Supreme Court
New South Wales
Common Law Division

Case Title:	Australian Vaccination Network Inc v Health Care Complaints Commission
Medium Neutral Citation:	[2012] NSWSC 110
Hearing Date(s):	22 February 2012
Decision Date:	24 February 2012
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Declare that by reason of the circumstance that neither the McLeod complaint nor the McCaffery complaint was a complaint under the Health Care Complaints Act 1993, the HCCC's investigation into these complaints, the recommendation contained in the Investigation Report and the Public Warning issued by the HCCC in respect of the plaintiff were not within the jurisdiction of the HCCC. (2) Unless an application for a different order is made within seven days of the date of this order, order the HCCC to pay the plaintiff's costs of the proceedings.
Catchwords:	ADMINISTRATIVE LAW – statutory construction – whether investigation conducted and warning issued by the Health Care Complaints Commission was ultra vires – construction of the Health Care Complaints Act 1993 – meaning of "complaint" – meaning of "affects" – whether an individual client's care has actually been affected – jurisdictional fact – entitlement to certiorari – whether a discernible legal right affected
Legislation Cited:	- Health Care Complaints Act 1993

	- Charitable Fund Raising Act 1991 - Trade Practice Act 1974 (Cth) - Australian Consumer Law - Gaming Machine Act 1991 (Qld)
Cases Cited:	- Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 - Awad v Health Care Complaints Commission [2006] NSWSC 698 - Chase Oyster Bar Pty Limited v Hamo Industries Pty Limited (2010) 78 NSWLR 393 - Corporation of the City of Enfield v Development Assessment Commission (1999) 199 CLR 135 - Gedeon v NSW Crime Commission (2008) 236 CLR 120 - Hot Holdings Pty Limited v Creasy (1996) 185 CLR 149 - Lockwood v Commonwealth (1954) 90 CLR 177 - Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355 - Shanks v Shanks (1945) 65 CLR 334 - Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177 - Tuch v South Eastern Sydney and Illawarra Area Health Service [2009] NSWSC 1207 - VAW (Kurri Kurri) Pty Limited v Scientific Committee (established under s 127 of the Threatened Species Conservation Act 1995) [2003] NSWCA 297 - Yrttiaho v Public Curator (Queensland) (1971) 125 CLR 228
Texts Cited:	
Category:	Principal judgment
Parties:	Australian Vaccination Network Inc – Plaintiff Health Care Complaints Commission – Defendant
Representation	
- Counsel:	A J Abadee – Plaintiff N G Sharp – Defendant

- Solicitors:	Hinterland Legal – Plaintiff Crown Solicitor – Defendant
File number(s):	2011/00098303
Publication Restriction:	

JUDGMENT

Introduction

1 The plaintiff, an association originally known as "Australian Council for Immunisation", and later renamed "Australian Vaccination Network", was incorporated on 25 November 1994. The focus of its work is the dissemination of material on the topic of vaccination. It accepts that much of the material it publishes is sceptical about the benefits of vaccination. It is based in northern New South Wales. It operates a website through which it purports to disseminate information about vaccination.

2 In 2009, two complaints were made against the plaintiff, and its President, Ms Dorey, to the first defendant (**the HCCC**). The first complaint, made by Mr McLeod (**the McLeod complaint**), was that the plaintiff engaged in misleading or deceptive conduct in order to dissuade people from being, or having their children, vaccinated. The second complaint, made by Mr and Mrs McCaffery (**the McCaffery complaint**) against the plaintiff and Ms Dorey, is said to raise similar issues. The second complaint is not in evidence although it is summarised in the HCCC report of the investigation. The plaintiff, through its counsel, accepted that there was no material difference between these two complaints.

3 The HCCC, after assessing the two complaints, decided to investigate them in so far as they concerned the plaintiff, but not Ms Dorey. The investigation involved a review of the content of the plaintiff's website. After it had completed its investigation, the HCCC released its final report on

7 July 2010 (**the Investigation Report**) in which it made a recommendation that the plaintiff publish a disclaimer on its website (**the Recommendation**). When the plaintiff did not do so, the HCCC issued a public warning (**the Public Warning**) in respect of the plaintiff on 26 July 2010 pursuant to s 94A of the *Health Care Complaints Act* 1993 (**the Act**) which said:

> "The AVN's failure to include a notice on its website of the nature recommended by the Commission may result in members of the public making improperly informed decisions about whether or not to vaccinate, and therefore poses a risk to public health and safety."

4 The Investigation Report, the Recommendation and the Public Warning were then relied upon by the Minister for Gaming and Racing (the minister administering the *Charitable Fund Raising Act* 1991) to revoke the plaintiff's fundraising capacity.

5 In these proceedings the plaintiff seeks, in substance, a declaration that the HCCC's investigation, the Investigation Report, the Recommendation and the Public Warning were *ultra vires* because neither of the complaints was a complaint within the meaning of the Act. It also seeks an order in the nature of *certiorari* quashing the HCCC's decision or determination to issue the Public Warning. The Minister for Gaming and Racing was named as the second defendant but on 5 July 2011 the plaintiff discontinued proceedings against him.

6 The HCCC contends that the complaints were complaints within either s 7(1)(b) or s 7(2) of the Act and that accordingly it had power to investigate them, make recommendations and, when the recommendation was not acted upon, issue a public warning. In the alternative, the HCCC submits that even if I am satisfied that these matters were *ultra vires*, the plaintiff is not entitled to *certiorari*.

7 The question whether the actions of the HCCC referred to above were within power turns on the meaning of "complaint" in the Act, since its jurisdiction to investigate is conditioned upon the existence of a "complaint" within the Act: *Awad v Health Care Complaints Commission* [2006] NSWSC 698 at [92], per Hall J.

Relevant statutory provisions

8 Section 4 of the Act relevantly defines a "complaint" as a complaint made under the Act.

9 Section 3 of the Act, the objects clause, provides:

> "**3 Object and principle of administration of Act**
>
> (1) The primary object of this Act is to establish the Health Care Complaints Commission as an independent body for the purposes of:
>
> (a) receiving and assessing complaints under this Act relating to health services and health service providers in New South Wales, and
>
> (b) investigating and assessing whether any such complaint is serious and if so, whether it should be prosecuted, and
>
> (c) prosecuting serious complaints, and
>
> (d) resolving or overseeing the resolution of complaints.
>
> (2) In the exercise of functions under this Act the protection of the health and safety of the public must be the paramount consideration."

10 Vaccination is a matter about health. The provision of information about vaccination is a health education service. It is common ground, and I accept, that the plaintiff is a "health service provider" within the meaning of s 4 of the Act since it provides "health education services".

11 Part 2 of the Act deals with complaints. Section 7 in Division 1 provides for the right to complain in the following terms:

"**7 What can a complaint be made about?**

(1) A complaint may be made under this Act concerning:

(a) the professional conduct of a health practitioner (including any alleged breach by the health practitioner of Division 3 of Part 2A of the Public Health Act 1991 or of a code of conduct prescribed under section 10AM of that Act), or

(b) a health service which affects the clinical management or care of an individual client.

(2) A complaint may be made against a health service provider.

(3) A complaint may be made against a health service provider even though, at the time the complaint is made, the health service provider is not qualified or entitled to provide the health service concerned."

12 The words "clinical management or care" in s 7(1)(b) are not defined but "client" is defined by s 4 as meaning "a person who uses or receives a health service, and includes a patient".

13 Section 8 provides that a complaint may be made by any person.

14 The Act distinguishes between the assessment (s 20) and investigation (s 23) of complaints.

15 Section 42 provides for the outcome of investigations. It provides:

"**42 What action is taken at the end of an investigation?**

(1) At the end of the investigation of a complaint against a health organisation, the Commission must:

(a) terminate the matter, or

(b) make recommendations or comments to the health organisation on the matter the subject of the complaint, or

(c) refer the matter the subject of the complaint to the Director of Public Prosecutions.

(2) If the Commission makes recommendations or comments, it must prepare a report on the matter for the Director-General.

(3) The report must include:

(a) the reasons for its conclusions, and

(b) the reasons for any action recommended to be taken."

16 Section 59 confers additional powers on the HCCC to investigate. It provides:

> "**59 Investigation of health services**
>
> The Commission may, in accordance with this Part, investigate the delivery of health services by a health service provider ***directly affecting*** the clinical management or care of clients which may not be the particular object of a complaint but which arises out of a complaint or out of more than one complaint, if it appears to the Commission that:
>
> (a) the matter raises a significant issue of public health or safety, or
>
> (b) the matter raises a significant question as to the appropriate care or treatment of clients, or
>
> (c) the matter, if substantiated, would provide grounds for disciplinary action against a health practitioner."
>
> [Emphasis added.]

17 The HCCC does not rely on s 59 to support its exercise of jurisdiction in respect of the complaints. It does, however, rely on the use of the word "directly" to qualify "affecting" in s 59 in support of a submission that Parliament intended a broader connection in s 7(1)(b) since the word "affects" is not qualified.

18 Section 80 of the Act provides for the HCCC's functions. It provides in part:

> "**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 the clinical management or care of individual clients by health service providers

- 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…"

19 The word "function" is defined in s 4 to include a power, authority or duty.

20 Section 94A confers power on the HCCC to issue warnings. It provides:

"**94A Warnings about unsafe treatments or services**

(1) If following an investigation, the Commission is of the view that a particular treatment or health service poses a risk to public health or safety, the Commission may cause a public statement to be issued in a manner determined by the Commission identifying and giving warnings or information about the treatment or health service.

(2) The Commission may revoke or revise a statement under subsection (1)."

The meaning of "complaint" – the parties' arguments

21 The plaintiff submitted that since the complaints fell neither within s 7(1)(b) nor s 7(2), they were not made under the Act and the HCCC had no power to investigate them.

22 It submitted that the complaints did not fall within s 7(1)(b) since the health service that it provided did not affect the clinical management or care of an individual client. It said that to fall within s 7(1)(b) the health service must

actually influence an individual. Nor is it enough that the complainant alleges that the health service has that effect.

23 The plaintiff submitted that the HCCC had to have an objective rationale or basis for concluding that there is an individual person, or persons, whose clinical care or management has been affected by the health service about which a complaint is made. In other words, the plaintiff submitted that the HCCC could not satisfy itself of this jurisdictional fact merely on the basis of an allegation made in the complaint.

24 The plaintiff submitted that no distinction ought be drawn between the word “affects” in s 7(1)(b) and “directly affects” in s 59. The plaintiff submitted that both mean “produce a tangible result”. It was insufficient for the health service to have such a tendency, if it could not be shown to have produced a tangible result in respect of an individual client.

25 The plaintiff also submitted that the reference to “clinical management or care” ought be read as a composite phrase, as if Parliament had said “clinical management *and* clinical care”. The plaintiff initially submitted that the word “clinical” imported an element of clinical judgment, which in turn would carry with it the requirement of some knowledge or understanding on the part of the health service provider of the client’s personal circumstances and needs, and consideration by such a provider as to how the intended supply of the health service would affect those personal circumstances. The plaintiff referred to the Shorter Oxford Dictionary definitions of “clinic” and “clinical” and their etymology which derives from the Greek work for bed. The adjective “clinical” is relevantly defined in this text as:

> “1 MEDICINE Designating or pertaining to teaching given at the bedside of a sick person, esp. In a hospital, and (branches of) ***medicine involving the study or care of actual patients***.” [Emphasis added.]

26 Accordingly, the plaintiff submitted that such a requirement would never be satisfied by information disseminated to the public at large. The plaintiff submitted that only complaints that concerned a particular health service supplied by a health service provider to an ascertained client which has affected the client's health, in the sense of producing an effect on the clinical care or management of individual clients are "complaints" for the purposes of the Act. Furthermore, he sought initially to distinguish between "advice" about which a complaint could be made under s 7(1)(b) and "information", and suggested that whereas the giving of advice would affect the clinical management and care of a client, the provision of information would be less likely to do so.

27 However, the plaintiff accepted in oral argument that if I found that "care" should be read as an alternative to "clinical management", a complaint concerning a mother who had relied upon particular passages from the plaintiff's website to decide not to immunise her child could be a complaint under s 7(1)(b) since it could affect the care of an individual client. I took the plaintiff to accept that the making of such a complaint would confer jurisdiction on the defendant to assess and investigate it, notwithstanding that, in that scenario, the plaintiff might have neither knowledge nor understanding of the particular circumstances of the mother or the child and notwithstanding that it might be regarded as "information" rather than "advice". In that event, the causal connection would be established by an individual client relying on the information.

28 Further, the plaintiff submitted that s 7(2) did not augment the process of complaint in s 7(1).

29 The HCCC's primary submission was that s 7(1)(b) and s 7(2) provided separate avenues through which a complaint might be made under the Act.

30 It submitted that it is sufficient for the purposes of s 7(2) that complaints were made against the plaintiff, which admits that it is a health service

provider. It contended that any other construction would simply give no work for s 7(2) to do because a complaint about a health practitioner or health service will always be a complaint made "against" a health provider and would therefore be at odds with the principle of construction that all words are to be given some meaning and effect: *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, per McHugh, Gummow, Kirby and Hayne JJ. It sought to confine the otherwise broad application of s 7(2) by submitting that the words permitting a complaint to be made against a health service provider ought be qualified by the gloss "in its capacity as a health service provider".

31 Further, and in the alternative, it submitted that the action of the HCCC in the present case could be supported by s 7(1)(b).

32 The HCCC submitted that the word "affects" in s 7(1)(b) ought not be read narrowly, particularly as elsewhere in the Act, for example in s 59, the word "affects" is qualified by the word "directly" thereby manifesting a Parliamentary intention that the word "affects" be read as encompassing indirect, as well as direct, effects. The HCCC submitted that the word "affects" is a word of wide import (*Yrttiaho v Public Curator (Queensland)* (1971) 125 CLR 228 at 245, per Gibbs J). It relied on what McTiernan J said, in *Shanks v Shanks* (1945) 65 CLR 334 at 337:

> "[I]n its ordinary usage, "affects" is a synonym for touching or relating to or concerning."

33 The HCCC submitted that the expression "clinical management or care" should be read disjunctively, both because of the use of the word "or" and because not all of the health services within the definition, such as welfare services, health education services and forensic pathology services, would be relevant to "clinical management". It submitted that both complaints concern the plaintiff's health education service, which affects the care of an individual person who uses or receives such education. The HCCC submitted that it may reasonably be inferred that people access the plaintiff's website in order to obtain information about vaccinations to help

them decide whether or not to have themselves or their children vaccinated, and that it is the plaintiff's intention that they do so. Children are "clients" because they use and receive the plaintiff's service through the agency of their parents.

34 It contended that unless such a construction is adopted, it is difficult to see how a health education service could ever be said to "affect" the clinical management or care of an individual client and therefore be the subject of a complaint under s 7 since, by definition, a health education service will be one step removed from the actual provision of clinical management or care.

35 The HCCC submitted that the section did not require that the client be an identified person and that the words "individual client" were merely another way of referring to a natural person or persons who received or used health services. Further, the HCCC put that a person may be said to use or receive health services merely by reading information provided by a health service provider such as the plaintiff. Such information was apt to affect (in the sense of touch or concern) the care of individual persons and therefore the HCCC had jurisdiction to assess and investigate the complaint.

36 The HCCC submitted that I ought infer that the information the plaintiff has published on its website about vaccination has affected the decisions of people to vaccinate themselves or their children. It pointed to an extract from the website which was relied upon in the McLeod complaint which read:

> "Unlike vaccination (which offers only temporary immunity), the natural occurrence of each of these diseases (measles, mumps and rubella) (all non-threatening illnesses in early childhood) generally results in lifelong immunity… Research also suggests that there is a connection between MMR vaccination and the development of autism, Crohn's Disease and Irritable Bowel Disease."

37 Further, in so far as the HCCC had initially purported to justify its exercise of jurisdiction by reference to s 7(2), it submitted that if I find that its power resides under s 7(1)(b) but not s 7(2), the exercise of power would be nonetheless valid. It referred to the principle articulated in *Lockwood v Commonwealth* (1954) 90 CLR 177 at 184, per Fullagar J that:

> "an act purporting to be done under one statutory power may be supported under another statutory power."

38 It submitted that the qualification to the *Lockwood* principle: where there is a procedural or substantive difference in any material respect between the power originally relied upon and the power subsequently relied upon did not apply: cf *VAW (Kurri Kurri) Pty Limited v Scientific Committee (established under s 127 of the Threatened Species Conservation Act 1995)* [2003] NSWCA 297 at [12] – [60], per Spigelman CJ.

Construction of s 7

39 The parties accepted that the existence of a complaint under s 7 was necessary to confer jurisdiction on the HCCC.

40 I reject the HCCC's submissions that s 7(2) is an alternate source of jurisdiction to that provided under s 7(1). I consider that on a reading of the Act as a whole, Parliament ought be taken to have intended that the HCCC be empowered only to deal with certain types of complaints, being the complaints concerning the subject matters specified in s 7(1). This construction is consistent with s 80, which sets out the functions of the HCCC and does not include, in terms, a function to deal with complaints against health service providers *per se*. Rather, it relevantly replicates the two parts of s 7(1).

41 Accordingly, in order for the HCCC to have acted within jurisdiction the complaint must fall within s 7(1)(b), it being the only part of s 7(1) which is said to be relevant.

42 Both parties accepted, properly in my view, that a complaint "concerning a health service which affects the clinical management or care of an individual client" was a jurisdictional fact and that it therefore identifies that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion: *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 148, per Gleeson CJ, Gummow, Kirby and Hayne JJ). If this criterion is not met, then the decision or action purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision-maker: *Gedeon v NSW Crime Commission* (2008) 236 CLR 120 at 139).

43 It is accepted, and I find, that the complaint concerned a health service and that the plaintiff was the relevant health service provider.

44 However, the meaning of each of the subsequent words in s 7(1)(b) was disputed, as appears from the summary of the respective arguments set out above. I consider that the words "clinical management or care of an individual client" are apt to refer to much more specific instances than the one postulated by the HCCC of a cohort of persons reading the plaintiff's website and taking its contents into account in deciding whether to vaccinate their children. Had Parliament intended complaints regarding the contents of such websites to be covered by s 7(1)(b), it would, in my view, have used broader words. It might, in that instance, have provided for complaints "concerning a health service that affects medical decisions made by clients of the health service". There would, in that event, have been no need for "the clinical management or care of an individual client" to be affected and no need for Parliament to use those words.

45 In my view, the use of the words "the clinical management or care of an individual client" evince an intention that only a complaint concerning a health service that has a concrete (even if indirect) effect on a particular person or persons is within jurisdiction. Complaints about health services

that have a tendency to affect a person or group, but which cannot be shown to have had an effect, would appear to be excluded.

46 If Parliament wishes to describe conduct that has a particular tendency, rather than having an actual effect, it can do so. Examples include the prohibition in the former s 52 of the *Trade Practice Act* 1974 (Cth) (now s 18 of the *Australian Consumer Law*) which proscribed "conduct that is misleading or deceptive or is likely to mislead or deceive" in respect of which it is well established that the actual effect of such conduct need not be established.

47 As the Full Federal Court said in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 199, per Deane and Fitzgerald JJ:

> "In our view, it is sufficient to enliven s 52 that the conduct, in the circumstances, answers the statutory description, that is to say, that it is misleading or deceptive or is likely to mislead or deceive. It is unnecessary to go further and establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception. The words "likely to mislead or deceive" "make it clear that it is unnecessary to prove that the conduct in question actually deceived or misled anyone"

48 A provision such as s 7(1)(b) is in a different category from s 52 in that the HCCC's jurisdiction depends on an individual client's clinical management or care actually being affected.

49 I do not need to determine the precise parameters of s 7(1)(b) for the purposes of determining whether the subject complaints fall within it. I accept the plaintiff's submissions that "affect" connotes a causal connection. Therefore even were I disposed to read "clinical management" separately from, and as an alternative to "care" and to read "care" as unqualified by the word "clinical", I consider it still to be necessary that there be a causal connection between the health service and the care of an individual client or clients, in order for the complaints to be complaints under the Act within the meaning of s 4.

50 It is therefore necessary to examine the evidence to determine whether such a causal connection has been established as a matter of jurisdictional fact.

The jurisdictional fact to be determined

The relevant principles

51 The relevant principles governing the determination of whether a state of affairs is a jurisdictional fact and how the existence of a jurisdictional fact is to be determined are set out in *Chase Oyster Bar Pty Limited v Hamo Industries Pty Limited* (2010) 78 NSWLR 393 at 428, per Basten JA:

> "Whether something is a jurisdictional fact is ascertained by a process of construction, undertaken in the usual way. The court will have regard to the full statutory context and to the object that the legislation seeks to achieve. One asks, in essence, whether the legislature intended that the presence or absence of the factual condition should invalidate an attempted exercise of power: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] (McHugh J, Gummow J, Kirby J and Hayne J).
>
> A jurisdictional fact may be the existence or non-existence of a specified state of affairs… The legislature may specify that the existence of that state of affairs — the jurisdictional fact — is essential to the exercise of statutory power.
>
> …
>
> In [that] case, if the exercise of power is challenged on the basis that the jurisdictional fact does not exist, the court must itself inquire into the existence of that fact. It may grant relief against the exercise of jurisdiction if it finds that the jurisdictional fact did not exist."

52 It was common ground, and I accept, both that the existence of a complaint that fell within s 7(1)(b) was a jurisdictional fact and that I must inquire into the objective existence of that fact.

The parties' arguments on the establishment of jurisdictional fact: a complaint within s 7(1)(b)

53 The plaintiff submitted that there was no evidence capable of establishing the jurisdictional fact.

54 The HCCC argued that I ought find that the jurisdictional fact had been established by reference to the following evidence:

(1) Mr McLeod, in his complaint, said:

> "The AVN [the plaintiff] is based in northern NSW. 33% of children in that region are not fully vaccinated. This is not only a risk to these children but also to other unvaccinated children who are not protected by 'herd immunity'.
>
> For parents concerned for the well-being of their children, and not being exposed to the epidemics that our older generations were, the message is believed and acted upon, and consequently we are seeing the reappearance of diseases we thought were defeated and people are dying."

(2) The plaintiff's application for incorporation of association lodged on 25 November 1994 nominates its objects as:

> "(a) to maintain and provide information relating to immunization and vaccination.
> (b) to be a central source of information to public benefit.
> (c) to ensure and assist community awareness as to immunization issues."

(3) The plaintiff's committee's report for the financial year ended 31 December 2009 includes in the list of its principal activities:

> "1. To promote informed choices about vaccination and natural health.
> 2. Support the right of all Australians to make free vaccination choices without discrimination or penalty."

(4) The following evidence of Ms Dorey, the plaintiff's President:

> "Q. And it is right that you seek to provide people with information so that they can make decisions about whether or not to vaccinate themselves or their children?
> A. To help them with that decision, yes.
>
> Q. So it is right that the AVN, as at 2009, seeks to help people make choices about vaccination?
> A. Yes, we do."

(5) The following passage from the HCCC's investigation report into the complaints:

> "The Commonwealth General Practice Immunisation Incentive (GPII) scheme provides financial incentive to general practices that monitor, promote and provide immunisation services to children under the age of seven. The aim of this scheme is to encourage 90% of practices to achieve 90% proportions of full immunisation, which is consistent with current Government immunisation policy."

(6) Statistics cited by the plaintiff in a submission to the HCCC in response to the complaints which refers to statistical tables which are said to "indicate an increase in the percentage of children receiving pertussis [whooping cough] vaccination, from 71% in 1989-1990 to 95.1% in 2008."

55 The HCCC submitted that in order to find the jurisdictional fact that the plaintiff's health service had affected the clinical management or care of an individual client, all I needed to be satisfied of was that at least one person had read the plaintiff's website and that its contents had affected that person's decision whether to vaccinate, or have another person (usually a child) vaccinated. It was not necessary that any particular person be identified. It submitted that it was unreal to suppose that the plaintiff had been so unsuccessful in the achievement of its goals and the activities in which it had engaged that there was not at least one person who met that description. Furthermore it said that although the figure of 33% was not referable to any national standard (unless I took into account and drew inferences from the statistics referred to above), it was the clear implication

of that part of the complaint that the plaintiff was at least in part responsible for the low rates of vaccination in the area in northern New South Wales where it was based.

56 The plaintiff submitted that speculative evidence of this nature was not apposite to establish a jurisdictional fact. It submitted that it would be improper for me to infer that the statistics to which the plaintiff referred in one of its responses were matters known to and regarded as fact by the HCCC at the time it exercised its purported jurisdiction to deal with the complaint.

57 The plaintiff submitted that without evidence of a particular person who had relied on the information published by the plaintiff concerning his or her, or another's clinical care and management (which the plaintiff conceded would include the decision whether or not to vaccinate), I could not find that the jurisdictional fact had been established.

Whether the jurisdictional fact of a complaint within s 7(1)(b) has been established

58 The evidence referred to above tends to establish that Mr McLeod, one of the complainants, believed that the plaintiff's publications affected the decisions of a sizable portion of the local community whether to have their children vaccinated. It also tended to establish that the plaintiff wanted to influence such decisions and that its goals and activities were directed, at least in part, to that end. That the area from which the plaintiff operated was said to have lower rates of vaccination than the Commonwealth Government's targets, and which had apparently been achieved in respect of pertussis, provides some circumstantial evidence of a connection with the plaintiff, although alternative hypotheses, unexplored in the evidence, are available (for example, that people who settle in that area are more likely to eschew orthodox medicine, or that there was a particular incident which led to the decline).

59 Although I find that both complaints concern the health service that the plaintiff provides, the health service has not been shown to "affect the clinical management or care of an individual client". Although it might have that tendency, and although the plaintiff hopes to have that effect, I do not consider this to be sufficient to establish that it has had that effect.

60 I do not consider the evidence to be relied upon by the HCCC to be sufficient that there was such a causal link, or that any link could be established in respect of "an individual client". Had the HCCC apprehended that such would be required to found jurisdiction, it presumably could have readily obtained such evidence from one of the complainants. However, the ease with which it might have done so is not the test. It did not do so. As I have found, the evidence adduced before me is not sufficient to bring the complaints within s 7(1)(b) of the Act.

Entitlement to relief – the parties' arguments and my conclusion

61 It is common ground that if I find that the HCCC acted *ultra vires* because the complaints did not fall within s 7(1)(b), the plaintiff is entitled to a declaration to that effect. Although the summons does not seek a declaration regarding the Public Warning, I assume that in the event that I decline to grant *certiorari*, such a declaration ought include the Public Warning.

62 The HCCC disputed the plaintiff's entitlement to *certiorari*. It submitted that this case was not relevantly distinguishable from *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. In *Ainsworth* a report was prepared by the Criminal Justice Commission and tabled in Parliament. It contained adverse recommendations about certain persons and companies involved in the poker machine industry, including those associated with the appellants. The High Court held that *certiorari* did not lie because no legal effect or consequence attached to the report, notwithstanding that it might bear on the appellants' prospects of obtaining

licences under the *Gaming Machine Act* 1991 (Qld), to which reputation was a relevant factor.

63 The HCCC distinguished *Tuch v South Eastern Sydney and Illawarra Area Health Service* [2009] NSWSC 1207, in which Johnson J ordered *certiorari* of a report and recommendations made by a Review Committee on the footing that that the Chief Executive of the Health Service was obliged to take them into account as a matter of law.

64 The plaintiff argued that its claim for *certiorari* was supported by the High Court's decision in *Hot Holdings Pty Limited v Creasy* (1996) 185 CLR 149. In that case the High Court held that *certiorari* was available to quash a report whose only legal force was that it had to be taken into account by the Minister before coming to his own decision. Brennan CJ, Gaudron and Gummow JJ said, at 165:

> "A preliminary decision or recommendation, ***if it is one to which regard must be paid by the final decision-maker*** will have the requisite legal effect upon rights to attract certiorari." [Emphasis added.]

65 The plaintiff argued that the Public Warning was, as a matter of practical reality, a matter that the Minister for Gaming was obliged to (and in fact did) take into account in determining whether to revoke the plaintiff's authority to raise funds under the *Charitable Fundraising Act* 1991. When asked to identify the discernible legal right which was affected, counsel for the plaintiff said:

> "The damage to its reputation by being labelled a public risk to health and safety."

66 The plaintiff submitted that its rights were not only directly affected, but also altered, by the HCCC's decision to issue the Public Warning and that *certiorari* is accordingly available: *Ainsworth* at 595, per Brennan J. It argued that the decision directly exposed it to a new hazard of an adverse exercise of public power (having its fundraising capacity revoked).

However, the plaintiff could not point to any provision in the *Charitable Fundraising Act* 1991 that made the Public Warning a mandatory relevant consideration in the Minister's decision whether to revoke the authority.

67 Accordingly there is no basis on which I could find that the Minister for Gaming is legally obliged to take into account the Public Warning. For these reasons, *certiorari* does not lie.

Costs

68 I have not heard argument on the question of costs. The plaintiff has substantially succeeded although it has not obtained *certiorari*. Written and oral submissions were made on the availability of *certiorari* but I do not consider that the time spent on this issue was sufficiently substantial to warrant any departure from the usual rule that costs follow the event. Accordingly the order that I propose is that the HCCC pay the plaintiff's costs of the proceedings. If the parties wish to contend for a different order, they are to make an application within seven days of the date of this order. In the absence of such application being made within such period, my order will be as foreshadowed.

Orders

69 I make the following orders:

(1) Declare that by reason of the circumstance that neither the McLeod complaint nor the McCaffery complaint was a complaint under the *Health Care Complaints Act* 1993, the HCCC's investigation into these complaints, the recommendation contained in the Investigation Report and the Public Warning issued by the HCCC in respect of the plaintiff were not within the jurisdiction of the HCCC.

(2) Unless an application for a different order is made within seven days of the date of this order, order the HCCC to pay the plaintiff's costs of the proceedings.

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