

Health Insights

Federal Court of Australia confirms Professional Services Review (PSR) has the power to order part repayments

Professional Services Review (**PSR**) is a Commonwealth Agency whose objective is to protect the integrity of the Commonwealth Medicare benefits, dental benefits and pharmaceutical benefits programs and, in doing so, protect patients and the community from the risks associated with ‘inappropriate practice’, and protect the Commonwealth from having to meet the cost of medical and other health services provided as a result of ‘inappropriate practice’.

The Determining Authority of PSR is responsible for the ratification of section 92 repayment agreements reached between the Director of PSR and practitioners and for the final determination of matters following a PSR Committee hearing, including with respect to any repayment orders.

Pursuant to section 106U(1)(cb) of the *Health Insurance Act 1973* (Cth) (**Act**), the Determining Authority has the power to order that a practitioner, the subject of review, repay to the Commonwealth the whole or a part of the Medicare benefits that were paid. The recent Federal Court of Australia decision of *Norouzi v The Director of the Professional Services Review Agency* [2020] FCA 1524 confirms that the Determining Authority of PSR must, where requested to do so by a practitioner under review, consider whether part payment of Medicare benefits is appropriate where a practitioner has been found to have engaged in ‘inappropriate practice’.

On 21 October 2020, the Federal Court of Australia handed down its judgment in *Norouzi v The Director of the Professional Services Review Agency* [2020] FCA 1524. The case considered two important issues, namely, whether an extension of time ought to be granted to apply for an order of judicial review of the PSR Committee’s decision and whether the PSR Determining Authority’s final determination was lawful. The applicant, Dr Norouzi, succeeded only in his challenge of the Determining Authority’s repayment determination. The application for orders under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and *Judiciary Act 1903* (Cth) was dismissed on the basis of “lengthy delay” by the applicant of 181 days in challenging the Committee’s decision and public interest considerations telling against the granting of an

extension of time for judicial review. The “prospective merits” in the grounds of the application were also found to not warrant the granting of an extension.

Decision

The Court determined that the question as to whether Dr Norouzi ought to be directed to repay, in whole or in part, the amount of \$459,555.55 be remitted to the Determining Authority for reconsideration according to law.

The Determining Authority had been expressly requested by Dr Norouzi to exercise its power to require only part payment of the Medicare benefits. Dr Norouzi, a General Practitioner who practised at House Call Doctor between 2016 and 2017, submitted that he should only be required to repay the difference between the urgent after-hours items (\$129.80 and \$153 respectively) and the non-urgent after-hours items (\$69), in circumstances where many of his patients, in fact, required after-hours care.

The PSR Committee found that the applicant had engaged in ‘inappropriate practice’ on two distinct bases:

1. As to eight of the services reviewed, the PSR Committee found he engaged in inappropriate practice as a result of record-keeping deficiencies and clinical decisions; and
2. As to 38 of the services reviewed, the PSR Committee found that the criterion in MBS items 597 and 599 that “*the patient’s condition requires urgent medical treatment*”, as defined in regulation 2.15.1 of the *Health Insurance (General Medical Services Table) Regulation 2016*, was not met.

Dr Norouzi’s challenge of the Determining Authority’s decision focused upon the second aspect of the Committee decision, namely, that he engaged in ‘inappropriate practice’ by rendering MBS items 597 and 599 where the services rendered were ‘non-urgent’ treatment. In particular, the Determining Authority ordered that Dr Norouzi repay the entirety of those services.

The Court held with respect to the reasons for the Determining Authority’s decision in this case at [95]:

“...It is not in any way evident either from [32] or [34] of its reasons, which look to be the critical paragraphs, or otherwise, that the Determining Authority even appreciated that it had the power to require part payment. Reading the reasons as a whole and without an eye for error, the better view is that it did not”.

The Court held that the Determining Authority failed to appreciate that Dr Norouzi had, in fact, provided a service to the patient, albeit that such service did not meet the technical and specific requirements of the applicable urgent MBS after hours item numbers. The following observation was made by Justice Logan at [101]:

*“...With respect, I do not disagree with the statements made by Mortimer J in *Sevdalis v Director of Professional Services Review (No 2)*, at [81] – [82]. But it does not contradict a finding of a committee that a service was provided but claimed on the basis of an incorrectly specified item number, to appreciate that, in the circumstances found by that committee, a scheduled item number was always applicable to the service. That is this case. There were ‘non-urgent’ item numbers which were put forward as applicable on the basis of the findings made by the committee”.*

Ultimately, Justice Logan held the failure of the Determining Authority to consider either the fact that an applicable 'service' had been provided to the patient (albeit not one that met the requirements of the MBS Item Number in fact billed), and to turn its mind to the question of whether a part payment was indicated in those circumstances, meant that the decision was unlawful. He ordered that the decision be remitted for a fresh decision according to law.

Implications

The Federal Court's judgment in *Norouzi* may provide a basis for practitioners subject to PSR reviews to submit to the Determining Authority that only part payment of benefits ought to be ordered, for example, by reference to the monetary difference between two MBS item numbers where the practitioner might have fulfilled the requirements of a lower/alternative MBS service. There may be some practical difficulties with this approach given that a PSR Committee does not usually make any finding as to whether it may have been appropriate for the practitioner under review to bill *another* item number, as a Committee is responsible for determining whether the item number in fact billed by the practitioner constituted 'inappropriate practice' under section 82 of the Act.

Nevertheless, the Federal Court's decision provides a foothold for practitioners under review to submit that part payment of benefits is reasonable in particular cases. For example, the MBS specifies a number of similar services varying with regard to minimum time requirements and complexity. Typically, the documentary requirements and level of complexity required for lower item numbers is less onerous. Practitioners under review should ask the Director of PSR in negotiating section 92 voluntary repayment agreements (being agreements subject to ratification by the Determining Authority), and also the Determining Authority directly following Committee Hearings, to consider part payments in these circumstances. When submissions such as this are advanced, practitioners under review ought to have a reasonable expectation that any Draft and Final Findings of the Determining Authority of PSR specifically deal with such submissions. Should practitioners in the future manage to persuade the Determining Authority that a part payment order is reasonable, this could result in a reduction of the repayments in fact ordered. The success or otherwise in achieving any part repayment order will be factually specific to each case. In this regard, the Court specifically observed in *Norouzi* at [103]:

"...there is in Pt VAA a very large conception of what constitutes inappropriate practice. Some provision of services yielding a finding of inappropriate practice will be the result of findings such as made by the committee in Sevdalis v Director of Professional Services Review (No 2); others will be the result of findings such as those made by the committee in the present case. As to a requirement for repayment, there is no 'one size fits all' sequel in the subsequent decision by a Determining Authority. That decision must, inherently, be specific to the particular findings of the committee. And by express provision in s 106U(1)(cb) of the HIA, that necessarily includes the contingency of requiring part payment on the basis of those findings. In this case, and with all due respect, the Determining Authority has conspicuously failed to appreciate this in circumstances where it was expressly asked to address that subject".

The Court also appeared to recognise the discretionary nature of the powers of the Determining Authority in that it distinguished an earlier Federal Court decision where the practitioner under review was found to

have placed the public at risk by reason of his medical treatment. It seems clear that the seriousness of a PSR Committee's findings in relation to the conduct of a practitioner *may* impact whether the Determining Authority accepts whether part payment of Medicare benefits is appropriate.

Norouzi also provides clarity that it does not automatically follow that practitioners found to have engaged in 'inappropriate practice' in all circumstances ought to be subject to an order to repay the whole of the relevant Medicare benefits. The Court held at [103] that "*...If it were the case that any service tainted in any way by a committee finding of inappropriate practice had to be repaid in full, there would have been no point to the inclusion as an alternative in s 106U(1)(cb) of 'in part'.*" This provides a powerful indication that the Determining Authority has a wide discretion which, historically, has seldom been exercised.

Conclusion

On initial review, the Federal Court's decision appears encouraging. However, on closer analysis, the implications may not be as significant as hoped, for practitioners the subject of PSR reviews. It must be stressed the Court only had power to direct the Determining Authority to reconsider whether a part payment should be ordered, because of the flawed nature of the reasons of the Determining Authority. Practically, the Court merely required that the original decision be quashed and be remitted back to the Determining Authority for a fresh decision according to law. The Court does not have the power to substitute its own decision in place of the PSR Committee or Determining Authority.

Nevertheless, the PSR's longstanding position that an entire MBS service deemed to be 'inappropriate practice' must usually be repaid in full, even where the practitioner would have satisfied the requirements for a lower item number, could now potentially be subject to relaxation. It is hoped that the Determining Authority, with regard both to its functions in ratifying voluntary section 92 agreements, as well as making final determinations (repayment orders after Committee hearings), will take up the opportunity for more flexibility in the future. The Federal Court held:

"...That part payment is a contingency surely recognises that the result of inappropriate practice as found by a committee in some cases may require something less than repayment of the whole in order to protect the revenue of the Commonwealth".

It will remain to be seen whether the Determining Authority will be persuaded that Dr Norouzi be directed to make a partial repayment. While decisions of the PSR process are not always published, it is anticipated the ultimate outcome of this dispute will be published in some form on the PSR's website in due course. It is hoped the PSR will implement changes to its processes to ensure the flexibility available to the Determining Authority is exercised appropriately on a case by case basis and that the decision does more than simply result in improved reasons issued by the Determining Authority in the future.

The PSR has significant powers and its most recent annual report indicated that practitioners under review were required to refund \$29 million in benefits to the Commonwealth, with almost 70% of voluntary

agreements involving repayments over \$200,000, representing a significant increase in refunds as compared to historical annual average refunds.

Meridian Lawyers assists health care practitioners respond to reviews by the PSR (on referral from Medicare), including with respect to PSR Committee hearings, which examine whether a health care practitioner may have engaged in 'inappropriate practice' in connection with rendering or initiating services in that the conduct would be unacceptable to the general body of their peers as defined in the *Health Insurance Act 1973* (Cth).

This article was written by Principal Daniel Davison and Senior Associate Sarah Twinn. Please contact us if you have any questions or would like more information.



Daniel Davison | Principal
T: +61 7 3220 9358
E: ddavison@meridianlawyers.com.au



Sarah Twinn | Senior Associate
T: +61 7 3220 9300
E: stwinn@meridianlawyers.com.au

Disclaimer: This information is current as of October 2020. This article does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of this article.