

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 29/06/2018 8:42:42 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating Application for Relief Under Section 39B Judiciary Act 1903 - Form 69 - Rule 31.11(1)
File Number:	QUD443/2018
File Title:	ANCHITA KARMAKAR v MINISTER FOR HEALTH MP GREG HUNT
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Dated: 29/06/2018 4:07:48 PM AEST

A handwritten signature in blue ink, appearing to read 'Warwick Soden'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**Originating application for relief under section 39B Judiciary Act 1903**

No. \_\_\_\_\_ of 2018

Federal Court of Australia  
District Registry: Queensland  
Division: General

**Anchita Karmakar**

Applicant

**Minister of Health**

**MP GREG HUNT**

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**Time and date for hearing:**

**Place:**

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority  
of the District Registrar

A handwritten signature in black ink, appearing to be 'AK' or similar initials.

Filed on behalf of (name & role of party) Anchita Karmakar (APPLICANT)  
Prepared by (name of person/lawyer) \_\_\_\_\_  
Law firm (if applicable) \_\_\_\_\_  
Tel 0400700966 Fax \_\_\_\_\_  
Email anchitajuju@gmail.com  
**Address for service** 34 Beazley Circuit Bridgeman Downs QLD 4035  
(include state and postcode) \_\_\_\_\_



## Details of claim

On the grounds stated in the statement of claim, accompanying affidavit or other document prescribed by the Rules, the Applicant applies for the following relief under section 39B of the *Judiciary Act 1903*:

1. That it be declared that the current Medicare audit scheme executed as delegated powers by the Department of Health, Professional Review Program(**PRP**) and the Professional Service Review(**PSR**) is one of the main contributors of preventable errors by healthcare professions.
  - a. Currently there are over 18,000 deaths from preventable medical error in Australia, next to death from Cancer and Cardiovascular complications.
  - b. The current audit system is creating unnecessary audit anxiety resulting in clinicians withholding essential medical/health services clinically needed by patients which is the intention of the Health Insurance Act; to provide universal access to healthcare.
  - c. This is in fact, inadvertently jeopardizing the welfare of the general public, leading to medical errors and adverse outcomes.
  
2. That it be declared that section 106ZR of the Part VAA Health Insurance Act is invalid because it:
  - a. Impermissibly burdens the freedom of political communication inferred from the Commonwealth Constitution;
  - b. Is incompatible with the Commonwealth Constitutional guarantee of affording natural justice to the appellant
  
3. That it be declared that there is enough evidence to support the contention that the Medicare billing system is generally poorly understood and that Medicare has the resources to notify perceived problematic billing on a timely basis to resolve these issues quickly, openly and transparently and to the benefit of the patients, practitioners and the community's needs; however this is not currently exercised and will need to be rectified
  
4. That it be declared that currently there are no commonly agreed and contemporary guidelines, standards and or benchmarks published which are legislatively endorsed, and which clearly defines the minimum requirements needed for practitioners to be eligible for the income derived from Medicare for the services they provide to patients

AK



5. That it be declared that the checks must be put in place to ensure there is consistency of ruling or deliberations made by the PRP and PSR. Currently there are none, due to the privacy clause embedded within the Health Insurance Act, Section 106ZR, prohibiting practitioners to learn and rectify any findings of inappropriate conduct, and or to ensure rulings are consistent for all accused by having commonly agreed standards
6. That it be declared that PRP and PSR are not adhering to the principles of Natural Justice and Due process in absence of published precedential hearings and or published peer reviewed and endorsed standards and guidelines. Due to this fact, fundamentally, this process is unfair and prejudicial to any clinician subjected to an audit investigation by these organisations
7. That it be declared that any audit process conducted against a clinician in regard to their billing with emphasis on clinical relevance (in absence of commonly peer reviewed and agreed standards), medical record keeping or clinical reasoning need to follow and adhere to the principles of Natural Justice or risk being declared invalid if it can be shown that such was not the case and any adverse finding was made against any practitioner in the past, present and future
8. That it be declared that in previous matters involving the PSR and or PRP, there was a wrong assumption made by the courts that there was peer reviewed and agreed clinical standards which all clinicians and relevant professional bodies followed, and therefore, notwithstanding these clinical standards, practitioners are not afforded due process in context to the implied emphasis on clinical relevance when determining if the clinician had billed inappropriately or not
9. That it be declared that one of the current identification process of clinicians rely on the NPS Medicine Wise(**NPS**) data analysis and or the Provider Digital Access(**PRODA**) Medical Billing statistics, which is highly unreliable since NPS data and PRODA data is collected with no clinical profiling allowing for any sub specialisation factors of the clinician or the demographic variance which may affect the billing patterns
10. That it be declared that Australian Medical Association (**AMA**) and Royal Australian College of General Practice (**RACGP**) and other relevant professional bodies are all in violation of their own corporate constitution to their minority stakeholders being their members by participating in the selection process and appointment process of the PSR Directors and Committee panel members as empowered by the Health Insurance Act
11. That it be declared that **AMA, RACGP** and other relevant professional bodies be excluded from this PSR process to enable individual clinicians to seek guidance, support and advocacy as part of their minority stakeholder's rights, protected under section 140 of the Corporations Act

A handwritten signature in black ink, appearing to be 'S' or 'S.', located at the bottom right of the page.



12. That it be declared that an Independent Healthcare Standards and Ethics Board (**IHSEB**) (as proposed by David Dahm) be established to ensure standards, guidelines, and benchmarks which are peer reviewed, endorsed, published which professional bodies including the **PRP** and **PSR** may consult initially when questionable billing and or conduct is recognised/identified. The primary role of IHSEB is to encourage research, teaching, promulgation and self-regulation of professional standards
13. That it be declared there is a need for the relevant professional bodies, Medical Defence Organisations and the Government to implement the 2011 findings in the Federal Senate Professional Service Review inquiry.
14. That it be declared that clinicians subjected to Medicare audits and interrogation must be afforded just terms for the requisition of their acquired property despite the findings made in the *Peveril vs Health Insurance Commission* case in 1999 where income derived from bulk billing was classified as being gratuitous and not acquired property, being an income, which was not statutorily protected and therefore not having any just terms
15. A writ of prohibition issue directed to the **PRP** and **PSR** to not conduct any further reviews, interrogations, interviews and rulings prior to the establishment of IHSEB and review of consistency of rulings in deliberations and findings of **PSR/PRP** over the years to ensure clinicians are afforded natural justice
16. A writ of mandamus instructing AMA, RACGP and other relevant professional organisations to reconsider their involvement with audits, and their mentions in the legislation and to remove themselves from the process and or to consider altering their company constitution to reflect their true activities
17. A writ of mandamus instructing AMA, RACGP and other relevant professional organisations to work in collaboration to aid in the formation of IHSEB addressing the issues mentioned in this case, in the name of preserving public health interest and sustainability
18. A cost order be made of a "no cost order" as per Judicial Review Act 1991 (QLD) Section 49 (2)(b) and Federal Court Act 1976 (Cth) Section 43:
  - a. The applicant raises a legitimate public interest issue, where the general public with health conditions may have difficulties in accessing good quality health care due to the legal controversies
  - b. The applicant raises significant issues as to the interpretation and future administration of the relevant act
  - c. The applicant raises a novel question of the general interpretation and operation of the relevant Act



- d. The applicant has contributed to the proper understanding of the law in question
- e. The applicant has no private financial gain
- f. The applicant is properly exercising the public administration of law
- g. The applicant has no financial ability to meet any cost orders and that it would force the applicant to abandon the proceedings

### **Claim for interlocutory relief**

The Applicant also claims interlocutory relief.

1. Such orders are as necessary to enable an expedited hearing of this proceeding to take place prior to the Applicant's stage 2 determinations under the **PSR** or such later time as the court directs.
2. Further or alternatively, an interlocutory injunction until the hearing and determination of this proceedings are made regarding all current **PRP/PSR** matters against all clinicians

### **Jurisdiction**

1. The application is made pursuant to ss75(iii) and 75(v) of the constitution, and is a matter arising under the Constitution and involving its interpretation pursuant to s30(a) of the Judiciary Act 1903(Cth)
2. The application is made pursuant to section 39B(1A) (1B) (1C)(1EA) of the Judiciary Act 1903 (Cth), and is a matter arising under the constitution or involving its interpretation with a relief of declaration, injunction, prohibition and mandamus

### **Standing**

3. She is currently a generally registered Medical Practitioner who has been and will be directly affected by the outcome of these proceedings in context to her ability of earning a living and future career prospect
4. The applicant has gone through the process of PRP, PSR Director's Interview, and PSR Committee Hearing, pending recommendations from PSR Stage II
5. The applicant was also an active paying member, being a minority stakeholder of the AMA and RACGP
6. The applicant has a matter yet to be determined by the PSR Committee
7. The applicant's interests are affected because:



- a. She has an interest in ensuring the public monies are spent in accordance with law
- b. She has an interest in ensuring that the powers of the Parliament not delegated to members of the Executive without any consideration of relevant facts, affording the applicant due process and is executed in ultra vires without appropriate parliamentary scrutiny of those powers; and
- c. She also owes fiduciary obligations to her patients ensuring that such processes do not adversely affect that way clinicians provide health care to the general public

## Grounds

### Pertaining to invalidity of Section 106ZR

#### The Test for Compatibility

1. A law (including law of a State) will be incompatible with the freedom of political communication inferred from the Commonwealth Constitution, and hence invalid, where (see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1 at [93], [196], [210]):
  - a. the law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and
  - b. the law is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.
2. It has been proposed that the second branch of that test involves two inquiries:
  - a. The first concerns the proportionality between the legislative object and the means adopted for its attainment. Thus, "if the means employed go further than is reasonably necessary to achieve the legislative object, and are disproportionate to it", then the burden cannot be justified: see *Monis v The Queen* (2013) 295 ALR 197 at [280]; and
  - b. The second concerns the proportionality between the law and the maintenance of the constitutionally prescribed system of representative and responsible government. Thus, it is necessary to assess "the extent of the restriction imposed upon political communication" to establish whether the law imposes an "undue burden" on the freedom: see *Monis v The Queen* (2013) 295 ALR 197 at [282].





First limb: Section 106ZR Burdens the Freedom of Political Communication

3. The prohibition of the Applicant disclosing the deliberation and findings of the PSR process other than to her solicitor or barrister burdens the freedom of political communication in two ways.
4. First, communication constituted by publishing and discussing the findings and deliberation of the committee hearing content is explicitly prohibited and the freedom is thus burdened to that extent: see, e.g., *Monis v The Queen* (2013) 295 ALR at [343]; *Roberts v Bass* (2002) 212 CLR 1 at [102]; *Levy v State of Victoria* (1997) 189 CLR 579, 614; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 130.
5. Secondly prohibition on disclosure of findings and deliberations defeats the purpose of the originating legislation of ensuring public wellbeing is maintained by enforcing the right usage of Medicare funding for clinically relevant and compliant care, as clinicians do not have any published peer reviewed and agreed standards nor access to precedential case findings due to this legislation
6. For these reasons, it is submitted that the likely effect of section 106ZR is to significantly diminish the ability of a clinician to maintain and deliver consistent standard of care to the public, and to have the ability to be interrogated in a fair and just manner

Second limb: No proportionality between legislative object and legislative means

7. Section 106ZR is interpreted by the PSR Committee panel as of 'paramount importance in securing and ensuring the privacy of the patient file content and of the clinician's privacy'
8. This reasoning and interpretation made by the Committee is unreasonable and gives no rationale to support the legislative object. Patient demographics and clinician's details can be redacted as deemed appropriate and the findings and deliberations could be published with no breach of privacy
9. As a matter of fact, under section 106ZPR of the Health Insurance Act, the Director of PSR has the right to publish any names and details of clinicians who have had a determination made against them, and therefore, the proposition that Section 106ZR is in existence for the 'maintenance of privacy' of the clinician bears no standing
10. Once again, therefore, it is submitted that section 106ZR selects irrelevant criterion upon which to operate and there is thus no proportionality between the means selected and the legislative object.
11. The legislative means are also disproportionate to the object because they create the chilling effect of Medicare audit anxiety, which illustrates many clinicians in Australia suffer from this and is influencing the way they provide care to the public. To the extent





that law prevents or prohibits parties and affiliated organisations from publishing these findings and deliberations, it goes well beyond the legislative object. The secretive nature of these interrogation is a burden out of all proportion to the need to ensure sustainability of public health insurance funding and public well-being.

### **Pertaining to invalidity of the current PSR interrogation and parties involved**

#### **12. Ground One is that the ground of Unreasonableness**

- a. This ground rests on the premise that:
  - i. ...when discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.<sup>1</sup>
- b. Categories of unreasonableness in correlation to this case include:
  - i. That the decision was devoid of plausible justification<sup>2</sup>
  - ii. The giving of excessive or inadequate weight to a consideration
  - iii. Making an erroneous finding of fact on a point of importance
  - iv. The unnecessarily harsh effect of the decision
  - v. Failure to give genuine, proper and realistic consideration to the matter including making adequate inquiry as to facts
  - vi. Demonstrate inconsistency with other decisions and
  - vii. Discrimination with a rational distinction
- c. In particular to this case, the PSR committee panel has the duty to conduct an adequate inquiry, whereby a decision-maker may act unlawfully by not attempting to obtain information 'when it is obvious that material is readily available which is centrally relevant to the decision to be made' or where the available material 'contains some obvious omission or obscurity that needs to be resolved before a decision is made.'<sup>3</sup>
- d. The PSR Committee and the Director of PSR did not conduct these inquiries and disregarded the fact that the Applicant was a GP registrar at the time of audit, the

<sup>1</sup> *Kruger v The Commonwealth* (1997) 190 CLR 1, 36 per Brennan J. Adopted also by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 650

<sup>2</sup> *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379

<sup>3</sup> *Videto v Minister for Immigration and Ethnic Affairs* (1986-7) 69 ALR 342, 353 per Toohey J.



fact that documents were in fact missing and did not use their legislative authority to subpoena any relevant employers or supervisors for the Applicant

13. Ground two is of Relevant /Irrelevant consideration, where relevant factor such as patient outcome, patient statements were not taken into consideration.

- a. Factors a decision maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. Part VAA of the Health Insurance Act expressly states the considerations to be taken into account, and therefore, it will be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors are not expressly stated, i.e. patient outcome and patient declarations, they must be determined by implication from the subject matter, scope and purpose of the Act
- b. Under the current procedure, patient input is completely oblivious when the primary scope and purpose of the Act is to ensure monies of the Commonwealth is spent in accordance to clinically relevant and sustainable practice by the clinician. The decision to deem whether the care given and its accordance to the regulations of the billed item is currently, based on opinion and heavy emphasis on medical records, when it should be a factor, not a determining factor.

14. Ground three is of Procedural fairness (including probative evidence)

- a. The doctrine of procedural fairness represents an important aspect of good administration. Ways in which it does this include by:
  - i. Appealing to a fundamental sense of justice
  - ii. Ensuring that all the necessary information is obtained from the parties
  - iii. Ensuring high quality impartial decisions; and
  - iv. Fostering public confidence in the fairness of the administrative system
- b. The Doctrine has two elements:
  - i. That a decision maker must afford an opportunity to be heard to a person whose interest will be adversely affected by a decision and
  - ii. The decision maker must be impartial and disinterested in the matter to be decided
  - iii. Currently there is no regard to patient outcome or the circumstances behind why clinicians are billing in certain patterns nor are there any published standards to use for judgements



- c. Breach of Procedural Fairness can be illustrated by considering the rules of Probative evidence, rules of Bias, and rules of Rights to be heard.
- i. Right to be heard: as seen in *Kioa v West*, however in this case Applicant is not afforded the right of legal representation
  - ii. Bias: may be actual or apprehended and may manifest itself in the decision-maker's personal associations, interests or in the structure of the decision-making process
    1. Committee members, Director, and executives have all prejudged assumptions regarding the decision of who is guilty or not. Many have been through the PSR system themselves and or are affiliated with organisations such as Medical Board of Australia or AMA and or board directors of various Medical Defence Organisations which can be taken as actual and apprehended bias towards the Applicant
  - iii. Probative evidence: In *R v Deputy Industrial Injuries Commission, ex parte Moore*, Diplock LJ noted that natural justice requires that tribunal's decisions are based on some evidence of probative value, that is:
    1. the requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant.<sup>4</sup>
    2. In this case, there were no 'evidence' to take into consideration at all. The only evidence was based on medical records owned by the Applicant's employers and or the oral evidence the Applicant gave during the various interview and hearing process retrospectively from memory. No patients were interviewed even though this whole process is about whether the patient's insurance money was paid out to the Applicant for the service provided.

<sup>4</sup> (1965) 1 QB 456, 488. See also the Privy Council in *Mahon v Air New Zealand* [1984] AC 808

MO

**Applicant's address**

The Applicant's address for service is:

Place: 34 Beazley Circuit Bridgeman Downs QLD 4035

Email: anchitajuju@gmail.com

**Service on the Respondent**

The Respondent(s) address for service is:

Parliament House

Canberra ACT 2600

Phone: (02) 6277 7220

Email: [Minister.Hunt@health.gov.au](mailto:Minister.Hunt@health.gov.au)

It is intended to serve this application to Respondent.

Date: 29<sup>th</sup> of June 2018

A handwritten signature in black ink, appearing to be 'A. Karmakar', written over a horizontal line.

Signed by Anchita Karmakar  
Applicant

*I certify that this is signed by  
Anchita Karmakar in my  
presence. Pp 10 c of Dec  
Reg NO 3111.  
DIECKMANN PAULINE  
29.6.18*