way each of reg 11(a) and s 106KA(2) were held to interact. And, once the medical practitioner establishes both that exceptional circumstances existed and they affected the rendering or initiating of services by him or her, the day or days on which that is established are not taken by s 106KA(1) to have constituted engaging in inappropriate practice. The Full Court did not deal with the operation of s 106KA(2A).

16 At the outset it is important to understand how s 106KA operates. First, s 106KA(1) is expressly made subject to subsections (2) and (2A). Each of the latter subsections identifies an exception to s 106KA(1) although the exceptions work in different ways. How they work bears on what s 106KA(1) itself does in deeming a certain state of affairs to amount to a practitioner engaging in inappropriate practice.

17 Because s 106KA(1) creates a statutory fiction, by the deeming it prescribes, ss 106KA(2) and (2A) recognise that the person under review is entitled, to a point, to negate that fiction. Critically, s 106KA(1) refers to '… the circumstances in which some or all of the referred services were rendered … constituted a prescribed pattern of services'. Thus

while not all of the referred services may remain a part of a pattern after the committee examines them, it is essential that what remains is a pattern. A pattern, by regulation 10, must have the characteristic that 80 or more professional attendances within the meaning of reg 7 ' … are rendered on *each* of 20 or more days in a 12 month period'. Thus, conduct cannot satisfy reg 10 so as to constitute a prescribed pattern of services unless it occurs 'on each of 20 or more days'.

18 Next, s 106KA(2) affords the practitioner a means of negating that he or she engaged in inappropriate practice on or more or each of the days in the relevant period which has been referred to the committee for examination. The effect of s 106KA(2A) will need to be considered if for one or more, but not all, of the days referred, the practitioner satisfies the committee under s 106KA(2) that the services were rendered when exceptional circumstances existed. Now, s 106KA(2A) provides, first, that s 106KA(2) '… does not affect the operation of subsection (1) in respect of the remaining day or days during the relevant period during which the person rendered … referred services'. At first blush, 'the operation of' s 106KA(1) to which s 106KA(2A) refers must be in respect of the remaining day or days – that is, s 106KA(1) remains engaged despite one or more of the days in the pattern originally alleged being shown not to be part of any prescribed pattern. But, critically, s 106KA(2A) goes on to provide that the remaining day or days do not, even if considered alone, cease to constitute a prescribed pattern.

19 The doctors argued that because reg 10 prescribed only one circumstance, namely a pattern extending over 20 or more days, if the practitioner showed that exceptional circumstances existed on enough of the days on which referred services were rendered to leave only 19 or less days, s 106KA(1) could have no operation. They said the consequence was that s 106KA(2A) did not expose the practitioner to a finding that he or she engaged in inappropriate practice.

20 It is, of course, significant that the Act does not prescribe any period or pattern. Rather ss 106KA(3) and (4) authorise the making of regulations for those purposes. The fact that regulations may operate in a way which produces a particular result is irrelevant in construing the meaning of the statute. The last clause of s 106KA(2A) is, however, arcane and obscure. It provides that even if the operation of s 106KA(2) has removed one or more

days from the pattern, that removal does not affect the operation of s 106KA(1). So, the circumstances in which the referred services were rendered on the day or days left in the original period (after any day has been removed by the operation of s 106KA(2)) can still be found to be inappropriate practice even though what remains '… would not, if considered alone, have constituted a prescribed pattern.' The committee contended that this meant that even though the 20 days which reg 10 set as the minimum period for a prescribed pattern cannot be established after days are removed by force of s 106KA(2), the remaining 19 or less days, even if only 1, can amount to a pattern of 20 days.

21 The words of s 106KA(2A) suggest that 1 day can constitute a pattern even though the definition of the pattern applied in s 106KA(1) would not otherwise have been satisfied. That is an odd result, but no sensible alternative construction of s 106KA(2A) appears to be open which gives effect to the words of the last clause: cp *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321 at 338 [34]-[35].

22 If one construes s 106KA(2) using the prescription in reg 11(a), the section then provides that if the medical practitioner satisfies the committee that on a particular day or particular days during the relevant period an unusual occurrence causing an unusual level of need for professional attendances existed that affected the rendering or initiating of services by the medical practitioner, his or her conduct in connection with rendering or initiating those services on that day or those days is not taken by s 106KA(1) to have constituted engaging in inappropriate practice.

23 I am of opinion that the expression 'exceptional circumstances' requires consideration of all the circumstances. In *Griffiths v The Queen* (1989) 167 CLR 372 at 379 Brennan and Dawson JJ considered a statutory provision which entitled either a parole board or a court to specify a shorter non-parole period than that required under another section only if it determined that the circumstances justified that course. They said of the appellant's circumstances:

> *'Although no one of these factors was exceptional, in combination they may reasonably be regarded as amounting to exceptional circumstances.'*

24 Brennan and Dawson JJ held that the failure in that case to evaluate the relevant circumstances in combination was a failure to consider matters which were relevant to the

exercise of the discretion under the section (167 CLR at 379). Deane J, (with whom Gaudron and McHugh JJ expressed their concurrence on this point, albeit that they were dissenting) explained that the power under consideration allowed departure from the norm only in the exceptional or special case where the circumstances justified it (167 CLR at 383, 397).

25 And, in *Baker v The Queen* (2004) 223 CLR 513 at 573 [173] Callinan J referred with approval to what Lord Bingham of Cornhill CJ had said in *R v Kelly (Edward)* [2000] QB 198 at 208, namely:

> *'We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.'*

26 Exceptional circumstances within the meaning of s 106KA(2) can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. Thus, the sun and moon appear in the sky everyday and there is nothing exceptional about seeing them both simultaneously during day time. But an eclipse, whether lunar or solar, is exceptional, even though it can be predicted, because it is outside the usual course of events.

27 It is not correct to construe 'exceptional circumstances' as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural 'circumstances' as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of 'exceptional circumstances' in s 106KA(2) includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon. And, the section is directed to the circumstances of the actual practitioner, not a hypothetical being, when he or she initiates or renders the services.

THE COMMITTEES' INTERPRETATION OF 'EXCEPTIONAL CIRCUMSTANCES'

28 Each committee used a set of standard paragraphs under the heading 'Prescribed

Pattern of Services – Legal Considerations'. In these paragraphs they had regard to the fact that s 106KA had been introduced into the Act by the *Health Insurance Amendment (Professional Services Review) Act 1999* (Cth) to implement the recommendations of the Review Committee of the Professional Services Review Scheme which had reported to the government the same year. That report had stated that the medical profession generally accepted that high volume provision of services by a practitioner prohibited adequate clinical input.

29 The Review Report recommended, following wide consultations with relevant medical organisations, that the threshold for deeming practice to be inappropriate in the case of a general practitioner should be 80 or more services on 20 or more days in a year. Each committee noted that the Review Report also had recommended that a practitioner should be able to demonstrate to the satisfaction of a committee that exceptional circumstances occurred which allowed him or her to practice appropriately while rendering such a high number of services (see: recommendation 3 in the Review Report and its attendant reasoning). Each committee went on to refer to the Review Report's use of examples of exceptional circumstances such as an exceptional event or a very extreme geographic occurrence. The Review Report also indicated that regard should be had to the availability of alternative medical services or unusual occurrences causing unusual levels of need for medical services and said that it was expected 'that argument [sic] that a practitioner's ability or organisation provides an exceptional circumstance is unlikely to be sustained'.

30 Each committee considered that those examples and comments confirmed their view that 'exceptional circumstances were seen as being generally intermittent or episodic situations beyond the practitioner's control but necessitating the provision of medical services as well as practicable'. They also referred to the explanatory memorandum issued by the Minister when he introduced the Bill which became the Act. Each committee then said this (using the paragraph numbering in Committee 295's Report):

> *'52. This Committee considers that this confirms that* "exceptional circumstances*" were seen as most likely to be of an intermittent or episodic nature, rather than a predictable on-going situation. The Committee does not see that some extreme on-going circumstance is totally ruled out (if* "particular days*" can be* "many days*") – although the general body of general practitioners would ordinarily expect a practitioner to manage their practice to promptly bring patient*

> *attendance rates down to acceptable levels such that proper clinical care can be provided to all patients.*
>
> *53. In summary, it appears to the Committee that subsection 106KA(1) and the Regulations implement a view of the legislature that it is most unlikely that 80 or more professional attendances can be rendered satisfactorily within one day. The* "20 or more days" *proviso acknowledges that the exigencies of normal practice may occasionally require a doctor to provide more attendances in a day than would otherwise be considered satisfactory. But by subsection 106KA(2) of the Act, exceptional circumstances will be required to justify 20 or more such days. Thus, the exception may be read as excusing lower standard services on particular days because of exceptional circumstances – and it will be difficult to justify this on an on-going basis.'*

31 These two paragraphs appear to be part of a standard form explanation used by other committees. The same words appear in Dr Oreb's committee's report: see: *Oreb* 146 FCR at 262 [156]. Immediately after quoting these words, Lander J said that the committee there fell into error in its construction of s 106KA(2) and reg 11, by failing to have regard to the terms of reg 11 itself. Likewise, I am of opinion that the committees here fell into error, by putting a gloss on the meaning of s 106KA(2). They asserted that the expression 'exceptional circumstances' was to be seen 'as most likely to be of an intermittent or episodic nature, rather than a predictable on-going situation'.

32 As McHugh, Gummow, Kirby and Hayne JJ pointed out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78], the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended it to have. They said:

> *'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction (for example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities:* Coco v The Queen *(1994) 179 CLR 427 at 437) may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'* (See also *DB Management* 199 CLR at 338 [34].)

33 Indeed, the provisions of reg 11 prescribed some of the matters which the Review Report regarded as exceptional circumstances. But reg 11 could not supplant the natural and ordinary meaning of 'exceptional circumstances' as used in s 106KA(2). Rather the purpose of the regulation-making power granted by the Parliament in s 106KA(5) was to set out a free-standing set of circumstances which may or may not be within the ordinary and natural meaning of 'exceptional circumstances' in s 106KA(2).

34 However, in their approach the committees have made the tail of the regulation wag the dog of the statute. This eschewed the ordinary principles of statutory construction and the application of the salutary and broad discretion which the Parliament, by its words, conferred on the committees in s 106KA(2). While reg 11 gave effect to intentions expressed in the Review Report and in the Parliament, it did not restrict the circumstances which a committee must take into account in forming a view for the purposes of the application of s 106KA(2). Those intentions are matters to which the Court may have regard as part of the historical context in which s 106KA was enacted so that a purposive meaning can be given to the legislation: *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at 280-281 [10]-[11] per McHugh ACJ, Gummow and Hayne JJ; *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at 125 [2] per French, Finn and Allsop JJ. The literal construction of s 106KA(2) and reg 11 will not defeat the intention of the Parliament (or the Executive in making the regulation).

35 As Mason CJ, Wilson and Dawson JJ said in *Re Bolton; ex Parte Beane* (1987) 162 CLR 514 at 518:

> *'The function of the court is to give effect to the will of Parliament as expressed in the law.'*

In effect, the view which each committee took as to the management of the respective doctors' practice and its concentration on the episodic construction they had placed on 'exceptional circumstances' resulted in them failing to consider the combination of circumstances relied on by each doctor either in the context of s 106KA(2) or reg 11(a).

36 The committees focused on the examples given in the Review Report, which were codified in reg 11, as identifying what s 106KA(2) meant. That is how they discerned a test that the words 'exceptional circumstances' do not convey. Their test of an 'intermittent or

episodic' situation, rather than a predictable on-going one, is narrower than the natural and ordinary meaning of 'exceptional circumstances' in s 106KA(2). The real question was whether the circumstances relied on were individually or in combination such as formed an exception to the ordinary course of practice. The circumstances necessarily included the actual situation of the practitioner. Of course, a practitioner who habitually saw more than 80 patients a day may not be able to show 'exceptional circumstances', if he or she were located in a city. But, what of the one doctor in a country town? Is such a doctor's position affected if he or she has been looking for, but cannot find, any other practitioner to join his or her practice? Or consider a specialist in a country centre. The statute did not condemn dedicated professionals; rather it sought to protect the public from unsatisfactory methods of practice and inappropriate derivation of income from the medical benefits system while providing that some exceptions must be given recognition.

37 This is not to say that had the committees approached the task confided to them under s 106KA and reg 11(a) in accordance with law they could not have come to the same conclusion. The provisions of s 106KA are intended to be protective of the public. The section seeks to create presumptions as to the circumstances in which particular numbers of professional services may be initiated or rendered by practitioners over a given period. This is intended to ensure that the standard of care provided by practitioners to patients is maintained at an appropriately high standard.

38 What s 106KA(2) does is to give effect to fictions, first, the fiction of the deeming worked by force of s 106KA(1) and, secondly, the fiction that where exceptional circumstances are established that deeming is negated. That does not affect the other provisions of the Act dealing with inappropriate conduct notwithstanding the failure of the deeming provisions to catch the conduct. Thus, the exception in s 106KA(2) does not require examination of the individual services or attendances rendered by the doctor any more than the deeming in s 106KA(1) does. Each subsection looks at a particular factual situation and its operation is engaged or not depending on those facts.

DR HO'S CLAIM OF EXCEPTIONAL CIRCUMSTANCES

39 Dr Ho said that because of the nature of the partnership before Dr Nguyen-Phuoc left, and the circumstances in which he did leave, when he and Dr Do had to deal with over

10,000 patients of the practice, it was sometimes necessary to see more than 80 a day. This was because, although they were making efforts to do so, they had been unable to locate a suitable replacement for Dr Nguyen-Phuoc who could work in the practice on a full time basis. This was made more difficult than usual because at this time medical practices were being corporatised which affected the market and availability of practitioners who might be suitable recruits to work in the practice. Moreover, the first day on which the new practice operated was 4 January 2000. A large number of patients needed to be seen following the Christmas break and the re-organisation of the practice. When the practice closed for two days so they could move to new rooms in late March 2000, Dr Ho saw more than 80 patients. A number of the other days on which over 80 patients were seen were Mondays during winter. Dr Ho said that his practice was a family practice, rather than a medical centre type practice, in which individuals were important and wished to see the doctor of their nomination or choice, rather than being referred to whoever was available at the practice.

40 In addition, in the relevant period there were two days on which Dr Do went home sick and another on which he was not present at the practice.

41 In essence, the committee rejected all of these explanations finding that for each of them, proper practice management would have enabled Dr Ho to see less than 80 patients on any of the days.

THE WAY DR HO PUT HIS POSITION BEFORE THE COMMITTEE

42 At the conclusion of Dr Ho's hearing the chairman expressed the preliminary view of the committee which he said was to be spelled out in detail in their draft report to similar effect, namely that the practice appeared to be a high volume one and that there were no particular distinguishing features shown in the adjudicative referral material for any of the 24 days. The chairman then summarised the committee's understanding of the claim for exceptional circumstances made by Dr Ho as follows:

- his lack of awareness of the 80/20 rule during the referral period;
- the serious conflict in his earlier practice;
- the departure of Dr Nguyen-Phuoc from that practice;

- the current practice's inability to employ another doctor;
- the high numbers of patients in the practice's books;
- busy Mondays, days after long weekends and wintertime; and
- two days when his partner suffered a sudden illness and was unable to work.

43 Dr Ho asserted that there had been exceptional circumstances on each of the 24 days on which he rendered 80 or more professional attendances. The committee recorded in its draft, and then final, reports that three issues principally affected the practice:

(1) The two court cases in 1999 and 2000 involving aspects of partnership disputes, including the extra stress on Dr Ho resulting from the fact that Dr Nguyen-Phuoc was his brother-in-law.

(2) The attempts of the new practice to recruit a third doctor from late March to late November 2000, when one was successfully recruited.

(3) The need to give special consideration to particular days within the 24 day period (such as when Dr Do went home sick).

44 The committee reports noted that Dr Ho said he had worked long hours, often in excess of the opening hours of 8.30a.m. to 8.00p.m. and he had provided a calendar showing the hours which he had worked. He had said that 15 of the 24 days in question were Mondays, which tended to be the busiest in general practice. On 4 of the days, when over 80 patients were seen, the surgery had been closed for a number of the preceding days, namely:

- 4 January 2000: the surgery had been closed for 3 days over the preceding New Year period;
- 27 March 2000: the surgery opened in new premises after a 2 day closure in which it was moved;
- 26 April 2000: the surgery had been closed for 6 days over Easter (and, presumably, Anzac Day) break;
- 13 June 2000: the surgery had been closed for 3 days over the Queen's

Birthday holiday.

45 In addition, the committee reports noted the claim concerning the two days on which Dr Do had gone home sick and left Dr Ho on his own. However, the committee reports did not refer to Dr Ho's claim that Dr Do had been away on one further day, 25 June 2000.

46 The committee reports also noted that Dr Ho said that he had been unaware of the 80/20 rule during the relevant period.

47 In its draft report, in a passage which remained unchanged in the final report, the committee concluded that in the context of Report 4 which was part of the referral, the 24 days when Dr Ho rendered 80 or more professional attendances showed no particular distinguishing features. Report 4 set out in tabular form the number of services per day rendered by Dr Ho during the referral period by calendar month with monthly totals. This suggested to the committee that his practice was 'a high volume practice'. And they concluded:

> *'Having weighed all the evidence, the committee did not accept that Dr Ho's claims as stated* [in the earlier part of the draft report] … *constituted exceptional circumstances on any of the 24 days when 80 or more services were rendered.'*

48 That statement of non-acceptance was the whole of the reasoning to that point in the committee's reports justifying rejection of Dr Ho's explanation.

DR HO – THE FINAL REPORT

49 After the draft report had been served on Dr Ho in accordance with s 106KD(3) he made submissions upon the findings. In its final report the committee set out, in tabular form, a summary of the thrust of Dr Ho's submissions and their response. The committee noted in response to the argument that s 106KA(2) should be interpreted literally, that a purposive approach should be taken referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 355.

50 The committee's final report noted that Dr Ho's lawyers had raised legal issues in his post hearing submissions. The submissions claimed that the chairman's summary given at

the conclusion of the hearing had understated the difficulties encountered by Dr Ho. The submissions provided further material concerning, among other things, the difficulties encountered by Dr Ho as a result of the former partnership litigation disputes, the problems of locating and engaging a suitable new doctor and the difficulties caused by the corporatisation of medical practices which was then occurring. Corporatisation was said to make it even more difficult than normal to recruit a suitable practitioner to the practice.

51 The committee noted that most of Dr Ho's claimed stressful circumstances were outside the referral period. It went on to say:

> '*[70] In relation to his practice, Dr Ho did not present any additional evidence to the committee on how he might have alternatively managed his patients, for instance, by limiting hours and initiating an appointment system, or by referring patients to other practitioners or hospitals in the area. Dr Ho told the committee that in retrospect he could have handled the situation thus:* "I could say no and refuse to see them because my volume was so high. I just did not" *because he felt it was more an ethical issue that he see his regular patients. The committee considers the opening hours of the Familyland Medical Practice during the referral period to be both business and lifestyle decisions made by the partners in the practice and, thus, this does not constitute exceptional circumstances.'*

52 The committee found that such matters did not constitute exceptional circumstances on particular days within the meaning of s 106KA(2). It said that, '[r]ather, the circumstances described were part of a long-term and on-going practice'. The committee noted that Dr Ho had told them that he and his partner knew that it was a problem that they were seeing a lot of patients and at the end of the day were very tired and run down. It referred to his evidence that:

> *'I mean, the way … that I run the practice when it is busy, you become a casualty.'*

53 The post hearing submission challenged the committee's preliminary conclusion that the practice was a high volume one and that the 24 days were not significantly different from other days, suggesting that the committee was making an adverse inference relating to Dr Ho's conduct on the other days.

54 The committee responded in the final report that they recognised that the factors to

which Dr Ho had drawn attention might be relevant to the task of the Determining Authority, but that they did not constitute exceptional circumstances 'such as to excuse inappropriate practice by way of a prescribed pattern of services'. The committee said that they had not made any finding about Dr Ho's services in general but had noted his general pattern when assessing his claim that there were exceptional circumstances on the 24 days.

55 The final report noted Dr Ho's concession that most of the stressful circumstances had occurred outside the referral period but rejected his submission that more weight should be given to the difficulty in attracting another doctor to the practice before November 2000. They said that all practices had to cope on occasion with ongoing resource limitations '… and must adjust their patient load accordingly to maintain the quality of services'. The committee said they had amended their draft report accordingly.

56 In answer to Dr Ho's post hearing submission that the 3 days when he was alone at the surgery were circumstances which he could not reasonably have foreseen and were of an intermittent or episodic nature, the committee responded, again, that their '…view is that all practices must cope on occasion with ongoing resource limitations and must adjust their patient load accordingly to maintain the quality of services'. The committee referred to its earlier finding that Dr Ho had not presented any additional evidence on how he might have managed his patients in an alternative way. (The reference in the report to paragraph 69 was agreed to be a typographical error for paragraph 70 of the same report.)

57 The final report then said that in reaching their findings the committee had applied their combined professional expertise and had had regard to all of the evidence before them concerning Dr Ho's conduct. Finally, the committee made findings that:

- Dr Ho engaged in inappropriate practice by rendering 80 or more professional attendances on 24 days during the referral period which constituted a prescribed pattern of services under s 106KA(1) of the Act;
- for the purposes of s 106KA(2) the committee did not consider that exceptional circumstances existed that affected the rendering of services by Dr Ho on any of the 24 days.

58 Both the committee in their reports and Dr Ho in his submissions had set out the express terms of reg 11(a) but neither discussed in terms how reg 11(a) related to consideration of Dr Ho's position.

DR DO'S CLAIM OF EXCEPTIONAL CIRCUMSTANCES

59 In his initial statement to Committee 293 Dr Do referred to the circumstances in which he, Dr Ho and Dr Nguyen-Phuoc had left a practice run by another doctor. Dr Nguyen-Phuoc took the old practice's patient data base representing that he was entitled to do so. The former practice's principal disputed that and commenced litigation against the three partners which was settled towards the end of 1999 on the basis that they paid the other doctor a significant sum of money.

60 Dr Do noted that when Dr Nguyen-Phuoc left in December 1999 and they dissolved their partnership the latter took with him only about 1,000 of the 11,000 patient files. He said that a significant area of the dispute between Dr Nguyen-Phuoc and Dr Ho and himself had been the former's growing interest in alternative health therapies at the expense of traditional medicine. The ongoing dispute with the former practice's principal and this developing tension within the new partnership made the doctors feel that they could not recruit any further practitioners until the uncertainty generated by the litigation was finalised. Soon after the litigation was settled the partnership was dissolved and for most of the year 2000 only two practitioners serviced a patient population which was almost the same size as that that had been served by three. He noted that the first person whom they recruited to take on some of the burden during the earlier part of the year 2000 only worked about 20 days between March and September 2000. Dr Do said that he was not aware of the 80/20 rule until he received notification from the Health Insurance Commission in 2000.

THE WAY DR DO PUT HIS POSITION BEFORE THE COMMITTEE

61 The chairman advised Dr Do at the hearing that although exceptional circumstances were declared in reg 11, the legislation did not prevent the committee from considering circumstances other than those declared. At one point during the course of the hearing before the committee the solicitor for Dr Do said that the overall thrust of his case was that the difficulties created by Dr Nguyen-Phuoc's conduct when a member of the partnership, the disenchantment with him of a significant number of his patients and his ultimate leaving the

practice, combined with litigation with the former practice (over the patient list), led Dr Do to feel uncomfortable and uncertain about where his practice was going so that he did not want to take on another doctor while in partnership with Dr Nguyen-Phuoc to deal with what was said to be a fairly heavy patient load and that caused him to render as many services as he did. The chairman acknowledged that the submission accorded with what the committee had understood from Dr Do's written submission.

62 At the conclusion of the hearing the chairman informed Dr Do of the committee's preliminary views in relation to the evidence of exceptional circumstances he had presented. He summarised the claims saying that the committee understood that the reasons advanced by Dr Do were the limited availability of medical practitioners in the practice due to a doctor leaving in late 1999 and said that the committee had difficulty in accepting that that constituted exceptional circumstances. The chairman said that the referral extended over a six month period in the first half of the year 2000 and that Dr Do had the opportunity to employ another doctor at his practice following the departure of Dr Nguyen-Phuoc or to make other arrangements for his patients. He said that the committee believed that there were about 50 medical providers in the area at the time and wondered whether there was any reason why overflow patients could not have gone to those other general practitioners in an emergency. The committee observed that one other surgery advertised being open 24 hours a day, seven days a week, and another had opening hours between 8.00a.m. and 10.00p.m. seven day a week during 1999.

63 The committee said that it appeared that Dr Do's practice generally provided high numbers of services and that the days with 80 or more were simply a part of that pattern, observing that there seemed to be nothing particular about those days, other than the number of professional attendances. The chairman noted that Dr Do had provided some additional explanations for 5 particular days in question.

64 The chairman said that the committee had reached the preliminary finding that Dr Do had engaged in inappropriate practice by rendering 80 or more personal attendances on 20 or more days during the referral period and that that constituted a prescribed pattern of services under s 106KA of the Act.

65 Once again, Dr Do did not challenge Report 4 in the investigative referral. It set out the number of services per day rendered by him during the referral period by calendar month. On 17 days Dr Do rendered over 100 services. Like Dr Ho, Dr Do referred to the circumstances surrounding the partnership with Dr Nguyen-Phuoc and its subsequent dissolution. Dr Do submitted that there were exceptional circumstances in respect of 5 of the 56 days in the referral, namely 4 January (105 services), 27 January (105 services), 27 March (112 services), 20 April (124 services) and 26 April 2000 (126 services).

66 He submitted that on 4 January 2000 the practice reopened following the departure of Dr Nguyen-Phuoc and that there was a large number of patients who required attention. He said that he and Dr Ho had attempted to advertise for another doctor to join the practice but advertisements could not be placed until February 2000. The committee found that exceptional circumstances did not exist on that particular occasion and that those circumstances were foreseeable. They said that 'some effort could have been made to limit the number of patients seen by Dr Do on that day', and they suggested that a triage system could have been established to ensure that the patients with an immediate healthcare need were attended to but others could have been directed to another healthcare provider or scheduled to present to Dr Do at another time. They noted that Dr Do had not presented any evidence that he had developed or put in place an action plan to manage the increased patient demand on this day.

67 Dr Do submitted that the practice had been closed for the Australia Day public holiday on 26 January and the practice reopened on the next day when a large number of patients requested attention. Again, the committee found that exceptional circumstances did not exist on that particular day noting that a public holiday was a foreseeable event and that it was reasonable to expect Dr Do to implement a plan, such as a triage system, to limit the number of patients seen. Again, the committee noted that he had not presented any evidence about developing or putting in place an action plan to manage the increased patient demand on that day.

68 Dr Do said that on 24 March he had verbally advised patients that he did not intend to work on the next two days and that subsequently a large number of patients requested attention when he returned to work on 27 March 2000. Again, the committee rejected the

contention that this constituted exceptional circumstances for that day. They considered that Dr Do should have foreseen that his intention not to work on 25 and 26 March would increase patient demand on his next day of work and he should have implemented a plan to limit the number of patients seen, such as by engaging a locum. They again referred to the absence of any evidence from Dr Do of developing or putting in place any action plan to manage increased patient demand on the day.

69 Dr Do submitted that Dr Ho was absent from the practice in the period between 20-25 April for the Easter and Anzac Day break and that therefore he was the only doctor present to attend to a large number of patients seeking attention on 20 April 2000, the day before Good Friday. The committee found that Dr Do had continued to see patients over this period and that the only day on which he did not work was Easter Sunday, 23 April. They found that exceptional circumstances did not exist on 20 April and that Dr Do should have foreseen that his practice partner's intention not to work over the Easter/Anzac period would increase patient demand on his own services at that time and that he should have implemented a plan to limit the number of patients seen, such as by engaging a locum. Once again, the committee noted that Dr Do had not presented evidence of developing or putting in place an action plan. As to Wednesday 26 April, the committee came to a similar conclusion in relation to the increased demand on the practice when the holiday break concluded and Dr Ho had returned to work.

70 The committee then went on to make findings that Dr Do had not been able to demonstrate to their satisfaction that exceptional circumstances had existed on the 5 days in question. They said that they did not believe that the limited availability of medical practitioners in the practice constituted exceptional circumstances when the partnership had reduced to two. They pointed out that there were approximately 50 medical providers in the immediate area at the time and that patients unable to be seen by Dr Do would have been able to access other practitioners. The committee pointed to the fact that Dr Do had illustrated his ability to limit the number of patients seen by giving them advance notice on 24 March that he would not be available on the succeeding two days.

71 Critically, the committee noted that Dr Do had not submitted that there were particular exceptional circumstances on the 51 other days in the subject of the referral.

However, he had submitted that throughout the referral period there were circumstances which, coupled with patient demand, constituted exceptional circumstances. Those circumstances were the litigation, partnership difficulties with Dr Nguyen-Phuoc, the difficulties in engaging another doctor and corporatisation. The committee considered that those circumstances could and should have been managed so as to limit patient numbers. They did not consider that these constituted exceptional circumstances on a particular day or days. The committee said that it appeared that Dr Do generally provided high numbers of services and that the days of 80 or more were simply part of that pattern. They considered that Dr Do did not appear to understand the need to manage the number of consultations that he undertook regardless of demands from patients. They did say that:

> *'[o]n his own evidence, Dr Do seems to feel a high sense of responsibility to see all patients that come to see him, but fails to recognise that he cannot take responsibility for all patients, no matter how caring and diligent he is.'*

72 The committee pointed out that the principle inherent in the legislation and their own view was that regularly seeing a high number of patients inevitably compromises both patient care and the doctor's ability to manage other aspects of his or her own life including personal health and family needs. They identified the introduction of an appointment system to the Familyland Medical Practice after February 2001 as reinforcing their view that the management of patients was possible in a busy family medical practice.

73 The committee considered a post hearing submission by Dr Do but came to the conclusion that it did not provide any additional relevant information which he had not already provided to the committee in relation to the claim of exceptional circumstances. They noted that Dr Do had claimed to have been unaware of the introduction of the deeming provisions but they referred to a circular sent out by the Health Insurance Commission in September 1999 and the Medicare Benefits Schedule Book which had been issued on 1 November 1999, each of which publicised these matters.

74 The committee said that in reaching their findings they had applied their combined professional expertise and had regard to all of the evidence before them including the conduct of Dr Do, and his written and oral answers to the committee. They made findings as follows:

- Dr Do engaged in inappropriate practice by rendering 80 or more professional

attendances on each of the 56 days, and that this constituted a prescribed pattern of services under s 106KA(1) of the Act.

- The committee did not consider that exceptional circumstances existed that affected the rendering of services by Dr Do on any of the 56 days in question.

DR DO – THE FINAL REPORT

75 After they had provided Dr Do with a copy of their draft report, he responded with submissions on it. The committee then prepared a final set of responses which were incorporated into the form of the report which I have set out above. The committee made a number of alterations to the form of the draft report as a result of Dr Do's comments. The committee identified Dr Do's claim of the combination of factors which he said amounted to exceptional circumstances but said:

> *'The committee considers that these circumstances could and should have been managed so as to limit the patient numbers. It does not consider that they constituted exceptional circumstances on a particular day or days.'*

The committee said that the legislation made no provision for proving that services were acceptable notwithstanding high numbers on a day and adhered to its interpretation set out above.

DID THE COMMITTEES FAIL TO CONSIDER OR APPLY REG 11(A)?

76 The process of judicial review is to do with procedures and observance by those charged with carrying out the procedures required by law, rather than with the substantive outcome: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592 at 598 [25] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

77 As Lander J pointed out in *Oreb* (146 FCR at 268 [193]) there is always a two step inquiry as to whether exceptional circumstances are made out in accordance with s 106KA(2). The first step is to inquire whether the circumstances relied upon, whether under the ordinary English meaning or one or more of the meanings declared in reg 11, amounted to 'exceptional circumstances'. If so, the second step is to consider the effect of the circumstances so found on the rendering and initiating of services by the practitioner on the day or days in question.

78 It is common ground that there was no express consideration of reg 11(a) by either committee. At the forefront of the doctors' argument was the fact that the committees failed to conduct any analysis in the terms of, or having regard expressly to, reg 11(a). In *Lee v Kelly* [2005] FCAFC 197, another decision of Black CJ, Wilcox and Lander JJ decided at the same time as *Oreb* 146 FCR 237 and *Hatcher* 146 FCR 275, Lander J, with whom the Chief Justice and Wilcox J agreed, said at [2005] FCAFC 197 [24] that if a medical practitioner relied on the provisions of s 106KA(2), the committee must satisfy themselves as to whether in doing so the medical practitioner was relying upon 'exceptional circumstances' in its ordinary English meaning or upon either of the sub-paragraphs in reg 11. He pointed out that a medical practitioner could rely on all three, but that would be unlikely. Lander J observed that it was more likely that the practitioner would rely on only one of the three matters to discharge the onus in s 106KA(2) and continued:

> *'If, however, the medical practitioner is not able to articulate which of the three separate legislative provisions are relied upon, then the committee must inquire as to whether the factual circumstances advanced by the medical practitioner come within any of the exceptional circumstances in s 106KA(2), or the circumstances in reg 11(a) or reg 11(b).'*

79 Lander J held that the general practitioner does not need to establish that the circumstances were the dominant circumstances affecting the rendering or initiating of the services, only that the 'exceptional circumstances' acted upon or influenced the initiation or rendering of the services (see *Oreb* 146 FCR at 266 [178]). That was the relevant degree of relationship between the exceptional circumstances and the rendering or initiating of the services which the committees here had to consider. Each committee relied on standard paragraphs which explained its view of 'exceptional circumstances'. But in each of the present cases the committees did not apply that test, because they recited the same paragraphs used by the committee in *Oreb* 146 FCR 237 as the appropriate legal standard by which to assess the conduct of each of Drs Ho and Do.

80 The doctors submit that each of the factors on which they relied before the committees should have been considered individually by them as an occurrence on which reg 11(a) operated. Thus, for example, the doctors say that their inability to find a suitable replacement doctor was capable of being seen as an unusual occurrence. The nature of their practice was, in effect, one in which the remaining two doctors were treating a population of

patients which belonged to a practice of three doctors. That created, so they said, an unusual level of need for professional attendances, in that practice of two.

81 The committees reasoned that the unusual level of need could have been met by referring the patients elsewhere or somehow through practice management. That is true, but the argument does not address the terms of reg 11(a) which refer to the cause of an unusual level of need, not to how the unusual level of need can or should be addressed once it exists.

82 Here, each committee began its consideration of what confronted Dr Ho and Dr Do on 4 January 2000 as if they were able to apply practice management techniques so as to render no more than 80 services each on that day. That approach ignored the actual circumstances which existed. It is not usual to begin a new practice after a difficult partnership dissolution in which the two remaining partners must service, from the first day, over 90% of the patients of the practice three partners had previously serviced. Again, that first day followed the New Year's holiday weekend closure. Less doctors were then available to deal with patients who presented as patients of their continuing practice. Nor is it in the ordinary course, or regular, that a replacement doctor was not then available, or that market conditions were, at the time, such that replacements were harder than usual to find. If it were reasonable to seek to maintain the goodwill and professional approach of the practice while a bona fide search continued for a replacement or extra doctor, there would quite possibly be a higher demand on those practitioners by patients who had confidence in the then members of the practice.

83 These combined factors were capable of being 'exceptional circumstances' even though they had at the time of the hearing the additional characteristics of being, as Dr Ho's committee said, long term and on-going. The 'long term' conclusion was made with hindsight. It was not so on 4 January 2000, although the earlier history of the practice had begun to skew the workload towards Dr Ho and Dr Do. And, one reason why the doctors said it occurred, which can be seen with hindsight to have made this 'long term', was their subsequent difficulty in finding a suitable replacement for Dr Nguyen-Phuoc. Once the replacement was found, a 'normal', not exceptional, situation could be seen.

84 Management of the number of services initiated or rendered by a practitioner is obviously relevant to the assessment of 'exceptional circumstances' in s 106KA(2), but it is not an absolute concept applicable regardless of the *other* operative circumstances affecting

the practice.

85 The committees argued that they were not required to consider reg 11(a) unless a doctor raised matters that might arguably support the inference. But I am of opinion that the doctors did raise circumstances which were capable of being considered as falling within reg 11(a) and the committees failed to undertake their statutory function by not considering them: *Lee* [2005] FCAFC 197 [24]. The doctors raised matters which might arguably have supported the possible application of reg 11(a). The committees needed to address the applicability of reg 11(a) in terms if they were to discharge their functions according to law (*Oreb* 146 FCR at 242 [15]). Neither committee did so.

86 To take again the simple example of when Dr Do went home sick on two occasions, leaving Dr Ho as the only doctor at the surgery, it was an unusual occurrence. That was capable of being viewed as an unusual occurrence, because it was quite out of the ordinary in the practice, even though from time to time, one of the doctors would be expected to fall sick. That does not mean that the occurrence is usual. It is in the ordinary experience of life unusual for people to fall sick and be required to go home from work. Of course it happens, but, when it does, it is a disruption to the routine not only of the person concerned but of those with whom the person works. And, when a shortage of personnel occurs in the work place through such an occurrence, the fact of the person going home sick increases the burden on that person's colleagues in the work place. The fact that practice management or other methods may have been used to address it does not rob the occurrence of its characteristic of being out of the ordinary. On those days patients presented for medical attention and only one doctor, not two, was available.

87 In the case of a medical practice, the increase in the burden is reflected in the remaining practitioner or practitioners being the only persons available to offer medical services to patients who are presenting on that day. Therefore, by going home sick, Dr Do could have created an unusual level of need for professional attendances from Dr Ho as the remaining medical practitioner in the practice available to see the practice's patients.

88 Each of the circumstances relied on by the doctors could have amounted to an unusual circumstance within the meaning of reg 11(a) in itself, or in one or more combinations, and each could have been seen as causing an unusual level of need for professional attendances.

The cause which reg 11(a) required to be considered was the effect of the relevant occurrence on the ability of each of the two doctors to deal with the practice's workload. Because the committees did not address the application of reg 11(a) at all, they failed to have regard to a relevant consideration or constructively failed to exercise their jurisdiction.

89 For these reasons, I am of opinion the committee committed a jurisdictional error in this respect.

DID THE COMMITTEES APPLY A POLICY THAT PRACTICE MANAGEMENT OUGHT TO HAVE MET THE CIRCUMSTANCES CLAIMED TO BE EXCEPTIONAL?

90 The doctors argued that the committees, in effect, posited that practice management was a panacea to each suggestion of exceptional circumstances which the doctors put forward. In *Oreb* 146 FCR at 240 [6] Black CJ and Wilcox J said that it was for a committee to determine whether the relevant circumstances were truly exceptional, having regard to the usual operation of a practice of a kind conducted by the person under review. They said that in the case of a general medical practitioner the touchstone would be the circumstances ordinarily faced by general practitioners. They later explained that the committee in that case had expressed a qualified view that 'exceptional circumstances' were seen as most likely to be of an intermittent or episodic nature and did accept 'some extreme on-going circumstance' may be an exceptional circumstance. Their Honours said that it was for a committee to determine the facts of the case, including whether circumstances advanced by the doctor should be regarded as exceptional, having regard to the usual operation of a general practitioner's practice. In making that determination, they said, a committee might be required to consider whether particular circumstances were foreseeable or avoidable and in relation to that type of situation, there was room for consideration of the way in which a particular practice was managed (146 FCR at 241-242 [13]).

91 Dr Do's case illustrates that considerations of practice management were relevant considerations for assessing the question under s 106KA(2) as to whether exceptional circumstances existed. In the period of nearly six months, almost one-third of the period (56 days) involved Dr Do providing more than 80 services per day. That was capable of giving rise to an inference that he found himself in a 'usual', rather than 'exceptional', situation (leaving aside the circumstances of the 5 particular days he raised separately). His answer

was, however, that the combination of circumstances which were protracted, but essentially temporary, amounted to 'exceptional circumstances'.

92 I am of opinion that each committee did not look at the combination of factors having regard to the statutory test in s 106KA(2) and that they committed an error of law in failing to do so. If a three person practice is, for a temporary period, reduced to a lesser number of practitioners, that in itself is capable of being an exceptional circumstance. It is not the point to say that practice management could change the situation, except if a third doctor were able to be introduced. That was the very difficulty facing Drs Ho and Do in their practices. They claimed that no third doctor was available for the referral periods, although their case was that they were seeking to recruit one. So while each committee was entitled to consider how the situation could be managed, it was with respect to the actual practice of the doctors that they needed to address themselves.

93 The question of whether or not the committees correctly concluded that the doctors had not satisfied them that exceptional circumstances existed that affected the rendering or initiating of services by the doctors on any one or more of the 24 or 56 days involved a question of mixed fact and law. Provided that the committee applied the appropriate legal test, ordinarily they would be free to determine the facts for themselves (cp: *Oreb* 146 FCR at 265 [171]-[173]).

94 The doctors argued that each committee incorrectly applied the test of 'exceptional circumstances' in s 106KA(5) by which I understand them to mean that subs (5) extends the ordinary English meaning of the expression 'exceptional circumstances' to include those declared in reg 11.

95 The doctors said that the committees could not take into account questions of practice management in considering reg 11(a). They rely on remarks made by Black CJ and Wilcox J in *Oreb* 146 FCR at 242 [15] when they said:

> *'That being so, the possible application of reg 11(b) needed to have been addressed by the committee in terms, and in reasoning that was free of consideration (irrelevant in the context of reg 11) of patient management measures that might have been available and desirable.'*

96 Their Honours continued that other matters including patient demand, special needs of the patients of the practice, inability of the practice to obtain or retain additional resources and the individual practitioner's work pattern were relevant to reg 11. They said whether or not the practitioner '… could have better organised his practice was irrelevant. The focus of reg 11 is the need of the patients, not the management skills of practitioners' (*Oreb* 146 FCR at 242 [16]).

97 While their Honours were expressing a view on proper construction of reg 11(b) in particular, their observations are of assistance in the construction of reg 11(a) and its operation in the present cases. However, there is one significant textual difference between reg 11(a) and reg 11(b). That is the use of the word 'unusual' in two places in reg 11(a) in contradistinction to the use of the concept of 'absence' in reg 11(b) as the determining factor. Because 'unusual' is an ordinary English word which involves the making of a value judgment as to departure from a norm, the committees argued that an example given by Kiefel J in *Hatcher v Cohn* (2004) 139 FCR 425 at 440 [56] of an epidemic or tragedy involving injury to many people exemplified the correct approach to the construction of an 'unusual occurrence' in reg 11(a). But on appeal, Lander J (with whom Black CJ agreed: 146 FCR at 276 [1]) said at 288 [67]-[68]:

> *'[67] Again, it would not be appropriate to attempt to categorise what might be an unusual occurrence or what might be an unusual level of need. The occurrence must be unusual and the level of need must be unusual and be caused by the unusual occurrence. Regulation 11(a) provides for circumstances which are like, but not the same as, circumstances which might be "exceptional circumstances" in s 106KA(2) …*
>
> *[68] Again, no more need be said about the paragraph other than because the occurrence must be unusual it must be not usual or out of the ordinary. Again, because the level of need for professional services which must be caused must be unusual, that level of professional services must be not usual or must be out of the ordinary.'*

98 The level of need to which reg 11(a) refers cannot be connected to the way in which the individual practitioner manages his or her practice. The need is that of the patient or patients caused by the unusual occurrence. The need in reg 11(a) is 'for professional attendances', that is for services provided by a doctor to more than one patient (see reg 7 which defines 'professional attendance' as meaning a particular service). Patients need services or professional attendances. Unless patients present for or request the doctor to see

them, no need for professional services could arise. If, as appears to be accepted in the construction placed on s 106KA(2) by the Full Court in *Oreb* 146 FCR at 241-242 [13], questions of practice management are relevant, there is a reasonable basis for construing reg 11(a) as not taking such considerations into account, in the same way as the Full Courts approached this matter in relation to reg 11(b).

99 I am of opinion that it is not appropriate to put a gloss on the words of reg 11(a) so as to confine the expression 'an unusual occurrence' to the example used by Kiefel J. Rather, the words are of general application and must be considered for the purpose of reg 11(a) in respect of each situation which a practitioner asserts is an exceptional circumstance. And just as the ordinary English meaning of the words 'exceptional circumstances' can apply to a combination of circumstances, I am of opinion that the expression 'an unusual occurrence' in reg 11(a) is not to be confined to a singular event, such as an epidemic or an accident. In legislation, the singular includes the plural in the absence of a contrary intention (see s 23(b) of the *Acts Interpretation Act 1901* (Cth)). As in many areas of ordinary experience, an occurrence can be the product of a combination of causes and forces.

100 The doctors argued before the committee that on Mondays in winter a large number of patients presented for services. One might infer that they were suffering from normal winter maladies. But there is a question of judgment involved as to whether such an occurrence is 'unusual'. By itself it may not be and a properly managed practice may be able to cope with such a demand. But a practice that is one doctor short in its desired or 'ordinary' manning levels may, again, be faced with 'an unusual occurrence' formed from a combination of 'usual' and predictable circumstances. It is predictable that if a practice is short one practitioner, it may not be able to comply with the 80/20 rule if a larger number of patients present on particular days (whereas if the extra doctor were present, the practice would comply). The situation in which the practitioners would then find themselves would be unusual (because of the absence of one doctor) and temporary. And that is so even though the situation drags on because one of its characteristics is the difficulty in locating a suitable recruit to the practice. It is not usual for a three practitioner practice to have to service its patients with two practitioners.

101 Another consideration in this regard must be the nature of the practice, its client base,

the need to maintain and build the goodwill of patients and the likelihood or not that the situation, involving short staffing, is to continue indefinitely as a 'usual' feature of the practice. A practice which was not short staffed ordinarily would be able to cope with the increased demand on a Monday in winter which the practices of Drs Ho and Do experienced. The same practice which temporarily lacked one doctor (but was expecting to fill the vacancy and was making bona fide efforts to do so but was frustrated genuinely by the then constraints of the market) is capable of being considered as being subject to 'an unusual occurrence' within the meaning of reg 11(a). However, the committees never considered the matter from this perspective. And, if either committee were to find that this was 'an unusual occurrence' there was a basis for them also finding that this caused an unusual level of need for professional services from the respective doctor, because of the unusual absence of another doctor in the practice to treat those patients.

102 For these reasons I am of opinion that each committee failed to address the matters they were required to address under reg 11(a) in accordance with law.

SHOULD RELIEF BE GRANTED

103 The committees argued that any error in their application of s 106KA(2) and reg 11 would not have made any difference to the outcome. They asserted that, for example, even if an error had been made in relation to the 3 days that Dr Do was not present at the practice, Dr Ho would still have to establish 'exceptional circumstances' for each of the remaining 21 days in the referral period in respect of him.

104 However, I am of opinion that the way in which the committees approached the application of the tests 'exceptional circumstances' was erroneous and that on any further hearing, a committee will be able to reconsider the whole of the evidence and take further evidence, if so advised, having regard to the proper legal standards to be applied. Each committee followed an incorrect procedure and their decisions were affected by jurisdictional error. There is no reason why the doctors should not be granted the relief they seek: *SZBEL* 231 ALR at 598 [25] where Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ said:

> *'It is, therefore, not to the point to ask whether the tribunal's factual conclusions were right. The relevant question is about the tribunal's processes, not its actual decision.'*

See also *Tran v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 154 FCR 536 at 548-553 [56]-[81].

WAS THERE AN IMPROPER EXERCISE OF POWER BASED ON RIGID APPLICATION OF PRACTICE MANAGEMENT?

105 I am opinion, for the reasons that I have given, that each committee misconstrued or failed to apply the tests for 'exceptional circumstances' under s 106KA(2) and reg 11(a). For those reasons I do not consider that this ground arises.

APPARENT BIAS

106 The doctors argued that because the committees focused on practice management as a substantive answer to the doctors' reliance on 'exceptional circumstances', this demonstrated that each committee had an inflexibility of approach which would entitle a hypothetical fair-minded lay person, properly informed as to the nature of the proceedings or process, reasonably to apprehend that each committee might not have brought an impartial mind to making the decision. In deciding that question, the Court determines the issue objectively: *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 459 [68] per McHugh J citing *Re Refugee Review Tribunal; Ex Parte H* (2001) 75 ALJR 982 at 990 [28]; 179 ALR 425 at 434-435 per Gleeson CJ, Gaudron and Gummow JJ.

107 Because I am of opinion that each committee made an error of law in their approach, as explained above, I am not satisfied that an apprehension of bias would be perceived by the hypothetical fair-minded lay person. Rather that person would consider that the committee was applying a wrong view of the law to its task and there is no reason to think that if properly instructed as to the law to be applied, the committee would not reapply itself appropriately to the issue.

108 However, I am more troubled about the question raised late in the argument that each of the committees has been the active respondent in the proceedings. Each of the committees submitted that there was no other respondent who had a right of appearance and that the committees were the only proper respondents in proceedings brought for judicial review of their decisions.

109 I do not consider this to be a correct view. There is no doubt each of the committees is a proper and necessary party to such proceedings. After all, it is their decision which is challenged. If the Court were to make an order, it must make one in favour of or against the members of the committee whose decision is the subject of the proceedings for judicial review.

110 The members of the tribunal are the relevant officers of the Commonwealth for the purposes of the proceedings and it is necessary that they be joined as parties to the proceedings: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 at 173 [43] per McHugh J, 185-186 [91] per Gummow J, 199 [153] per Kirby J, 204 [180] per Hayne J. Here, the tribunal took what the High Court said in *The Queen v Australian Broadcasting Tribunal; Ex Parte Hardiman* (1980) 144 CLR 13 at 35-36 was an unusual course of contesting the doctors' case for relief by presenting a substantive argument. Gibbs, Stephen, Mason, Aickin and Wilson JJ said:

> *'In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which may take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.'*

111 The third respondent, now known as the Medicare Australia CEO, in a case like the present has an interest in defending the conduct of proceedings by a committee established under the Act. Such proceedings are initiated by a reference from the Medicare Australia CEO under s 86(1) and a final determination made by the determining authority is conveyed to the Medicare Australia CEO pursuant to s 106W. If for some reason in proceedings it is not appropriate to join the Medicare Australia CEO as the intended active respondent, the proper respondent must be the Minister administering the *Health Insurance Act 1973* (Cth) for the time being. He or she is the officer of the Commonwealth who has the immediate interest in ensuring the due administration of legislation for which he or she is responsible under administrative arrangements and s 64 of the Constitution of the Commonwealth.

112 It is not satisfactory that the decision of a committee can be challenged, including on

the basis that there is an apprehension of bias alleged against them, and have to defend themselves actively in proceedings of this kind, for the reasons given in *Hardiman* 144 CLR at 35-36. Moreover, the fact that each committee has defended its own interpretation of the legislation and their dismissal of the doctors' cases would suggest to a fair-minded lay person that they will find it difficult entirely to put out of their mind the approach which the Court in proceedings such as this finds to be erroneous if they were to come to reapply themselves to the task. Not everyone, especially a body which has actively defended themselves in contested litigation, would be able to approach the task anew, unaffected by the forensic demonstration of their previous error of approach. Moreover, there is no reason here not to order them to pay the doctors' costs. A fair-minded lay person would be entitled to think that the committees here would not have the equanimity of Sir Winston Churchill, who said:

> *'In the course of my life, I have often had to eat my own words, and I must confess that I have always found it a wholesome diet.'*

113 That is not to suggest any adverse view about the members of either of the two committees. There is no reason to doubt that they would try to apply the law as the Court has declared it. But it is unsatisfactory that having actively sought to uphold a view of the law and their conclusions adverse to the doctors, the same committees should then be called upon to reconsider the matter.

114 The second aspect of procedural fairness or natural justice is that a person should not be a judge in his or her own cause. Here, each committee has acted as a protagonist in this Court in their own cause and they now suggest they should be returned to the position of being a judge, in the sense of a lay tribunal charged with functions of administrative decision-making, in the same cause. That is an unsatisfactory outcome which should not occur unless it is necessary under the legislation: see *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 81-82 per Mason CJ and Brennan J, 96 per Deane J. I am of the preliminary opinion that it is not necessary, but I will hear the parties, if they desire, on whether I should make orders of the following nature:

(a) An order in the nature of a writ of prohibition in the first instance issue prohibiting each of the first respondents from further constituting Professional Services Review Committee No 295 [293].

(b) An order in the nature of a writ of mandamus issue requiring the fourth respondent to reconstitute Professional Services Review Committee No 295 [293] to further consider the referral made on 13 December 2001 under s 86 of the *Health Insurance Act 1973* (Cth) in accordance with law.

115 For the reasons I have given, each committee made a jurisdictional error and the doctors are entitled to relief.

I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 26 March 2007

Counsel for the Applicants:	MA Robinson
Solicitor for the Applicants:	Tress Cox
Counsel for the Respondents:	RM Henderson
Solicitor for the Respondents:	Minter Ellison
Date of Hearing:	21, 22 September 2006
Date of Judgment:	26 March 2007