23 August 2011

Our Ref: JA:PAAG

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By e-mail: community.affairs.sen@aph.gov.au

Dear Sir,

Review of the Professional Services Review ('PSR') Scheme

I refer to the Senate's referral to the Community Affairs Committee ('the Committee') on 6 July 2011 of a review of the Professional Services Review Scheme for inquiry and report.

I **enclose** for the consideration of the Committee a preliminary submission on behalf of Avant Mutual Ltd ('Avant'). Avant is Australia's largest medical defence organisation and professional indemnity insurer of medical practitioners with over 55,000 members nationally.

In preparing that submission and considering the recommendations it contains, Avant consulted with its internal legal team and external legal providers about their experiences acting for and advising medical practitioners in their dealings with PSR over the life of the PSR scheme. The submission is a distillation of the more important opportunities for improvement of the PSR scheme which were highlighted by that process. The submission does not attempt to address all possible matters of interest to the Committee.

Avant would be grateful for the opportunity to assist the Committee by responding to any other relevant issues which may arise in the course of the Committee's inquiry or in any other way the Committee would find valuable.

Yours faithfully

Dr John Arranga
Chair Public Affairs Advisory Group
Avant Mutual Group Ltd

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Submission of Avant Mutual Group Ltd

to the inquiry by the

Parliament of Australia –

Senate

Community Affairs Committee

"Review of the Professional Services Review ('PSR') Scheme"

Date of submission:

23 August 2011

Terms of Reference

A review of the Professional Services Review (PSR) Scheme provided for under the Health Insurance Act 1973 (the Act) which is responsible for reviewing and investigating the provision of Medicare or Pharmaceutical Benefits Scheme services by health professionals, with particular reference to:

(a) the structure and composition of the PSR, including:
  (i) criteria for selection of the executive and constituent members encompassing their experience in administrative review proceedings,
  (ii) the role of specialist health professionals in assisting in cases where members lack relevant specialist expertise, and
  (iii) accountability of all parties under the Act;
(b) current operating procedures and processes used to guide committees in reviewing cases;
(c) procedures for investigating alleged breaches under the Act;
(d) pathways available to practitioners or health professionals under review to respond to any alleged breach;
(e) the appropriateness of the appeals process; and
(f) any other related matter.

Key to abbreviations used

PSR	Professional Services Review
PUR	Person Under Review – a term used by PSR to describe a practitioner referred for review by Medicare Australia
Director	Holder of the office of Director of Professional Services Review appointed pursuant to s.83 of the HIA
HIA	*Health Insurance Act* 1973
PSRC	Professional Services Review Committee constituted pursuant to s.95 of the HIA
DA	The Determining Authority constituted pursuant to s.106Q of the HIA
Kutlu	The decision of the Full Federal Court in Kutlu v Professional Services Review [2011] FCAFC 94

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Introduction

Avant Mutual Group Limited (Avant) is Australia's largest medical defence organisation (MDO). Through our licensed insurance subsidiary, Avant Insurance Limited, we provide indemnity insurance and support to more than 50,000 members.

Avant is a mutual, not-for-profit organisation and operates nationally with offices in New South Wales, Victoria, Queensland, Tasmania, South Australia and Western Australia. Avant provides insurance cover for over 60 per cent of insured doctors and also on behalf of a large number of allied health professionals.

Avant offers professional indemnity insurance to health care practitioners, medical students and allied health professionals. Among other things, Avant also provides:

- Medico-legal and risk management advisory services;
- Support, advice and legal representation in the event of a claim or complaint; and
- Education, research and training programs in collaboration with medical associations, colleges and training providers.

Executive Summary

- There is an opportunity for reform to the PSR scheme to overcome actual and perceived unfairness.
- Such reform should be aimed at improving the PSR scheme in regards to its decision-making process.
- Reform is desirable to improve the procedural fairness of PSR's processes for persons under review and to protect the reputation of the PSR as a legitimate peer review system.
- Legislative amendment to the *Health Insurance Act 1973* ('the HIA') should, at a minimum, be directed toward the following matters:
    - The negotiation of agreements between persons under review and the Director pursuant to s.92 of the HIA;
    - The making of determinations arising from s.92 agreements and other findings;
    - The constitution of PSRCs;
    - The conduct of hearings of PSRCs;
    - The availability of merit review;
    - The role of the Determining Authority and
    - The abolition of the anomalous 'double punishment' imposed by s.106X of the HIA.
- Both Medicare Australia and PSR should continue to co-operate with the profession to develop their understanding of the depth and complexity of modern medical practice (particularly general practice) and to appreciate the legitimate different perspectives on practice that exist among both patient groups and medical practitioners.

- Our experience in representing members of the medical profession raises concerns that the decisions of PSR do not reflect the views of the general body of the profession.

Major Recommendations

Avant has 4 major recommendations.

The Director

Greater scrutiny on the powers of the Director is desirable to ensure decision making is not inefficient or unreasonable.

The PSRC process

The fairness of the PSRC process could be improved by:

- The use of legally-qualified chairpersons;
- Allowing the PUR to be legally represented; and
- Providing for merits review of PSRC decisions to be sought in the Administrative Appeals Tribunal.

Composition of Professional Services Review Committees

The HIA could be enhanced if professional services review committees are chaired by a legally-qualified chairperson.

The HIA could be enhanced if the remainder of the Committee is comprised as follows:

- One community/patient representative; and
- Two medical members.

The negotiation of s.92 agreements

The Director should continue to be responsible for the negotiating of s.92 agreements however improvements to the process could be implemented to encourage matters amenable to early resolution to be more efficiently resolved.

Full Recommendations

The Director

Greater scrutiny of the powers of the Director is desirable to ensure the actions and opinions of one person do not result in inefficient or unreasonable decision-making.

The PSRC process

The fairness of the PSRC process could be improved by:

- The use of legally-qualified chairpersons;
- Allowing the PUR to be legally represented; and
- Providing for merits review of PSRC decisions to be sought in the Administrative Appeals Tribunal;

Composition of Professional Services Review Committees

The HIA could be enhanced if professional services review committees were chaired by a legally-qualified chairperson who:

- Has a minimum duration of relevant experienced (e.g. appearing before and/or sitting on administrative law tribunals);

- Is independent of PSR and the Commonwealth (not an employee of professional services review or Commonwealth nor counsel used by the Commonwealth within a period of time such as 2 years);

- Is appointed on an ad hoc basis and sits on no more than, say, 5 committees in any 12 month period.

- The HIA could be enhanced if the person under review had the right to object to the appointment of the Chair on the basis of apparent or actual bias or that the person lacks suitable qualifications or experience;

- The HIA could be enhanced if the remainder of the Committee was comprised as follows:

  (a) One community/patient representative randomly selected from a pool of such persons appointed by the Minister for a maximum duration of, say, three years;

  (b) Two medical members randomly selected from a pool of persons appointed by the Minister on the advice of both the relevant learned college and the AMA as suitable persons to represent the views of the general body of practitioners in that specialty or sub-specialty;

  (c) Both the community/patient representative and the medical members should be appointed for a limited duration (we suggest 3 years) and be permitted to sit on a maximum of, say, 5 matters during each period of appointment;

(d) Community and medical members should not be re-appointed in sequential appointment periods. The aim should be to involve as broad a cross-section of the relevant profession and the community as possible.

Hearings before PSRCs

- The HIA could be amended to permit persons under review legal representation when appearing before a professional services review committee;

- The HIA could be amended to provide the person under review a right to insist that specialist expert advice be obtained by a committee on issues of clinical standards arising in the course of a hearing;

- The HIA could be amended to require PSRCs to identify the basis for a proposed finding of inappropriate practice with sufficient precision as to allow a person under review a reasonable opportunity to prepare submissions and to adduce evidence (including by way of re-convening a hearing and adducing oral evidence if requested);

- The HIA could be amended to require PSRC's to make full disclosure to the person under review of all documents or things in the possession of the Committee which may be relevant to the Committee's deliberations or decision;

- The HIA could be amended to require PSRCs to give full reasons for all decisions (and an opportunity for the person under review to be heard about those decisions) including:

  (a) Reasons for making a finding that specific conduct would be unacceptable to the general body of peers (if s.82 remains unchanged);

  (b) Reasons for the rejection of expert evidence tendered by the person under review;

  (c) If requested by a person under review, reasons for any interlocutory or procedural decisions (e.g. reasons for vacating hearing days or whole hearings; refusal of adjournments etc)

Merits review

- The HIA could be amended to allow a person against whom a finding of inappropriate practice is made or in respect of whom a determination is made a right to file in the Administrative Appeals Tribunal an application for review of the decision.

The negotiation of s.92 agreements

The Director should continue to be responsible for the negotiating of s.92 agreements but the following improvements to the process should be implemented to encourage matters amenable to early resolution to be more efficiently resolved:

- Genuine attempts could be made in all matters to reach a negotiated settlement in preference to referral to a PSRC;

- The quality of information provided to the PUR by the Director could be improved;

- A clearer framework for negotiations could be implemented;

- Negotiated agreements should include consideration of mitigating/ aggravating factors and repayment offers relating to incorrect itemisation of MBS services must include realistic consideration of income from correctly itemised services.

Benefits of change to the PSR Scheme

Avant's position is that the suggested changes to the PSR Scheme will result in a more efficient and cost effective process by:

- Reducing the number of matters that proceed from review by the Director to PSR Committees.
- Leading to more efficient and focussed PSRC hearings with fewer points of potential conflict and appeal.
- Reducing the likely cost of PSRC hearings.
- Improving the perception amongst PUR and the professions of the PSR process.

Substantive Submissions

There is a need for legislative amendment

1. As a result of the Full Court's unanimous decision in *Kutlu*, the vast majority (if not all) decisions of the Director of PSR to refer matters to professional services review committees ('PSRCs') and the decisions of those PSRCs back to at least 2005 are likely to have been invalid because of a failure to properly consult with the AMA about the appointments of PSR Panel members and Deputy Directors.

2. That failure is not a mere technicality. The acceptability of the peers who are to sit in judgment of PURs is a fundamental tenet of the PSR scheme.

3. PSRCs are stressful, lengthy and expensive. The effort and resources applied by both the Commonwealth and the PURs in many PSR and PSRC cases over several years have been wasted.

4. Avant accepts there are consequences and costs arising from all legal processes, even scrupulously fair ones. Avant also accepts that, had the proper processes for the appointments which were in issue in the *Kutlu* case been properly made, inevitably at least some of the PURs affected directly or indirectly by that case would have been found guilty of inappropriate practice and suffered the appropriate consequences of that finding. However numerous PURs have suffered the shame of a finding they are 'guilty of inappropriate practice' only for the finding to be subsequently found void. Some have been punished by the imposition of sanctions and penalties imposed as a result of those findings and must now seek redress for their losses. In some cases, our members report that the stresses of PSR's processes have contributed to the dissolution of their marriage or have negatively impacted their health.

5. Regardless of the *Kutlu* decision, the processes for the selection of PSR Panel members is not in our submission producing PSR panels which are sufficiently widely experienced as to enable PSRCs to be drawn from it which are representative of the general body of many PURs' peers;

6. There is further evidence of difficulties with the PSR:

   (a) There are currently no members of the professional services review panel and no deputy directors;

   (b) In early 2011 all matters then at any stage within the PSR scheme (39 cases) were dismissed with minimal explanation to the persons concerned;

   (c) There is concern within the broader medical profession of the fairness of the PSR scheme in its dealings with doctors;

   (d) Avant has experience of ordinary appropriately-practicing doctors who are so fearful of the possibility of any involvement with Medicare and particularly the PSR Scheme they would prefer to perform some services for free or itemise a service (MBS item number) with a lesser rebate amount than that to which their patients are entitled in order that their statistical profile will approximate what they perceive will avoid sparking Medicare Australia's interest;

(e) Our members who have had dealings with the PSR Scheme, particularly PSR Committees, almost universally report that they believe the PSRC did not truly represent their peers and the outcome of their cases was predetermined.

7. The *Kutlu* decision was described by the President of the AMA as "momentous" and is currently the subject of much interest. Our comments and recommendations for improvement of PSRs processes go deeper than that decision and do not rely on that decision for their validity.

8. In Avant's submission, there are currently insufficient checks and balances on the powers available to the Director of PSR.

9. Avant accepts there is a range of cases referred to PSR of widely varying merit. We also accept that the Commonwealth's funds are deserving of a system to ensure appropriate accountability by those who may benefit from their distribution. It might be said in response to some of our criticisms of the PSR scheme's failings that complaints of the unfairness of any process would be expected from those who fall foul of the regulation it seeks to enforce (and perhaps those who represent them). However, we submit that in PSR's current circumstances, proponent of the PSR scheme would concede there is evidence that the PSR scheme would benefit from reform.

10. The argument for reform is clear. Such reform is necessary to fairly and properly deal with unmeritorious and meritorious cases alike. Indeed, in our submission, it is the inability to reliably distinguish between the meritorious and unmeritorious matters which has led too much of the litigation around the PSR scheme.

11. A more open PSR scheme would bring benefits to both the Commonwealth and the PURs, of less litigation, less cost and less delay.

12. Avant submits the objectives of the PSR scheme could be achieved through legislative amendment of Part VAA of the HIA following consultation with all relevant stakeholders. As Australia's largest Medical Defence Organisation ('MDO'), Avant is well placed to constructively contribute to that process of reform.

What could be done to improve PSR?

13. Avant submits the following aspects of the Professional Services Review Scheme are (in order of importance) in need of reform:

    (a) The fairness of PSRC processes, particularly:

        (i) The process for the selection of PSR Panel members and Deputy Directors

        (ii) The need for legally-qualified chairpersons of PSRCs and legal representation of PURs;

        (iii) The procedural fairness of hearings before a PSRC;

    (b) The absence of a right to merit review of the decision of a PSRC;

    (c) Other matters including:

        (i) The process by which a s.92 agreement is negotiated;

        (ii) Simplification of the process by which Determinations of sanctions/penalty are made following a s.92 agreement, a PSRC finding and where a second finding of inappropriate practice is made; and

        (iii) The availability of timely, reliable and authoritative advice to practitioners about the correct use of MBS item numbers and appropriate billing practices.

The Professional Services Review Committee ('PSRC') processes

14. The PSRC is the linchpin in the PSR scheme. Avant accepts that a peer standard should be the measure by which inappropriate practice is determined. Accordingly the proper appointment of peers and their proper and fair application of the peer standard could not be more important.

15. Avant submits it is essential to the proper functioning of the PSR scheme that a PSRC is and is seen to be independent of the Director and that the members of the PSRC exercise independent judgment and rigorous application of the rules of procedural fairness in their dealing with any matter referred to them.

16. It is arguable that the Director's involvement with PSRCs is too close.

17. Examples of the closeness of the Director to PSRCs are:

    (a) The Director's administrative staff are the PSRC Secretaries.

    (b) The Director 'trains' the members of the PSR Panel and Deputy Directors.

    (c) The Director's solicitors act for and advise all PSRCs.

18. Under the HIA a hearing before a PSRC is the only opportunity for a PUR to have the merits of their case heard. There is no merits review process

available. Consequently, the fairness of the PSRC process and the impartiality of the PSRC are paramount to the fairness of the PSR scheme overall.

19. The fairness of the PSRC process begins with the people appointed to the pool of willing and able people from which an individual committee may be drawn. It incorporates the process by which a PSRC, once selected, receives and deals with information and evidence, conducts its hearing, considers and makes its findings and communicates with the PUR.

20. Avant submits that reform of the PSRC process should involve:

    (a) Independence of PSRC's from the Director;

    (b) Review of the selection of PSRC members;

    (c) Appointment of a legally qualified chairperson to run PSRC hearings and ensure procedural fairness;

    (d) A right to legal representation and

    (e) Access to merits review.

The perceptions of PURs and PSRC hearings

21. In Avant's experience, almost universally, PURs perceive the PSRC process as pre-determined. In many cases they do not accept the appointed members are truly reflective of the views of their peers.

22. The reality of a PSRC hearing is that:

    (a) The PUR is not legally represented and can only be legally advised. That creates very significant barriers to the PUR effectively adducing any evidence in their defense as the PUR is nervous, inexperienced and often fatigued by extended questioning which can continue for days;

    (b) Although the PUR is, by the stage of the PSRC hearing, aware of both the type of services which are under consideration and the actual services which the PSRC intends to sample, the nature of the case against the PUR is not known. It is an inquiry but the tone of the proceedings is often adversarial.

    (c) The PSRC proceeds by reading a pre-prepared introductory statement, asking the PUR to introduce their legal adviser, swear or affirm and to give a short oral curriculum vitae.

    (d) The PSRC's questioning is conducted in a repetitive, formulaic fashion.

    (e) The PUR is asked whether there is anything they wish to add at the end of each patient and is invited to request an adjournment if needed but the questioning moves on sometimes for days, alternating between the three members of the Committee.

    (f) In our experience some PSRC members use an aggressive style of cross-examination out of place in an administrative inquiry where the

accused cannot be represented. Rarely is a proposition ever be put to a PUR, as procedural fairness would suggest ought to happen.

(g) The referral to the PSRC is of unspecified conduct, the PUR is usually left wondering during the hearing what conduct the PSRC members feel may be inappropriate

(h) There is no reason why the PUR should not be put on notice at the earliest reasonable time of any matters which the PSRC members believe may be found against the PUR.

(i) From time to time the PSRC will adjourn for a stated reason such as to discuss something between the members or to seek legal advice from their lawyer (who remains silent during the entire hearing) or for no stated reason.

(j) If the adjournment was for the stated purpose of the PSRC receiving legal advice, that advice will not be shared with the PUR upon the hearing reconvening.

(k) The hearing may be conducted over two days then, typically, another two days a month or two months later and, possibly further hearing days some further period in the future.

(l) Sometimes, at the conclusion of the hearing the PSRC will indicate in general terms the 'concerns' it has about the PURs conduct. Usually the PUR will not be told what the case against them is with any degree of particularity until the PSRC produces a draft report (s.106KD). Generally that will be at least several months after the hearing. The PUR then has one month to consider the Draft Report and "suggest changes" to the Draft Report before it is finalised and sent to the DA.

A legally-qualified chairperson and a right to legal representation is needed

23. PSRCs are required to apply a legal test in their work - the definition of inappropriate practice in s.82 of the HIA. The application of that legal test requires an objective assessment of the evidence and the application of the facts of the case as found to the law. Those are skills for which lawyers are trained.

24. Avant submits that the proper application of that test has proved difficult for many PSRCs because they lack the legal skills and experience to properly interpret and apply the test.

25. We submit the misapplication of the test in s.82 of the HIA is manifest in two ways:

(a) PSRCs have in our opinion misunderstood the requirement in s.82(3) that (as well as other relevant consideration) the adequacy and contemporaneity of a PUR's medical records must be taken into account in determining whether their conduct amounts to inappropriate practice. The sub-section is applied as if any deficiency in a medical record requires that a finding of inappropriate practice must be made; and

(b) In applying the test in s.82, there is often an apparent failure to make findings about or take into consideration the *realities* of medical practice – even, in at least one cases, to the extent of failing to properly take into account the realities of the PSRC member's own medical practice. The test requires that the PUR's conduct be compared with that which would be regarded by their peers as acceptable but such a comparison is rarely, if ever, actually made.

26. We refer you to the Case Example, The Peer Standard attached to these submissions

27. The fairness and efficiency of PSRC hearings could be improved by appointing an appropriately-experienced legally-qualified chairperson to administer the hearing and ensure its fairness.

28. Those benefits would be leveraged by permitting the PUR to also be legally represented.

29. Such a change would bring **no additional expense** for either 'party' as under the current scheme, both already have lawyers in the hearing throughout the proceedings. Furthermore, the time saved by the efficient disposal of objections and other procedural matters would be substantial as they could be more quickly and simply dealt with without the need to adjourn and vacate the room to allow the PSRC to seek legal advice. The costs of PSR 'training' medically-qualified members in the conduct of administrative law proceedings would be eliminated.

30. The greatest benefit to all stakeholders would be the improvement to the fairness of the hearings and, we expect, a commensurate reduction in the necessity for PURs to make judicial review applications. There would be further financial savings in the reduction in Federal Court proceedings delaying the resolution of matters in the PSR system and greater certainty as to the timeframe for the resolution of matters.

31. An appropriately legally experienced PSRC member would also be able to deal with evidence and other information, whether it be adduced during the hearing or by way of 'submissions' to the Draft Report.

32. In our experience PURs and their advisers go to enormous effort to consider a PSRC's Draft Report and to prepare their response. It is rare to receive a considered response to a submission on a draft report.

33. Furthermore, it is currently very difficult within a hearing before a PSRC to advance a case in defense of the general assertion that the PUR is guilty of inappropriate practice. That is so for two reasons:

(a) The 'case' against the PUR is usually not known with any precision until the Draft Report is received; and

(b) The PSRCs do not have the necessary legal skills to properly deal with evidence when it is adduced.

34. We refer to the Case Example, Dealing with Evidence in a PSRC hearing which is attached to this submission.

Merit review of PSRC decisions

35. Judicial review, though essential, is no substitute for relatively quick, cheap and fair merits review.

36. There are significant disincentives to judicial review even where there are reasonable prospects for success, not least of which is cost and the prospect that success might merely be remittal of the matter to a process in which the PUR already has limited confidence.

37. If it is the merits of a matter rather than the fairness of the process which is truly at issue for the PUR it is advantageous to all parties to have the issue resolved by way of merits review rather than potentially more legally-convoluted judicial review proceedings.

38. The appropriate forum to which applications for review of the merits of a PSRC decision should be made is the Administrative Appeals Tribunal.

Peers must be peers

39. The appointment of an appropriately-experienced legally-qualified chair to a PSRC is not sufficient to ensure the success of a revamped PSRC process.

40. Peers must truly be peers of the PUR if a peer review scheme is to have credibility and acceptance.

41. The decision of the Full Federal Court in *Kutlu* demonstrates the importance of rigorous adherence to the procedures for the proper appointment of peers.

42. Avant submits it is extremely important that the peers sitting on PSRCs are skilled and experienced in the particular area of medical practice in which the PUR rendered the services under consideration.

43. A legally-qualified chairperson dealing with the administration of the hearing and related processes frees the medical members from having to attempt what they are not trained to do and allows them to concentrate on the matters in respect of which their opinions are so important.

44. For PSR, the appointment of a legal chairperson eliminates the burden of having to seek to train doctors to be 'quasi-lawyers'. By eliminating the responsibility of medical members for the running of the hearing processes, those doctors who might have appropriate and desirable medical experience and knowledge but who are deterred from becoming involved as a PSR panel member because of that responsibility will have that barrier to PSR service eliminated.

45. Moreover, the elimination of the need to train medical members in procedural skills opens the way to more medical members being involved as PSR panel members, even if they are willing or able only to do so on a very occasional basis.

46. In his memorandum to the Minister dated 22 October 2009, the Director, inter alia, stated:

> *"...PSR aims to ensure that...panel members have the opportunity to participate in PSR committees regularly in order to keep their skills and knowledge of the PSR process current...*
>
> *...*
>
> *Of the current 163 panel members, PSR recommends that 46 be reappointed. These members have all indicated a continuing interest in serving on PSR committees. PSR greatly values their services which have in some cases been provided over many years. They have consistently demonstrated a sound knowledge of the PSR Scheme, and a willingness to take on the often challenging role of peer review..."*

47. As those statements indicate, under the current arrangements for the composition of PSRCs, the need for Panel members to have 'sound knowledge of the PSR Scheme and regular experience on PSRCs creates a significant barrier to the participation of those who may be appropriate peers but who are not able to become regular PSRC members or who would be dissuaded to contribute because they lack 'knowledge of the PSR scheme'.

48. There is no logical reason why knowledge of the PSR scheme should be a pre-requisite to sitting as a peer on a PSRC with an experienced lawyer as a chair. Nor is there any reason to think that the presence of a legally-qualified chair would 'dilute' the peer focus of the proceedings. Medical tribunals around Australia sit with judges as their chairs and apply a peer standard. The same is true of numerous other tribunals and committees in other professions.

49. Avant submits the integrity and the operation of the PSR panel would be enhanced by the expansion of membership of the panel as widely as possible and the opportunities for relevant medical knowledge and experience to be employed in PSRCs that such a change would allow. A broader representation of the medical profession, particularly general practice, is also much needed.

50. As is demonstrated in the Director's memorandum dated 22 October 2009, the PSR panel has *reduced* in size over recent years. Purported appointments made in January 2010 reduced the size of the PSR Panel by 38% from 163 to <u>just 100 members nationally</u> despite an expected 'significant' increase in the number of PSRCs.

51. There are nearly 88,000 registered medical practitioners in Australia.

52. Avant submits the appropriate role for medical 'peer' members on a tribunal such as a PSRC is in the use their relevant and up-to-date experience and knowledge to assist in the understanding and interpretation of the evidence given and the application of the appropriate peer standard.

53. Avant submits that the combination of a legally-qualified Chairperson and legal representation will likely lead to a reduction in the number of hearing days necessary to conclude matters.

54. Particularly in the case of general practice - which has many and widely-varied sub-specialties - the lack of appropriate knowledge and experience among members of PSRCs can be a cause of frustration for PURs.

55. To date, the attitude taken to populating the panel and certainly to the constitution of PSRCs has been to treat all general practitioners as if they were a homogenous group. That does not reflect the reality of general practice in Australia.

56. Avant submits it is unrealistic to expect that any GP is an appropriate person to sit in judgment of any other GP. Their skill sets and knowledge may be very different. It is precisely for that reason that the HIA distinguishes between different 'types' of specialist doctors (e.g. s.82). Medicine, like all professions and trades has become highly sub-specialised.

57. Avant submits the peer members of a PSRC should represent the general body of the relevant sub-specialty of the profession:

    (a) There should be a significantly enlargement of the pool of practitioners appointed to the Professional Services Review Panel and as Deputy Directors;

    (b) There should be greater matching of the skills and experience of PSRC members to the skills and experience of the PUR;

    (c) Panel members with appropriate skills and experience should be randomly selected if possible or at least there should be a limit on the number of PSRCs that an individual can sit on in any period of appointment;

    (d) The terms of appointment of both panel members and deputy directors be reduced from 5 years to 3 years and that any person be limited to 2 periods of appointment (whether as a panel member or a Deputy Director).

Negotiation of s.92 agreements

58. Currently a person whose conduct is referred to PSR is required to produce to the Director a sample of medical records for individual services (a particular service delivered to a particular patient on a particular day). The Director may choose to review any number of types of services and for each type of service a number of original medical records will be demanded.

59. The Director undertakes a review of those records with a view to deciding to either:

    Dismiss the referral to him (s.91); or

    Reach an agreement with the PUR (s.92), or

    Refer the PUR to a PSRC (s.93).

60. If the Director decides not to dismiss the referral, the Director is required (s.89C) to produce a report setting out the reasons why the Director has not dismissed the referral and to allow the PUR to make submissions about what action the Director should take.

61. The HIA does not require that the Director physically meet with the PUR however that practice has generally been followed since the first Director held office and we support the continuation of the Director's meetings with the PUR.

62. We include the administrative process involving the provisions of s.89C as a part of what is generally known as the 's.92 meeting' because there is little significance to the finer points of any of those steps if the Director chooses to dismiss the referral and other considerations come into play if a referral to a PSRC is made.

63. Both the Director and the PUR are free to reach an agreement or not. The consequences of not reaching an agreement are that the PUR will be referred to a PSRC where, they may be named as having engaged in inappropriate practice.

64. A s.92 agreement necessarily involves a written admission of inappropriate practice by the PUR and the potential 'penalties' which may result from the ratification by the DA of a s.92 agreement are themselves no less severe than if the PUR was found to be guilty by a PSRC.

65. The number of cases where the DA has not ratified a s.92 agreement are, we believe, insignificantly small.

66. The penalties imposed in addition to the finding of 'inappropriate practice' are very serious outcomes in themselves which can be financially, professionally and personally devastating.

67. It is our belief that the s.92 process has led to many admissions of inappropriate practice in circumstances where the PUR (and we) did not necessarily accept that the PUR's actions would truly be unacceptable to the general body of their profession. However given the view held by many PURs that PSRCs were not likely to reflect the views of the reasonable general body of peers a choice was made to accept the agreement rather than be exposed to the PSRC process.

68. The s.92 process is potentially able to bring about a reasonable and speedy conclusion to a referral.

69. However, the s.92 process is arguably not currently a genuine negotiation because the process is characterised by a lack of specific information from the Director.

70. Although the PUR is aware from the notice to produce medical records served by the Director of the names of the patients in respect of whom an individual service or services will be examined, the actual service (patient name and the date of service) is not identified in the request.

71. The PUR is <u>not</u> told at any stage of the Director's investigation which particular services are actually being reviewed.

72. The Director may assert in his report that the doctor is likely to be guilty of inappropriate practice because, for example, he has failed to record sufficient clinical information in his medical record for a service. The PUR is unable to adequately respond to such an assertion because:

(a) The doctor does not know and is not told which patient it is (of those patients whose records were produced) that the allegedly inappropriate service was rendered;

(b) Even if the doctor were able to 'guess' that a criticism made by the Director related to 'a particular patient because of the particular clinical circumstance the doctor does not know and is not told which of the services rendered to the patient is the subject of criticism.

73. There may well be information the doctor could give to about a particular patient, the period of time or the individual service which would give an entirely different complexion to the bare medical record of a service or which would explain any perceived inadequacy in the service.

74. The doctor is not given that opportunity.

75. If a PUR or their legal advisers seek that information it is not forthcoming.

76. Thus the PUR is often left to guess at what the real criticisms are or the true extent of any concerns identified by the Director. Therefore, the doctor is very poorly armed to make the decision as to whether any offer of a s.92 agreement made by the Director is a reasonable one or not. The doctor is equally poorly armed to consider an approach to the Director about a s.92 agreement.

77. The Director could be required to genuinely attempt to negotiate a s.92 agreement with the PUR.

78. The Director's review should result in the PUR receiving sufficient qualitative and quantitative information to enable a reasonable decision about a s.92 agreement to be made.

79. By way of example, the following are (de-identified) quotes from s.92 reports of the Director during 2010. They are typical of the f findings made:

> *"The majority of the medical records I examined for MBS item 23 did not raise concerns. However in a few of the records it would appear that Dr XXXXX had prescribed amoxicillin with clavulanic acid and flunitrazepam without indication."*

There is no indication as to which services the criticism is intended to apply or the number of such services. Moreover, there is no way for the doctor to know whether the criticism made with respect to the prescription of amoxicillin with clavulanic acid is made with respect to the same services which involved a prescription of flunitrazepam or different services. Our inquiries of the Director did not answer those questions.

80. *"From medical records I examined in relation to Dr xxx's prescribing of diazepam it would appear Dr xxx prescribed benzodiazepines without adequate clinical indication."*

> How wide spread is that criticism? To which patients does it relate? Does it relate to benzodiazepines other than diazepam?

81. *"The majority of the medical records I examined [for MBS item 54] appeared to be for simple or straight-forward complaints that did not require the time for a long consultation..."*

In the circumstances of the case concerned, there were 974 such services rendered during the period. Our inquiry as to the number of such services to which the criticism related was not answered.

82. In some cases the Director has given accurate statements or estimates of the proportions of services in a particular class he considers to be inappropriate. Those sorts of statements are useful to PURs in considering any potential s.92 agreement. However even where a number is given there is no identification of any particular service or patient such that a proper response can be made.

83. There is often no reference made either in the Director's report or in the meeting itself to the specific basis for the assertion that the PUR's conduct is inappropriate.

84. With only one exception (the use of computer tomography scanning in relation to which the stance taken by the Director was controversial), in our experience, the Director has not made any reference in a s.92 meeting or report to any 'evidence' (in the sense in which the term is used in medicine) of the basis for the view that the general body of peers would find the PUR's conduct 'unacceptable'.

85. Without that sort of information there can be no dialogue or intellectual discussion around whether there may be a range of acceptable views within the profession about an issue. Medicine, like all science, is not static and what is unacceptable today may be standard practice tomorrow and vice versa.

86. We refer you to the Case Example, s 92 Agreements attached to these submissions.

87. Avant submits the s.92 process should be improved by:

(a) The Director or another medically-qualified adviser providing to the PUR a report on the examination of the sample of the PURs medical records which clearly:

(i) Identifies any criticisms of the PUR's services;

(ii) Identifies whether, in the opinion of the Director the general body of peers would find the identified deficiency to be unacceptable and *why*;

(iii) Identifies the number of services and the actual services to which the criticism relates,

(iv) Provides an explanation of the reasons for which it is thought a service would be unacceptable to the general body of peers.

(v) If one or more medical services were thought to be incorrectly itemised, whether another MBS service could or ought to have been itemised instead;

(vi) Whether any mitigating circumstances are evident to the Director.

(b) The PUR should have an opportunity to review the report and to provide a written response addressing:

(i) Any criticisms made and whether, if an acknowledgement of inappropriate practice can be made, what that acknowledgement is;

(ii) Any mitigating circumstances;

(iii) Whether any alternative item number could have been charged for the service;

(iv) Any action taken by the PUR to address or respond to the reasons for criticism.

(c) The Director should then finalise his/her report and, in *all* cases, be required to set out the terms of a s.92 agreement which would be acceptable to the Director.

88. It is essential an opportunity be provided to the PUR to explain or rebut any criticism prior to the Director finalising a report.

89. The Director should clearly identify any deficiencies in the sample of the PURs services and, in the finalised report, the terms of any acknowledgement of inappropriate practice which it is thought should flow from such a deficiency.

90. The determination of penalty (repayment and, if relevant, disqualification from Medicare) should be made by a consideration of the acknowledged inappropriate practice, any mitigating (or aggravating) circumstances and should take into account whether a different MBS service should have been itemized instead of an incorrectly itemized one.

91. The repayments and disqualifications sought by the Director in a s.92 agreement can be a disincentive to negotiate a s.92 agreement. The result of that is significant cost to the Commonwealth from the need to constitute a PSRC in circumstances where the PUR was willing to reach a reasonable negotiated settlement.

92. In the earlier years of the PSR practitioners were encouraged by the negotiation process and to develop insight and objectively examine the criticisms made of their practices by the Director. In return, there was a genuine benefit in saving the costs to the Commonwealth of conducting a PSRC hearing and drafting a report. .

Determinations following s.92 agreements or a second finding of inappropriate practice.

93. Currently, the Director determines by 'negotiation' the penalties arising from s.92 agreements (whether a first or subsequent finding) only subject to the DA ratifying the agreement.

94. The DA alone determines penalties arising from a first or subsequent finding of inappropriate practice made by a PSRC.

95. Where a second (or subsequent) finding of inappropriate practice is made against a PUR the Director must notify the Chairperson of the MPRC. The Chairperson of the MPRC may hold a further hearing specifically to determine whether a further period of disqualification from the Medicare system for up to 5 years should be imposed. Any such period of disqualification is *in addition to* the penalties imposed as a result of both the first and second findings of inappropriate practice.

96. The 'double punishment' which occurs upon a second finding of inappropriate practice is an anomaly in the HIA and should be eliminated.

97. If it is thought that a greater range of potential disqualification ought to be available in cases where a person is found guilty of inappropriate practice for a second time, this can achieved without the need for two entirely separate processes. The considerations relevant to the imposition of a period of disqualification are relevantly identical in both processes.

98. The current arrangements/scheme for the determination of penalties is unnecessarily complex and expensive.

99. Greater efficiency, fairness and relativity would result from a combined independent body making all determinations arising from PSRCs and ratifying s.92 agreements as a well as determinations arising from convictions of fraud (as the current MPRC does). Where a PUR has a second finding of inappropriate practice, the Director may take into consideration whether the PUR has had a previous finding arising from the same or similar conduct and reflect that in the s.92 negotiations.

100. The appropriate body to make those determinations and ratify those agreements would be one resembling the current MPRC.

101. The current MPRCs are chaired by lawyers (barristers in private practice). They are advised by two doctors. Where oral hearings are required, they are quick (often lasting only an hour or so), efficient and procedurally fair. There is a right of merit review to the Administrative Appeals Tribunal which is seldom exercised. In our submission not all cases would necessarily even require an oral hearing and, with the consent of a PUR, many could be dealt with 'on the papers' with even great efficiency but still with improved fairness and consistency.

We thank you for considering our submissions.

.....

John Arranga
Chair Public Affairs Advisory Group
Avant Mutual Group Ltd

N 09001886 35

PROFESSIONAL
SERVICES REVIEW

MINUTE TO THE MINISTER

MINISTER ROXON

COPY

REAPPOINTMENT OF MEMBERS OF THE PROFESSIONAL SERVICES REVIEW PANEL

PURPOSE:
Ministerial approval is requested for the reappointment of 46 members of the Professional Services Review panel.

ISSUE

2. Members of the Professional Services Review (PSR) panel are health professionals who are available to serve on PSR committees. The panel currently comprises 163 members, whose appointments expire on 24 January 2010.

3. PSR recommends the reappointment of 46 current members of the panel to ensure that the necessary knowledge and experience of the PSR process is maintained.

BACKGROUND

4. PSR is the Commonwealth agency responsible for investigating and sanctioning health professionals who may have engaged in inappropriate practice in relation to the Medicare Benefits and Pharmaceutical Benefits Programs. PSR initiates an enquiry into a health professional's practice upon a written request from Medicare Australia.

5. Upon receipt of a request, the Director of PSR can:

   a) Elect to take no further action;

   b) Enter into a negotiated agreement whereby the practitioner acknowledges their inappropriate practice and sanctions are applied; or

   c) Refer the matter for investigation by a PSR committee.

6. PSR committees are made up of health practitioners who are peers of the practitioner whose conduct they are investigating. Committee members are drawn from the PSR panel. Under subsection 84 (2) of the *Health Insurance Act 1973*, the panel consists of practitioners appointed by the Minister.

7. Before appointing a practitioner to be a panel member, section 84 of the Act requires the Minister to consult with the AMA. The Act also requires the Minister to make arrangements with the AMA to consult specified organisations and associations.

8. The Director of PSR approached the AMA and the relevant organisations on the Minister's behalf when these practitioners were originally appointed to the panel. No concerns were raised.

18.

RELEVANCE TO ELECTION COMMITMENTS / GOVERNMENT POLICY:

9. PSR, along with Medicare Australia, administers the Professional Services Review Scheme.

COMMENT:

10. PSR intends to use the opportunity of the expiry of the current panel member appointments to refresh the panel. PSR aims to ensure that;
    - the membership better reflects the professions regularly reviewed by PSR;
    - panel members have the opportunity to participate in PSR committees regularly in order to keep their skills and knowledge of the PSR process current, and
    - the panel exhibits a better gender balance.

11. As the majority of practitioners referred to PSR are general practitioners, PSR proposes that the majority of the panel should be general practitioners. Other specialties not already represented on the panel can be appointed on a 'just-in-time' basis when and if they are required.

12. Some current members of the panel are no longer in active practice and are therefore unable to effectively perform their role as peer reviewers. Others have never served on a PSR committee because PSR has not been asked to review the profession or specialty they represent. These members have not been invited to nominate for reappointment.

13. PSR invited all current female and male members and who have performed well as committee members to nominate for reappointment.

14. Of the current 163 panel members, PSR recommends that 46 be reappointed. These members have all indicated a continuing interest in serving on PSR committees. PSR greatly values their services which have in some cases been provided over many years. They have consistently demonstrated a sound knowledge of the PSR Scheme, and a willingness to take on the often challenging role of peer review in order to help protect the integrity of the Medicare and pharmaceutical benefits programs.

15. The number of cases referred to PSR from Medicare Australia increased significantly in the 2008-09 financial year, which will result in the establishment of more PSR committees in 2009-10 and 2010-11. PSR needs to have experienced and knowledgeable panel members available to serve on committees.

16. As well as the 46 panel members recommended for the reappointment, PSR recommends the appointment of 23 current panel members as Deputy Directors. The appointment of Deputy Directors is addressed in a separate minute. A further minute recommends the appointment of 23 new panel members to supplement the experience and knowledge of existing members.

17. There is no set limit to the number of members who can be appointed to the PSR panel. PSR considers that a total panel size of up to 100 members will be sufficient to manage the workload on hand and expected, and ensure that panel members have regular opportunities to participate in PSR committees.

18. These recommended reappointments and new appointments will change the gender balance of the panel from 18% to 28% female practitioners. General practitioners will make up 76% of the panel, up from almost 50%.

19. The current composition of the panel compared to the proposed new composition should the Minister accept PSR's recommendations on reappointments and new appointments is at Attachment A.

20. Curriculae vitae for the practitioners recommended for reappointment as panel members are at Attachment B.

21. An instrument of appointment for the panel members recommended for reappointment is at Attachment C.

22. The names, location, discipline and gender of all proposed panel members are at Attachment D.

SENSITIVITY
23. N/A

FINANCIAL IMPLICATIONS:
24. N/A

LEGISLATION / TIMING OF PROPOSED LEGISLATIVE CHANGES:
25. N/A

TIMING / HANDLING:
26. The Minister's decision on reappointment of panel members by 30 November 2009 will ensure that sufficient panel members are available to serve on committees in 2010.

CONSULTATIONS:
27. The AMA and relevant bodies were consulted when these members were originally appointed to the PSR panel and no objections were raised.

28. The Secretary / Deputy Secretary:
- was consulted on the approach of this minute ☐
- has sighted this minute ☐
- none of the above ☑

COMMUNITY AWARENESS
29. There are no community awareness opportunities relating to this item.

RECOMMENDATION
R1. That you SIGN the instrument reappointing 46 members to the PSR panel for the period 25 January 2010 to 24 January 2015 (Attachment C).

TONY WEBBER
Director
Professional Services Review
22 October 2009

NICOLA ROXON
Minister for Health and Ageing

R1 SIGNED / NOT SIGNED
N09001886
25 NOV 2009

Contact Officer:
Alison Leonard
Executive Officer
Ph: 02 6120 9100
Professional Services Review

MINISTER'S COMMENTS:

Advice Rating	1	2	3	4	5	Comments
Timeliness						
Presentation						
Quality of advice						
	Poor		Satisfactory		Excellent	

ATTACHMENTS:
Attachment A – Current and proposed composition of the PSR Panel
Attachment B – Curriculae vitae of recommended panel members
Attachment C – Instrument of appointment
Attachment D – Names, location, discipline and gender of proposed Panel members

2.

Case Example The Peer Standard

1. We **attach** an excerpt of a transcript of an exchange between the chairperson of a PSRC and another member of the PSRC. In that exchange (which occurred while the PUR was out of the hearing room) the PSRC member acknowledges that only 1 in 16 doctors would actually fully comply every time with the requirements of the item numbers under consideration. The chairperson revealed that in an audit of his own practice only 65% of the services he examined met the requirements of the item number and that "*...that would be pretty good so other practices would probably be lower than that*". The chairperson continued:

   > *"Well it's so hard, we were discussing that before, it's so hard to completely comply it almost makes it hurdles which that are un-jumpable."(sic)*

2. We submit it is inconceivable in those circumstances that a PSRC properly applying s.82 could reasonably conclude that the general body of general practitioners would regard the deficiencies in the PUR's medical records to be 'unacceptable'. Yet, despite that exchange and those acknowledgements by two of the three members of the PSRC, the PSRC found <u>all</u> of the PUR's services of the relevant types to amount to inappropriate practice.

PSRC No.[redacted]

Audio recording [redacted] November [redacted]

Time: 10. 12 27s am to 10.14 20s am

Chairperson: He'll come back and say he made the phone calls but didn't record them. That's the easiest way for him.

[redacted] Yep, yep.

[redacted] .....If he says its records at any point then you obviously if you've got the record there and you'll say well where is it?

Chairperson Yeah, we'll he'll not do himself a lot of good that way. With, if they're going to take the strategy, which is probably the most obvious one and that is that the records are poor but we did everything that...

[redacted] That everything isn't documented?

Chairperson: ....The problem they have with TCA and GPMPs is that the record is so much a part of what's required that you know failing on the record it pretty much your death bed isn't it.

[redacted] How many people actually take all those steps in general practice?

[redacted] Well I do in my practice but I'm highly motivated.

[redacted] Yes, yes..

[redacted] ...No, no. The answer is none. One out of 16 would do it...

Chairperson: Well I think the answer....

[redacted] 1 out of 16 would do it every time.

Chairperson: Every time?

Chairperson: I did in an audit in my practice and I was saying to [redacted] yesterday, an audit, and I think we came up with about 65% as having done everything properly and then the 35% had a few misses in it and that would be pretty good so other practices would probably be lower than that.

[redacted]

[redacted] .....never meet the descriptor in general practice?

Chairperson Well it's so hard, we were discussing that before, it's so hard to completely comply it almost makes it hurdles which that are un-jumpable.

[redacted] And that's what needs to go back to Tony for you guys...descriptor.

Chairperson: Well the thing is they're looking at getting rid of it.

Case Example Dealing with evidence in a PSRC Hearing

The following case amply demonstrates the need for legal skills to deal with evidence.

1. The conduct of a consultant physician in connection with the physicians rendering of two types of (around 300 services) was referred to a PSRC.

2. Because of the particular tests involved, it was possible to 'guess' what the range of possible concerns about those item numbers could be and accordingly the doctor's lawyers qualified experts (3 of the most senior practising physicians in the PUR's sub-speciality in the state) to prepare expert reports on the PUR's conduct. The experts reviewed all of the medical records which were before the PSR and concluded unequivocally that every service had been properly performed and that the PUR's conduct would be regarded by peers not merely as acceptable but, in some respects, exemplary.

3. The expert reports were tendered to the PSRC and accepted into evidence. All experts were made available for cross examination.

4. The experts came to the hearing and observed a part of the PSRC's questioning of the PUR.

5. One of the experts was called to give evidence and was sworn by the Committee.

6. The Committee did not ask one single question of the expert about his opinion supporting the PUR nor challenge his report or put to him any contrary proposition.

7. The PSRC prepared a draft report in which it proposed finding the PUR guilty of inappropriate practice.

8. The 3 experts whose reports were in evidence were again asked to consider the PSRC's draft report and proposed findings and were consistent in their views that all of the conduct was acceptable to the PUR's peers. In addition, a fourth expert (the Head of department at a major teaching hospital in Sydney) was also commissioned to provide a report on the Draft Report. All 4 'supplementary' reports were supportive of the PUR. The supplementary reports were tendered with the submission in response to the Draft Report. The PSRC was invited to reconvene the hearing to question the experts. The PSRC chose not to do so.

9. The PSRC found the PUR guilty of inappropriate practice on the basis that, in three cases, the PSRC found, contrary to the untested expert reports, some criticism of the medical record of the service and in one case the PSRC believed, again contrary to the untested expert evidence, that the service should not have been performed on an elderly patient.

10. The inadequacies in the medical records reported by the PSRC to support its finding of guilt were of the most extremely minor kind. For example, the PUR was found guilty of inappropriate practice in one case because there was no recording of the patient's blood pressure in the progress note although there was a copy of a letter back to the referring GP dictated by the cardiologist during the consultation which clearly stated the patient's blood pressure.

11. During the proceedings (and reportedly because of the stress caused by the proceedings) the PUR actually attempted suicide. The PUR was devastated by the finding of guilt.

Case Example s 92 Agreements

1. In this matter the Director, on reviewing records, came to the view that the PUR had been guilty of inappropriate practice in relation to the use of item 53 and item 54 (Level B and Level C consultations). He insisted on the following repayment –

   Repayment of $52,297.00 itemised as follows:

   - Item 53 – 25% of Medicare benefits paid during the review period - $32,954.00.00
   - Item 54 – 30% of Medicare benefits paid during the review period - $6,657.00
   - Item 5040 – 30% of Medicare benefits paid during the review period - $8436.00
   - Item 0035 – 100% of Medicare benefits paid during the review period - $1,501.00
   - Item 3004 – 70% of Medicare benefits paid during the review period - $749.00

   In addition he required a four month total disqualification from all Medicare benefits.

2. Considering that a general practitioner can, without working excessive hours, earn upwards of $300,000.00 a year, this equated to a total economic impact on the practitioner of an amount of about $150,297.00.

3. It was submitted to the Director that determination sought was excessive and that the number of occasions on which a service would not be supported by a general body of peers was less than the proportion for which repayment was sought. Nevertheless, for the purposes of negotiating an agreement, the practitioner accepted the percentages identified by the Director.

4. The practitioner submitted that in circumstances where one item number, such as item 53, was inappropriate, he would have been entitled to an item 52 (which has a lesser fee attached) and for an item 54, he would be entitled to an item 53 which would reduce the payment to $29,000.00. It was suggested that disqualification was not appropriate in all of the circumstances but if one was required, it should be confined to item numbers such as item 54 and surgical item numbers.

5. The Director rejected the PUR's offer and was unwilling to negotiate further. The matter was heard by a PSRC which found as follows:

   (a) Item 53 – no adverse findings as the Committee after reviewing the records, decided not to examine those any closer

   (b) Item 54 – 58% of services considered inappropriate

   (c) Item 30035 – 7 services considered inappropriate

   (d) Item 30052 – 12 services considered inappropriate

6. The matter was one of the 39 cases dismissed by PSR in early 2011. However, had the PSRC's findings been the subject of a determination by the DA, the maximum repayment would have been $15,775.58 and then only if the DA did not accept that the amounts should be reduced to take into account that the PUR could have itemised a lower cost service in place of the one which is found to be inappropriate.

7. This is an example, of a matter which proceeded to a committee because the Director was not prepared to consider negotiating about what was an inappropriate service and what amounts should be repaid and particularly about any period of disqualification.