

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

- Case Title:** Quach v RU (No 1)
- Citation:** [2017] ACTSC 233
- Hearing Dates:** 19 April, 2 June, 10 July 2017
- Decision Date:** 21 August 2017
- Before:** Penfold J
- Decision:**
1. The contempt application is dismissed.
 2. Leave is given to the Health Care Complaints Commission to withdraw its application to set aside the subpoena dated 12 August 2016.
 3. Mr Quach is to pay:
 - (a) half of the Health Care Complaints Commission's costs of the contempt application and the application to set aside the subpoena; and
 - (b) any costs incurred by RU in connection with these applications;as agreed or assessed.
- Catchwords:** **PROCEDURE** – Contempt, attachment and sequestration – failure to comply with subpoena issued in ACT and served in NSW – application for subpoena recipient to be dealt with for contempt – initial reliance on statutory immunity to justify failure to comply – late application by recipient for subpoena to be set aside – subpoena not effectively served under *Service and Execution of Process Act 1992* (Cth) – no contempt found – application for subpoena to be set aside withdrawn – recipient's initial approach to subpoena delayed resolution of issues – successful recipient to receive only half its costs of applications.
- Legislation Cited:** *Criminal Code 2002* (ACT), s 720
Director of Public Prosecutions Act 1986 (NSW), s 28
Domestic Violence and Protection Orders Act 2008 (ACT)
Health Care Complaints Act 1993 (NSW), ss 80, 99A, 99A(1), 99A(2)
Service and Execution of Process Act 1992 (Cth), ss 3, 5, 29, 30, 30(1), 30(1)(b), 31, 31(a), 32, 59(a), pt 3, div 1
Court Procedures Rules 2006 (ACT), rr 4, 2444, 2445, 6606(4)
Service and Execution of Process Regulations 1993 (Cth), reg 4, Forms 2, 5
- Cases Cited:** *Annetts v McCann* (1990) 170 CLR 596
Application of Robert William Whitton [2007] NSWSC 606
Quach v RU (No 2) [2017] ACTSC 234
Quach v NSW Civil and Administrative Tribunal (No 2) [2017] NSWCA 182

Parties: Michael Van Thanh Quach (Appellant)
RU (Respondent)
Health Care Complaints Commission (NSW) (Respondent/
Applicant)

Representation: **Counsel**
Unrepresented (Appellant)
Mr B Thomson (Respondent)
Mr B Thomson (Respondent/Applicant)

Solicitors
Unrepresented (Appellant)
NSW Crown Solicitors Office (Respondent)
NSW Crown Solicitors Office (Respondent/Applicant)

File Number: SCA 36 of 2016

Decision under appeal: Court: ACT Magistrates Court
Before: Magistrate Morrison
Date of Decision: 13 April 2016
Case Title: Dr Michael Van Thanh Quach v [RU]
Court File Number: [RO 16/177]

Introduction

1. Michael Van Thanh Quach appealed against a Magistrate's refusal to make a personal protection order against a solicitor employed by the NSW Health Care Complaints Commission (the **HCCC**). The decision on that appeal was deferred until this matter was resolved, and can be found at *Quach v RU (No 2)* [2017] ACTSC 234.

The subpoena

2. In September 2016, before the appeal was heard, Mr Quach served a subpoena dated 12 August 2016 on the HCCC requiring the production of a large number of documents, many of them not obviously relevant to his appeal (the matters sought are listed in Attachment A). The HCCC responded to the subpoena by letter from Michael Darmody, Senior Legal Officer, saying:

I advise that section 99A(2) of the Health Care Complaints Act provides that a person may not be compelled in any legal proceedings to give evidence about, or produce documents containing, any information obtained in exercising a function under this Act.

Section 99B of the Health Care Complaints Act (copy extract attached) permits the release of information obtained in exercising a function under the Health Care Complaints Act in certain circumstances, at the Commission's discretion. Based on the information provided to the Commission, the Commission has decided not to produce any documents.

3. The HCCC took no steps to have the subpoena set aside.

Contempt application

4. On 19 September 2016, Mr Quach filed an application in proceeding alleging that the HCCC's failure to respond to the subpoena was a contempt of the court.
5. The hearing of the contempt application was adjourned pending the hearing of Mr Quach's appeal. That appeal was heard on 27 February 2017. At the end of the hearing, I reserved my decision, subject to the possibility of re-opening it after the contempt application had been dealt with. This was to ensure that if, as a result of his contempt application, Mr Quach obtained any documents that he considered were relevant to that appeal, he would have the opportunity to tender such documents and to make further submissions on the appeal.

Attempt to resolve subpoena dispute

Day 1: 19 April 2017

6. I began hearing the contempt application on 19 April 2017. At the beginning of the hearing, Mr Quach took exception to the HCCC being represented on the application by Mr Thompson. His argument was that:

On the basis that he represents the Office of the Attorney General for New South Wales and by acting to represent the HCCC and its employees, he is in breach of section 28 of the Director of Public Prosecution Act.

7. Section 28 of the *Director of Public Prosecutions Act 1986* (NSW) (headed "Attorney-General's functions to prevail"), provides that the Director of Public Prosecutions (**DPP**) cannot, without the Attorney-General's consent, exercise a function inconsistently with the manner in which the Attorney-General has exercised the function in the same matter.
8. Mr Quach has not identified any attempt by the DPP to exercise a function in this matter in a manner inconsistent with the Attorney-General's exercise of a function in this matter – indeed I cannot see that either the Attorney-General or the DPP has sought to exercise any function at all in this matter.
9. I refused Mr Quach's application to exclude Mr Thompson from the hearing.
10. Counsel for the HCCC indicated that the HCCC would no longer rely upon s 99A(2) of the *Health Care Complaints Act 1993* (NSW) to excuse its non-compliance with the subpoena, and there was discussion about whether some documents might appropriately be provided.
11. At the end of the day's proceedings, I made orders for the HCCC to indicate what material it considered could or should be provided under the subpoena, and for Mr Quach to try to narrow the scope of his subpoena to exclude any irrelevant material.
12. The contempt application was adjourned until 10 July 2017. The matter was also listed for mention on 2 June 2017, at which time each party was to produce its responses to the other party's revised approach to the subpoena, so that orders could be made in relation to the hearing on 10 July 2017.
13. On 17 May 2017, the HCCC provided a more considered response to the subpoena, although it still amounted to a refusal to produce any documents. However, each specific category of documents was addressed. Section 99A was relied on in respect of

only 8 of the 21 categories of documents sought, and in each case alternative grounds for refusal were also identified. Other grounds for refusal relied on were:

- (c) that the documents do not exist;
- (d) that the documents have already been provided;
- (e) that provision of the documents would be too onerous;
- (f) legal professional privilege;
- (g) relevance; and
- (h) that the description of the documents is too broad.

Day 2: 2 June 2017

Application to set aside subpoena

14. On 2 June 2017, the contempt application was mentioned, and the HCCC filed an application in proceeding to set aside the subpoena.

Mr Quach's response

15. Mr Quach, however, said that he had decided not to try to narrow down the scope of the subpoena, but that he wanted the contempt application to be heard as filed. The matter was again adjourned, to 10 July 2017.
16. Mr Quach's approach raised questions in my mind about his intentions in relation to his use of court processes, and in particular about whether the subpoena was issued in good faith.
17. If Mr Quach genuinely believed that his subpoena might secure the production of documents that would be relevant in his appeal from the Magistrates Court, then it is hard to see why, having been offered a second opportunity to obtain some of those documents while the appeal hearing remained unresolved, he preferred to pursue the contempt application rather than the documents.

Day 3: 10 July 2017

18. Before 10 July 2017 when the matter was listed to resume for the hearing of the contempt application, the parties had provided written submissions. The HCCC submitted that the subpoena had not been effectively served, and therefore:
 - (a) there had been no contempt; and
 - (b) the HCCC did not need to pursue its application for the subpoena to be set aside.

The HCCC's submissions

19. The HCCC's challenge to the subpoena was based on the terms of the *Service and Execution of Process Act 1992* (Cth) (the **SEP Act**).
20. Mr Quach's subpoena was expressed to require the HCCC to produce documents to the ACT Supreme Court, and accordingly fell within the definition of "subpoena" in s 3 of the *SEP Act*.

21. Division 1 of pt 3 of the *SEP Act* deals with the service of subpoenas generally. Section 29 of that Act provides that a subpoena issued in a State by a court may be served in another State. Under s 5 of the *SEP Act*, each Territory is to be regarded as a State for the purposes of the Act. Thus, a subpoena issued by an ACT court may be served in, for instance, NSW.
22. Other provisions of div 1 of pt 3 of the *SEP Act* set out the procedures for serving subpoenas in other Australian jurisdictions.

Time for service

23. Section 30 of the *Sep Act* is as follows:

30 Time for service

- (1) Service of the subpoena is effective only if the period between service and the day on which the person to whom the subpoena is addressed is required to comply with the subpoena is not less than:
 - (a) 14 days; or
 - (b) such shorter period as the court of issue or the authority of issue, on application, allows.
 - (2) The court or authority may allow a shorter period only if it is satisfied that:
 - (a) the giving of the evidence likely to be given by the person to whom the subpoena is addressed, or the production of a document or thing specified in the subpoena, is necessary in the interests of justice; and
 - (b) there will be enough time for the person:
 - (i) to comply with the subpoena without hardship or serious inconvenience; and
 - (ii) to make an application under section 33.
 - (3) In granting an application, the court or authority:
 - (a) is to impose a condition that the subpoena not be served after a specified day; and
 - (b) may impose other conditions.
24. Mr Quach's subpoena was issued out of the ACT Supreme Court on 12 August 2016; it showed 9 September 2016 as the last date for service, and 16 September 2016 as the date for compliance. It was received in the HCCC on 6 September 2016 (that is, only 10 days before the date for compliance). A copy of the subpoena as received was annexed to an affidavit sworn by Mr Thompson on 29 May 2017.
 25. Although s 30(1)(b) of the *SEP Act* permits a court to allow a shorter period than 14 days between the date of service and the compliance date, there is no evidence in this case that when the subpoena was issued, or at a later time, the court made an order allowing a shorter period between the service date and the compliance date.
 26. Thus, it appears that service of the subpoena was ineffective under s 30(1) of the *SEP Act*.

Information to be provided

27. Furthermore, it seems that there was also a problem with the material that accompanied the subpoena. Section 31 of the *SEP Act* provides as follows:

31 Information to be provided

Service of the subpoena is effective only if:

- (a) copies of such notices as are prescribed; and
 - (b) in a case where an application under paragraph 30(1)(b) has been granted--a copy of the order granting the application;
- are attached to the subpoena, or the copy of the subpoena, served.

28. Notices are prescribed in reg 4 of the *Service and Execution of Process Regulations 1993* (Cth) as follows:

4 Notices and forms

(1) For the purposes of a provision of the Act specified in a paragraph of this subregulation, the prescribed notice is a notice in the form identified by number in that paragraph:

- (a) section 16 -- Form 1;
- (b) paragraph 31 (a) -- Form 2;
- (c) section 41 -- Form 3;
- (d) section 51 -- Form 4;
- (e) paragraph 59 (a) -- Form 5;
- (f) section 69 -- Form 6.

29. The notice required by s 31(a) of the *SEP Act* to accompany a subpoena issued by a court is a notice in the form of Form 2 (set out in a schedule to the *Service and Execution of Process Regulations*). A notice in the form of Form 5 would be used for a subpoena issued under s 59(a) of the *SEP Act*, which deals with subpoenas issued by tribunals.

30. Form 2 is addressed to the recipient of the subpoena (referred to as the witness), and provides advice about the subpoena and its status, and the authority under which it is served. Under the heading "Your rights", it notes that the recipient may be able to get the subpoena set aside or varied. Under the heading "Your obligations", Form 2 advises that the subpoena must be complied with if, in summary:

- (a) the recipient has been offered or given conduct money; and
- (b) importantly, subject to any court order reducing the period, the recipient has received the attached subpoena at least 14 days before the date specified for compliance.

31. Form 5 is similar to Form 2 in most respects. However, under the heading "Your obligations", Form 5 advises that the subpoena must be complied with if:

- (a) the recipient has been offered or given conduct money; and
- (b) the subpoena is accompanied by:

a copy of an order from a court in [*State or Territory of issue*] permitting the attached subpoena to be served outside [*State or Territory of issue*] and specifying the day before which it must be served.

32. The subpoena served by Mr Quach was accompanied by a notice in the form of Form 5, rather than Form 2 as required by s 31 and reg 4. Because the subpoena was not accompanied by the correct documents, service of the subpoena was not effective under s 31.

Expenses to be met

33. Finally, s 32 of the *SEP Act* provides for “conduct money”, relevantly as follows:

Expenses

- (1) Service of the subpoena is effective only if, at the time of service or at some other reasonable time before the person to whom the subpoena is addressed is required to comply with it, allowances and travelling expenses sufficient to meet the person's reasonable expenses of complying with the subpoena are paid or tendered to the person.
34. The HCCC submissions assert that no conduct money was tendered when the subpoena was served. This submission was not supported by an affidavit to the relevant effect, but Mr Quach did not assert that conduct money had been tendered.
35. Thus, it seems that service of the subpoena was also ineffective under s 32 due to Mr Quach's failure to offer the HCCC an amount to meet the expenses of complying with the subpoena.

Subpoena not effectively served

36. Thus, the *SEP Act* renders Mr Quach's service of the subpoena ineffective in two and perhaps three separate respects – it was ineffective because it was served late, it was ineffective because it was not accompanied by the required documents, and it was also ineffective if indeed there had been no offer to meet the HCCC's relevant expenses.
37. In support of the proposition that service of the subpoena was ineffective, the HCCC relied on the case of *Application of Robert William Whitton* [2007] NSWSC 606. That case concerned a summons for attendance, and an order for production of documents, in NSW that were served, in Western Australia, by a plaintiff (the liquidator of a company) on a resident of WA who had been a director of the company. The recipient did not comply with either the summons or the order for production, and the plaintiff sought the issue of an arrest warrant.
38. In the NSW Supreme Court, White J held (at [12]) that both processes served on the recipient were subpoenas for the purpose of the *SEP Act*. His Honour declined to deal with the argument that the recipient had not been provided with sufficient conduct money (it seems that flights from WA had been booked and taxi fares were also to be met by the liquidator), but noted that, for the purposes of s 31 of the *SEP Act*, the subpoena had been accompanied by a notice in the wrong form (the notice was in the form of Form 1 rather than Form 2). His Honour said at [16]:

Mr Epton claimed that he should be provided with his airfares of returning from Florida to Sydney and that he should be provided with business class airfares because of what he claims to be his medical condition. So far as appears, these matters are a mere assertion on his part. **However, the failure to attach the correct form to the summons for examination is fatal.**

(emphasis added)

39. I am satisfied that Mr Quach's subpoena to the HCCC was not effectively served, and that the subpoena was therefore itself ineffective.

Mr Quach's response

40. Mr Quach did not seek to respond to the HCCC's arguments based on the *SEP Act*, although there was no suggestion that he had not seen the submissions in time to respond.
41. Instead, he made a variety of submissions which ranged from the obscure to the incoherent, apparently in response to the HCCC's application to have the subpoena set aside.

Scope for setting aside a subpoena after compliance date

42. There may be some merit in Mr Quach's submission to the general effect that it is too late to seek to set aside a subpoena some months after it should have been complied with. However, his submissions do not identify any specific basis for the proposition.
43. Rather, Mr Quach relies on a "ruling" attributed to Refshauge J sitting in the Court of Appeal to hear applications for leave to appeal against earlier orders made by me and Burns J setting aside other subpoenas issued by Mr Quach.
44. Mr Quach asserts that rulings made by Refshauge J exercising the jurisdiction of the Court of Appeal as a single Judge are binding on another single judge exercising the original jurisdiction of the Supreme Court. Whether this is correct (which seems unlikely) need not be pursued in this context, given the nature of the "ruling" sought to be relied on.
45. That ruling is said to be that "the statute overrides the common law". On its face this is an uncontroversial proposition, but Mr Quach claims that it is also authority for the proposition that the **absence** of a statute excludes the common law, such that "There can be no common law decisions by the lower Court". Mr Quach also cites Refshauge J in the Court of Appeal as the source of the propositions that:

A subpoena cannot be amended.

Any application to [set] aside a subpoena in whole or in part, cannot [sic] only be done within the statutory time limit.

46. I am uncertain about the concept of the "statutory time limit" relied on by Mr Quach. He seems to assert in his written submissions that the statutory time limit is "the last date for service of the subpoena", but this makes no sense, in that it suggests that serving a subpoena on the last day for service would of itself prevent the setting aside of the subpoena.

Application of *Court Procedures Rules* in personal protection matters

47. Mr Quach pointed out that r 4 of the *Court Procedures Rules 2006* (ACT) (the **Rules**) at the return date of the subpoena (16 September 2016) excluded the application of the Rules to the *Domestic Violence and Protection Orders Act 2008* (ACT) unless a territory law otherwise provided, and submitted that this meant that the Supreme Court had no statutory power to set aside a subpoena issued in proceedings under that Act. To the extent that his submission might be correct, it would seem also to mean that the obligations under the Rules (specifically r 6606(4)) to comply with subpoenas do not apply to subpoenas issued in such proceedings.

Application of *Criminal Code* provisions

48. Also in response to the HCCC's application for the subpoena to be set aside, Mr Quach relies on s 720 of the *Criminal Code 2002* (ACT), which is as follows:

720 Failing to produce document or other thing

- (1) A person commits an offence if—
- (a) the person—
- (i) is served with a subpoena to produce a document or other thing in a legal proceeding; or
- (ii) is otherwise required by law to produce a document or other thing in a legal proceeding; and
- (b) the person fails to produce the document or other thing as required by the subpoena or other requirement.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

Note The Legislation Act, s 170 and s 171 deal with the application of the privilege against self-incrimination and client legal privilege.

- (2) This section does not apply if the person has a reasonable excuse.

49. To my knowledge there has been no prosecution commenced against the HCCC or any officer of that entity under s 720. The bare existence of the offence provision does not apparently have any bearing on the scope for attempting to have a subpoena set aside. Nonetheless, Mr Quach says:

I rely on *Section 720 of the Criminal Code 2002* (ACG), in relation to Ms Sue Dawson and/or Mr Michael Darmody, to defeat any application after 16¹ September 2016 to set aside any part of the subpoena served on the NSW Health Care Complaints Commission, dated 12 August 2016.

Pursuant to the High Court ruling in *Annette [sic] v McCann* [1990], *Section 720 of the Criminal Code 2002* (ACT) "by plain words of necessary intendment" excludes any application to set aside subpoena to NSW Health Care Complaints Commission, after 16² September 2016.

50. This is a useful example of Mr Quach's approach to the use of case law in his legal proceedings. In *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Deane and McHugh JJ said at [2]:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment: In [*The Commissioner of Police v Tanos*], Dixon CJ and Webb J said (at p 396) that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from "indirect references, uncertain inferences or equivocal considerations".

51. Mr Quach does not explain how s 720, by plain words or otherwise, excludes an application to set aside a subpoena after the return date. In particular, he does not explain which rule of natural justice, which would otherwise regulate the exercise of a power conferred on a public official so as to permit the setting aside of a subpoena after the return date, is excluded by "plain words of necessary intendment" that are found in s 720.

52. Finally, Mr Quach points to rr 2444 and 2445 of the Rules, respectively dealing with individuals and corporations which fail to comply with subpoenas. Those rules provide for the issue of arrest warrants for an individual or a named senior office of the

corporation concerned. Mr Quach says that “enforcement for failure to comply with subpoenas is necessary pursuant to” the specified rules.

53. I note first that the two rules confer **powers** on the court to deal with failures to comply with subpoenas. They do not **oblige** courts to issue arrest warrants where failure to comply has been established.
54. Furthermore, the availability of these powers must also be questionable if, as Mr Quach asserts, the Rules did not at the relevant time apply to proceedings under the *Domestic Violence and Protection Orders Act*.

Conclusions about applications

55. Given that I have found that the service of Mr Quach’s subpoena on the HCCC was ineffective for two or possibly three different reasons, I can see no way in which the efficacy of that subpoena, on which Mr Quach relies for this contempt application, could be salvaged.
56. However, I should also say that I have not been persuaded that any of the material sought by the subpoena (at Attachment A below) could be relevant to the matters raised in the appeal. If Mr Quach is right that a subpoena cannot be set aside after “the statutory time limit”, then there is no need to set the subpoena aside at this stage. Furthermore, since the appeal in which the subpoena was issued has now been heard, and need not be further adjourned since Mr Quach has abandoned the prospect of obtaining any of the subpoenaed documents (at [15] to [17] above), there will be no scope for a new subpoena to be issued in these proceedings.
57. These conclusions are sufficient to permit me to dismiss Mr Quach’s contempt application, and to allow the HCCC to withdraw its application to set the subpoena aside. There are, however two further matters that are usefully dealt with, albeit briefly.

Reasons for HCCC’s treatment of subpoena

58. A lot of time and effort has been wasted in the ongoing proceedings in relation to this particular subpoena.

The HCCC’s statutory immunity

59. The HCCC’s initial response to Mr Quach’s subpoena seems to have been, as it has been on other occasions in the course of these and possibly other proceedings, to cite section 99A of the *Health Care Complaints Act* as a complete answer to any demand for documents. That section is as follows:

99A Offence: improper disclosure of information

- (1) If a person discloses information obtained in exercising a function under this Act and the disclosure is not made:
 - (a) with the consent of the person to whom the information relates, or
 - (b) in connection with the execution and administration of this Act, or
 - (c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or
 - (d) with other lawful excuse,the person is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 6 months, or both.

- (2) A person may not be compelled in any legal proceedings to give evidence about, or produce documents containing, any information obtained in exercising a function under this Act.
- (3) Subsection (2) does not apply to the following proceedings:
 - (a) proceedings under the *Royal Commissions Act 1923*,
 - (b) proceedings before the Independent Commission Against Corruption,
 - (c) proceedings under Part 3 of the *Special Commissions of Inquiry Act 1983*,
 - (d) an inquiry under the *Ombudsman Act 1974*.

60. The functions of the HCCC under the Act are set out in s 80:

80 Functions of Commission

- (1) The Commission has the following functions:
 - (a) to receive and deal under this Act with the following complaints:
 - complaints relating to the professional conduct of health practitioners
 - complaints concerning a health service that affects, or is likely to affect, the clinical management or care of individual clients
 - complaints referred to it by a professional council under the *Health Practitioner Regulation National Law (NSW)*,
 - (b) to assess those complaints and, in appropriate cases, to investigate them, refer them for conciliation or deal with them under Division 9 of Part 2,
 - (c) to make complaints concerning the professional conduct of health practitioners and to prosecute those complaints before the appropriate bodies, including professional councils, professional standards committees and tribunals,
 - (d) to report on any action the Commission considers ought to be taken following the investigation of a complaint if the complaint is found to be justified in whole or part,
 - (e) to monitor, identify and advise the Minister on trends in complaints,
 - (f) to publish and distribute information concerning the means available for the making of complaints and the way in which complaints may be made and dealt with,
 - (g) to provide information to health service providers and professional and educational bodies concerning complaints, including trends in complaints,
 - (h) to consult with groups with an interest in the provision of health services, including professional associations, health service provider groups, relevant community organisations and private and institutional health care providers, on the complaints process and the dissemination of information concerning the complaints process,
 - (i) to develop, after such consultation with clients, health service providers and persons who, in the Commission's opinion, have an appropriate interest, a code of practice to provide guidance on the way in which the Commission intends to carry out some or all of its functions.
- (2) The Commission also has such other functions as are conferred or imposed on it by or under this or any other Act.
- (3) A code of practice developed by the Commission under subsection (1) (i) has no effect unless it is incorporated in, or adopted by, the regulations.
- (4) The Commission may exercise its functions even though:

- (a) the Commission has not developed a code of practice in relation to those functions, or
 - (b) a code of practice has been developed but has not been incorporated in, or adopted by, the regulations.
- (5) Persons may be employed in the Public Service under the *Government Sector Employment Act 2013* to enable the Commission to exercise its functions.

Note : Section 59 of the *Government Sector Employment Act 2013* provides that the persons so employed (or whose services the Commission makes use of) may be referred to as officers or employees, or members of staff, of the Commission. Section 47A of the *Constitution Act 1902* precludes the Commission from employing staff.

61. A number of comments can be made about these provisions.

- (a) The protection given by s 99A applies to information “obtained in exercising a function” under the Act; it does not apply to every piece of information held by the HCCC or any other relevant body. Employing staff to perform the functions listed in s 80 is unlikely, in my view, to be a “function” of the HCCC, and the protection given by s 99A seems unlikely to extend, for instance, to routine information held about staff or about their employment.
- (b) The provisions seem to be intended to protect the privacy of people involved in health care complaints, whether as patients, doctors or other medical professionals, rather than to protect the organisation or its employees from any scrutiny of their conduct.
- (c) Section 99A(1) creates an offence of disclosing the protected information except in specified circumstances, which circumstances include where the disclosure is “for the purposes of any legal proceedings arising” out of the Act, or “with other lawful excuse”; that is, the provision does not render it an offence to disclose information in those circumstances.
- (d) Section 99A(2) protects the HCCC from being compelled, even in legal proceedings, to reveal information “obtained in exercising a function” under the Act but again, does not **prevent** it releasing any such information.

62. For all these reasons, it seems to me that the provision does not give the HCCC such a broad exemption from the production of material under subpoena as it seems to have assumed over time.

63. The HCCC’s willingness at a later stage in the proceedings to examine Mr Quach’s subpoena with a view to determining whether it did seek any information that could lawfully be provided having regard to s 99A, and that should be provided, suggests that there may now be some recognition within the HCCC that the section is not as wide as previously assumed.

Flaws in the subpoena

64. The use of a notice in the form of Form 5 (albeit without the extra document required by Form 5) is said by the HCCC to provide part of the explanation for its failure to notice at the time that the subpoena had not been effectively served. The HCCC is correct to say that if the subpoena had been accompanied by a Form 2 document, it would have been more immediately obvious (at least to anyone who read the Form 2 notice) that the subpoena had been served too late having regard to the return date.

65. Form 5, in contrast, does not specify the period required between the service date and the return date, because this is to be found in the attached order from a court of the issuing jurisdiction.
66. I assume (although it is not the subject of evidence before me, and is not relevant to the efficacy of the subpoena) that the subpoena when served was also not accompanied by a copy of any order made in an ACT court permitting the attached subpoena to be served outside the ACT, such as would have been required if Form 5 had been relevant to service of the subpoena. Since the subpoena was issued by an ACT court (rather than a tribunal), there would have been no need, and perhaps therefore no power, for an ACT court to make such an order for the purposes of the *SEP Act*.
67. However, it seems clear that the HCCC's consideration of the form that it did receive was cursory at best: any careful reading of the attached Form 5 would have revealed that it was not accompanied by the other required document, which should itself have raised, at the time of receipt, the possibility that the subpoena was ineffective.

Impact on costs orders

68. Having regard to the HCCC's role in prolonging the argument about this particular one of Mr Quach's many subpoenas, I consider that, despite its ultimate success, the HCCC should bear some of the burden of these applications, and this will be reflected in costs orders.

Conclusions

69. I am satisfied that the subpoena was not effective. It is unfortunate that the HCCC chose to raise a statutory immunity that was almost certainly not wide enough to apply to all documents sought, rather than carefully assessing the subpoena in all respects, and taking any proper objections to the validity and scope of the subpoena, at an early stage.
70. However, even in September 2016, Mr Quach's proceedings against the HCCC or its officers had involved an extraordinary number of different proceedings (see, for instance, *Quach v NSW Civil and Administrative Tribunal (No 2)* [2017] NSWCA 182, which cites five previous cases heard in the NSW Court of Appeal and two cases between Mr Quach and the HCCC heard in the Occupational Division of the NSW Civil and Administrative Tribunal (**NCAT**), as well as cases brought by Mr Quach against the NCAT Occupational Division itself³).
71. Given that history, it would be unsurprising if, when the subpoena was served, the HCCC simply took the view that over time it had devoted enough resources (being public resources intended for the supervision of the health system) to Mr Quach's constant litigating. On the other hand, if the HCCC had, nearly a year ago when it was first served, identified the real problems with the subpoena (both procedural and as to its relevance to the appeal), it would have enabled this aspect of the proceedings to be disposed of far more quickly. For that reason, I propose to order that Mr Quach pay only half of the HCCC's costs, as agreed or assessed, of the contempt application and the application to set the subpoena aside.

72. It seems unlikely that RU has incurred any costs in relation to either of those applications, but if she has, Mr Quach should also pay those costs as agreed or assessed.

I certify that the preceding seventy-two [72] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Justice Penfold.

Associate:

Date:

Attachment A: Documents sought under subpoena

1. Invoices from the following individuals/entities that appear on the two invoices in the letters of demand:
 - a. [RU]
 - b. Sarah Connors
 - c. Ragni Mathur
 - d. Katherine Richardson
 - e. Dr Simon JW Young
 - f. Dr Jeff Bertucen
 - g. Keith Matson
 - h. Frances and Peter Jones
 - i. Lisa and Ayhan Eriliki
 - j. Tiffany Woong
 - k. M. Richmond
 - l. Amber Stewart
 - m. Olympia Poretta
2. Receipts as proof of payments of "costs" for the New South Wales Health Care Complaints Commission for the two invoices in the letters of demand, from:
 - a. [RU]
 - b. Sarah Connors
 - c. Ragni Mathur
 - d. Katherine Richardson
 - e. Dr Simon JW Young
 - f. Dr Jeff Bertucen
 - g. Keith Matson
 - h. Frances and Peter Jones
 - i. Lisa and Ayhan Eriliki

- j. Tiffany Woong
 - k. M. Richmond
 - l. Amber Stewart
 - m. Olympia Poretta
3. Engagement Agreements or contracts between the New South Wales Health Care Complaints Commission and the following individuals:
 - a. Ms Ragni Mathur as counsel in the New South Wales Medical Tribunal and New South Wales Civil and Administrative Tribunal.
 - b. Ms Tiffany Wong as counsel in the Supreme Court for matters:
 - i. 2015/43211
 - ii. 2015/59068
 - iii. 2015/131892
 - c. Ms Katherine Richardson for matters:
 - i. 2015/4321 Supreme Court-2015/48269 Court of Appeal
 - ii. 2015/59068 Supreme Court-2015/67618 Court of Appeal
 - iii. 2015/131892 Supreme Court-2015/158685 Court of Appeal
 4. Briefs from the New South Wales Health Care Complaints Commission to the following counsels:
 - a. Ragni Mathur
 - b. Tiffany Wong
 - c. Katherine Richardson
 5. Completed opinions for the New South Wales Health Care Complaints Commission by the following counsels:
 - a. Ragni Mathur
 - b. Tiffany Wong
 - c. Katherine Richardson
 6. The Contracts of Employment (including details of salary, allowances and any other monetary arrangements) of [RU]:
 - a. Legal Officer in October 2012
 - b. Senior Legal Officer in 2015
 7. Details of [RU]'s promotion to Senior Legal Officer. Please state whom [RU] replaced to fill a vacancy of Senior Legal Officer. If [RU] did not fill a vacancy, what budgetary measures were taken to afford the promotion and higher rate of pay and extended leave.
 8. Please produce to the Court when [RU] was first informed that she would receive a promotion and what criteria were met for [RU]'s promotion to Senior Legal Officer.
 9. The Contract(s) of Employment (including details of salary, allowances and any other monetary arrangements) of Ms Sarah Connors:
 - a. Original contracts

- b. Other updated and/or renewed contracts of employments since commencement of employments with the New South Wales Health Care Complaints Commission.
10. Curriculum Vitae of Sarah Connors.
11. Qualifications of Ms Sarah Connors:
 - a. New South Wales Solicitor's Practising Certificate
 - b. New South Wales Barrister's Practising Certificate
12. Any directions, records or notations from the Commissioner or [RU]'s superior(s) in the New South Wales Health Care Complaints Commission for [RU] and Ms Sarah Connors to:
 - a. Seek cost orders against unsuccessful defendants.
 - b. Issue letters of demand for money on the 9 June 2015 and 18 December 2015.
13. Please produce evidence of any arrangements, understanding (written/oral) or otherwise, in the practice of in-house solicitors itemising legal services rendered with the intention of seeking costs against unsuccessful defendants.
14. Please produce the following information for Ms Sarah Connors:
 - a. Personal and company Australian Business Number, if any.
 - b. Name of trading entity (sole trader/company/partnership)
 - c. Previous two years income tax returns for 2014 and 2015 - personal and company (if any)
 - d. Names of accountants.
15. Names of the accounting firm(s) for the New South Wales Health Care Complaints Commission since 2005.
16. Names of the auditor(s) for the New South Wales Health Care Complaints Commission since 2005.
17. Tax returns of the New South Wales Health Care Complaints Commission since 2005.
18. Annual budgets submitted for funding of the New South Wales Health Care Complaints Commission since 2005.
19. All correspondences to participants in the proceeding:
 - a. Frances and Peter Jones
 - b. Amber Stewart
 - c. Olympia and Ilana Porretta
 - d. Lisa and Ayhan Eriliki
 - e. Keith Matson
 - f. Dr James Jeong
 - g. Dr Con Poulos
 - h. Dr Dzu Nguyen
 - i. Dr Elaine Hoang
 - j. Dr Haresh Vyas

- k. Dr Norgrove
- l. Dr Annie Lim
- m. Dr Siam Tang
- n. Dr Simon Young
- o. Dr Andrew Petherbridge
- p. Angela Corlett
- q. Dr Gavin Nichols
- r. Ms Cindy Watts
- s. Ms Jillian Lotoaniu
- t. Dr Sara Guirgis
- u. Dr Kathryn Hutt
- v. Dr Walid Jammal
- w. Detective Gordon Sharrock
- x. Detective Sergeant Megan Finlay
- y. Dr M A Chaudhary
- z. Dr Judy Watt

20. Copy of Subpoena to appear as a witness at the New South Wales Civil and Administrative Tribunal for Ms Angela Corlette.

21. All correspondences to:

- a. Medical Tribunal of New South Wales
- b. New South Wales Civil and Administrative Tribunal

¹ Corrected from "9" by Mr Quach in court.

² Corrected from "9" by Mr Quach in court.

³ Between July 2015 and the end of July 2017, the NSW Court of Appeal had published at least 12 decisions in matters brought by Mr Quach in relation to the cancellation of his registration as a medical practitioner.