

Court rules Medicare referrals probes invalid

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EVERY major Medicare referrals probe in the past six years could be declared invalid because the federal health minister — first Tony Abbott and now Nicola Roxon — failed to consult the Australian Medical Association on the appointment of investigators.

In a massive blow to the Professional Services Review, the full bench of the Federal Court has ruled that the ministers' failure to consult the AMA — as required under legislation — meant investigative committees were improperly constituted and had no legal basis to hear cases.

The decision has rocked the federal government and puts its ability to regulate doctors' use of Medicare under a cloud. The four doctors who fell foul of the PSR and won this week's landmark case have all had action against them overturned. They have also set a legal precedent that undermines scores of other cases, some of which have resulted in doctors being reprimanded, suspended or banned from using Medicare, or even ordered to repay millions of dollars in government funds.

The PSR, a statutory body established in 1994, is the protector of Medicare funds in Australia and has been at the forefront of government attempts to rein in health

spending. Headed by a director, the PSR has a panel of health professionals, normally appointed for five years, from which deputy directors are drawn to head investigative committees comprising other panel members.

With Ms Roxon on leave yesterday, it was left to the Department of Health and Ageing to try to explain the extraordinary legal drama, considered so sensitive a spokeswoman could release only a brief statement and not respond to questions. "The government sees the maintenance of the integrity of Medicare as a high priority and takes very seriously the issues of compliance by healthcare practitioners," the spokeswoman said.

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STEVE HAMBLETON
PRESIDENT, AMA

"The government is seeking urgent legal advice about the Federal Court findings and is reviewing its options."

While lawyers involved in the case were unable to predict the ramifications of the judgment, AMA president Steve Hambleton said it was a "momentous decision" that would produce considerable fallout. Dr Hambleton said the

PSR's findings against all doctors investigated by committees since 2005 were under a "significant threat". He reiterated that the AMA — meant to be a point of liaison for medical colleges in relation to the PSR's work — was not consulted on the 2005 or 2009 appointments to the committee.

"We keep telling the government they have to consult with the AMA, that there is legislation saying you must consult with the AMA, but they just haven't listened," he said. "We have no criticism of the role of the PSR, or the individuals (appointed to the committees) themselves, but we're meant to be there to ensure justice is done and seen to be done, and

that due process is followed."

The four doctors took action after *The Weekend Australian* revealed concerns over the appointment of doctors to the PSR panel and committees. Earlier this year, continuing uncertainty forced the PSR to abandon 39 cases it had taken on referral from Medicare last year. PSR annual reports suggest that since 2005-06, there have been at least 52 other doctors sent before PSR committees, normally resulting in a finding of inappropriate practice; the department refuses to say whether all cases are now invalid.

Dr Hambleton said the judgment would force the PSR to revisit cases involving "huge

amounts of money and huge amounts of pain and suffering for individuals".

"I think that all of the people that are affected will be fully aware of this outcome and I think this is applicable much more broadly than just the people who were before the court," he said.

Government barristers tried to convince the judges that parliament would never have intended a failure to consult to render the appointments and the work of the committees invalid, and to do so would cause "significant public inconvenience".

Nonetheless, the judges found the failure to consult was illegal.

"No doubt, the parliament

would not have anticipated the significant, but apparently unintended, failures of each minister to consult the AMA at all on the impugned appointments he and she made in 2005 and 2009," the judgment states. "Those failures appear to have resulted from an incorrect view of the meaning of consultation by those advising the ministers as opposed to any conscious decision not to comply with the requirements of the act by either minister.

"The magnitude of the consequences of the court finding invalidity here is simply the product of the scale of the breaches of both ministers' statutory obligations over a considerable period."